FOR USE IN
LIBRARY ONLY

SEEN BY
PRESERVATION
SERVICES
DATE 25-7-85

RT

5.00

Ra 4826 J

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/textbookofromanl00buckuoft

CAMBRIDGE UNIVERSITY PRESS
C. F. CLAY, MANAGER
LONDON : FETTER LANE, E.C. 4

LONDON : STEVENS AND SONS, LTD.,
119 and 120 Chancery Lane, W.C. 2
NEW YORK : THE MACMILLAN CO.
BOMBAY
CALCUTTA } MACMILLAN AND CO., LTD.
MADRAS
TORONTO : THE MACMILLAN CO. OF
CANADA, LTD.
TOKYO : MARUZEN-KABUSHIKI-KAISHA

ALL RIGHTS RESERVED

om.
924t.2

A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN

BY

W. W. BUCKLAND, M.A., F.B.A.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW
REGIUS PROFESSOR OF CIVIL LAW IN THE
UNIVERSITY OF CAMBRIDGE, FELLOW
OF GONVILLE AND CAIUS COLLEGE

194046
5.2.25

CAMBRIDGE
AT THE UNIVERSITY PRESS
1921

PRINTED IN GREAT BRITAIN

PREFACE

THE following pages contain an attempt to state the main rules of the Private Law of the Roman Empire for the use of students, and the chief purpose of the writer has been to set out the established or accepted doctrines. This consideration may be held to justify the arrangement of the book. Much criticism, often well founded, has been directed at the arrangement adopted by Gaius and followed by Justinian in his *Institutes*.

ERRATUM

p. 264, l. 15 *for* post-classical *read* mainly late

of treatment can be quite satisfactory. The study of any branch of the law calls for some knowledge of ideas which are to be looked for in other branches. The law of Persons suffers least from this source of difficulty and can therefore conveniently be studied first. But it is not quite free from it: in particular, ideas connected with civil procedure are frequently involved. This is the case throughout the law: in all systems, the remedy is the root of the matter. Rules of Law do not enforce themselves, and a general idea of the system of remedies, of the steps to be taken if a right is infringed, of the broad distinctions between the different remedies for infringement of different kinds of right, and of the nature of the relief which can be obtained, will be found greatly to facilitate the study of the substantive law. A very brief account of these matters has been prefixed[1] to the detailed account of the law of procedure, and the student is advised to familiarise himself with this, before beginning his systematic study of the book.

The subject treated is the law of the Empire—what is called the classical law—with later developments, including the legislation of Justinian. But the system elaborated by Labeo and his successors has its roots in the past and is scarcely intelligible without some knowledge

1 *Post* §§ CCVI, CCVII.

PRINTED IN GREAT BRITAIN

PREFACE

THE following pages contain an attempt to state the main rules of the Private Law of the Roman Empire for the use of students, and the chief purpose of the writer has been to set out the established or accepted doctrines. This consideration may be held to justify the arrangement of the book. Much criticism, often well founded, has been directed at the arrangement adopted by Gaius and followed by Justinian in his *Institutes*, and many modern treatises adopt arrangements differing from it in important respects. But these arrangements differ so widely among themselves that it may fairly be assumed that none of them has such overwhelming advantages as to make it desirable for the present purpose to adopt it, in view of the fact that the texts to which the student is directed adopt a different order. The general plan of the book therefore follows the Institutional arrangement, though with no hesitation in abandoning it where this course seems to tend to lucidity of exposition. In truth no order of treatment can be quite satisfactory. The study of any branch of the law calls for some knowledge of ideas which are to be looked for in other branches. The law of Persons suffers least from this source of difficulty and can therefore conveniently be studied first. But it is not quite free from it: in particular, ideas connected with civil procedure are frequently involved. This is the case throughout the law: in all systems, the remedy is the root of the matter. Rules of Law do not enforce themselves, and a general idea of the system of remedies, of the steps to be taken if a right is infringed, of the broad distinctions between the different remedies for infringement of different kinds of right, and of the nature of the relief which can be obtained, will be found greatly to facilitate the study of the substantive law. A very brief account of these matters has been prefixed[1] to the detailed account of the law of procedure, and the student is advised to familiarise himself with this, before beginning his systematic study of the book.

The subject treated is the law of the Empire—what is called the classical law—with later developments, including the legislation of Justinian. But the system elaborated by Labeo and his successors has its roots in the past and is scarcely intelligible without some knowledge

1 *Post* §§ CCVI, CCVII.

of the earlier institutions on which it is based. These earlier institutions are therefore taken into account, but are dealt with only in outline and only in so far as knowledge of them seems to be essential to the main purpose of the book.

The great constitutional changes which marked the foundation of the Empire would not of themselves justify the adoption of that event as the starting-point for a statement of the Private Law, but there are other reasons for choosing this or perhaps the slightly earlier age of Cicero. His writings give us the earliest contemporary account, from a more or less legal point of view, of the system of Private Law. The conquest of Greece was somewhat older, but the influence of Greek ideas on Roman institutions was only now becoming important. The first idea which this allusion brings to mind is the *Ius Naturale*. It is borrowed from Greek philosophy, but it does not appear that the expression was in use among the lawyers till the time of Augustus. The expression *ius civile* was in use, but in republican times it meant merely the unwritten part of the law, the "common law" as opposed to that which had been expressly enacted. The expression *ius gentium* is as old as Cicero, but we do not know that it is older, and there is no evidence that it was as yet used by lawyers to mark a sharp contrast with another system known as the *ius civile*. The contrast of *ius civile*, *ius gentium*, *ius naturale* belongs to the Empire. There is no trace of the conception of *obligatio naturalis* among the lawyers of the Republic. But this new traffic in ideas is only one indication of the rapid evolution of legal notions which was now beginning. The complex law of manumission described by Gaius is a very different matter from the simple system of the Republic. Most of the family law is indeed more ancient, but while the main framework of the Law of Property, even Equitable Ownership, is republican, many parts of it (some of which seem to us indispensable) were unknown to the Republic. Praedial servitudes were few in number, and the personal servitudes, though some of them were extant, were not thought of as servitudes: it is not quite clear how they were thought of, or indeed whether they were "servitudes" till a much later date. There was no such thing as acquisition of property by agent. In the law of succession the praetorian changes had as yet gone a very little way towards rationalisation of the system except so far as actual descendants of a man were concerned. It was the early Imperial law which gave something like due weight to the claims of a mother and invested the praetorian will with real efficiency. The early history of the "real" and "consensual" contracts is not certainly known, but it is not probable that any of them were recognised very long before Cicero. The use of *stipulatio* as a general form into which any undertaking might be cast

may perhaps be little older than the Empire, and it is at least possible that *mutuum*, unsupported by either *nexum* or *stipulatio*, is unknown as a contract to the earlier law. Most of the elaborate classification of actions which plays so large a part in the later juristic writings was the work of lawyers of the Empire.

These are changes in the broad institutions of the law, but still more important is the new scientific spirit. Constructive activity on the part of the lawyers was no new thing. Gallus Aquilius, who added so much to the law in the time of Cicero, had no doubt predecessors who inspired a great part of the Edict, but there is no mistaking the new creative impulse which appears with him and Quintus Mucius, and Servius Sulpicius, perhaps the most important of the three, all contemporaries of Cicero. Nearly all the subtle distinctions and refinements of the law, corresponding to the "case law" of our system, are the work of the classical jurists, the earliest of whom were trained by these men. That these refinements were introduced was not a misfortune: it was a necessity. That the introduction occurred then was not an accident: it was inevitable. Rome was now the capital of the civilised world, the chief market for all commodities, including brains. Her conquests and the peace she had imposed on the world led to a great increase of commerce of which she was the centre. The infinitely varying relations of trade created innumerable questions which demanded solutions, and the demand created the supply. From every quarter of the State men of ability gravitated to Rome, and the legal profession, then, as always, an avenue to political life, and having the additional advantage that it was the only career which still preserved its independence, naturally attracted a large proportion of them, many of them, perhaps the majority of the most famous, coming from the remoter parts of the Empire. The system elaborated by these men and modified by their successors is the primary subject of the book.

The subject is the Law, not the history of the Law. But between Labeo and Tribonian there elapsed more than 500 years, and throughout this long period the law was changing, sometimes rapidly, sometimes slowly, but always changing. Any attempt to state the law as a complete single system without reference to its changes would give a misleading result, and if this were remedied by historical footnotes there is some danger that the book would be unreadable. The method adopted therefore is that of a narrative treatment, in which, while the system, as a system, is kept in view and forms the main framework of the book, the historical development is also kept in view and the perspective distorted as little as possible. Further, the subject is the Private Law and little is said of such institutions as the Colonate and the privileged and

State-controlled trade corporations of later law[1], of which, important as they were in practice, the chief interest is social and political.

There are certain fundamental notions which find their application in nearly all branches of the law, and which, for this reason, it is frequently found convenient to treat once for all at the beginning of the discussion. The field of these notions is indeed differently conceived by different writers, but among typical matters may be mentioned the effect of mistake, fraud, duress or impossibility on legal transactions, the law of conditions, and of representation, the basis of legal obligation and so forth. But, apart from the fact that many of these notions cannot well be understood without some knowledge of the institutions to which they can be applied, there is in Roman Law the further serious difficulty that they are not handled in a uniform manner in different branches of the law. The treatment of conditions is not the same in the Law of Contract and in that of Wills. Even in the same branch of the Law there are often two systems to be considered. The effect of mistake or fraud is not the same in relation to Formal Transfers of Property and in transfer by delivery, *traditio*. It is not the same in *iure civili* contracts and in those *iure gentium*. The attempt to treat the law of representation once for all is likely to lead to a cumbersome result, partly because there was much change and partly because the change proceeded at different speeds, by different methods, and to different lengths in different branches of the law. The general result is that brevity, which is the main advantage to be derived from this mode of treatment, is not really attained in the discussion of classical law, though it may be in treatises on "Pandektenrecht," from which the formal and *iure civili* elements of the Roman Law have disappeared, and the various evolutions are more or less complete. There is therefore no attempt at this mode of treatment in the following pages.

On many points in the law, especially on its historical development, there is much controversy. It has seemed undesirable, on the one hand, to confuse the student by over much insistence on these doubtful points, or, on the other, to leave him in the belief that matters are clear and settled which are in fact obscure or disputed. There will therefore be found many references to controverted questions, but discussion of them is brief and, for the most part, relegated to the footnotes.

The question of the proper amount of detail has been found difficult. To a writer on a subject of which the principles are well known and settled, such as the English Law of Contract, the matter is easily dealt

1 An excellent account of both these matters can be seen in Cornil, *Droit Romain, Aperçu historique*, pp. 506–519, a work which was not available till the greater part of this book was in print.

with. Such details are selected as seem to the writer to illustrate the principle under discussion, and the reader is sent, for further information, to the Law Reports and the practitioners' textbooks. But the principles of the classical Roman Law are not known in the same way. Much, no doubt, is known, but scarcely a year passes without some new elucidation of principle, some new point which compels reconsideration of a hitherto accepted notion, and the starting-point in such cases is not unfrequently some point of detail which had been regarded as quite insignificant. In stating the common law for the student we start from the principle and illustrate by detail, while there are many parts of the Roman law in which it is not too much to say that we have not really passed the stage of arriving at the principle by the study of detail. There is always a danger of imposing on the reader for Roman Law what is really a modern conception and for classical law what is byzantine. It is difficult to say before hand what detail may prove illuminating, and the state of the study seems to justify a rather freer use of detail than would be necessary or convenient in a treatise on English Law. But here too it has been possible to rely to a considerable extent on footnotes.

Propositions of private law will be found to be, in general, supported by references to the original texts, but in the Chapter on the "Sources of the Law," since many of the rules stated are inferences from a large number of documents, this was hardly practicable and thus reference is frequently made only to authoritative modern writers. But the rest of the book also is, as such a book must be, largely indebted to earlier writers. Due acknowledgement is made in the footnotes, but more than this is necessary in the case of the well-known "Manuel" of M. Girard. It is impossible to estimate what the writer owes to this book, which he has kept within reach for twenty years.

The book is also indebted to many friends of the writer, in particular to Professor F. de Zulueta, of Oxford, who has read most of the proofs and to the Master of Trinity Hall, who has seen several parts of the book in manuscript, for countless hints and necessary corrections. Of the helpfulness and care of the Secretary and Staff of the Cambridge University Press, it is hardly necessary to speak: this is so much a matter of course.

W. W. B.

18 *July* 1921.

CONTENTS

PREFACE v

LIST OF BOOKS AND PERIODICALS CITED BY SHORT TITLE . xiii

CHAP. PAGE

I THE SOURCES OF THE LAW IN THE EMPIRE . . . 1

II THE LAW OF PERSONS. LIBERTY AND CITIZENSHIP . 56

III THE LAW OF PERSONS (*cont.*). THE LAW OF THE FAMILY . 102

IV THE LAW OF PERSONS (*cont.*). THE LAW OF THE FAMILY (*cont.*). PERSONS *SUI IURIS* 143

V THE LAW OF THINGS. *RES*. PROPERTY. POSSESSION. *IURE GENTIUM* MODES OF ACQUISITION OF PROPERTY 182

VI THE LAW OF PROPERTY (*cont.*). *IURE CIVILI* MODES OF ACQUISITION. SERVITUDES. AGENCY 233

VII ACQUISITION *PER UNIVERSITATEM*. SUCCESSION BY WILL 281

VIII THE LAW OF WILLS (*cont.*). LEGACY, *FIDEICOMMISSUM*. SOLDIER'S WILL. SETTLEMENTS 331

IX THE LAW OF SUCCESSION. INTESTACY. *BONORUM POSSESSIO*. SUCCESSION NOT ON DEATH. 361

X THE LAW OF OBLIGATIONS. GENERAL NOTIONS. VERBAL CONTRACTS. CONTRACTS *LITERIS* 403

XI *OBLIGATIO* (*cont.*). CONTRACTS *RE*. CONTRACTS *CONSENSU*. INNOMINATE CONTRACTS 459

XII *OBLIGATIO* (*cont.*). *PACTA*. INCIDENTS OF CONTRACTUAL OBLIGATION. QUASI-CONTRACT. EXTINCTION OF OBLIGATION. DELICT 524

XIII THE LAW OF PROCEDURE. *LEGIS ACTIO*. *FORMULA*. *COGNITIO* 599

XIV THE LAW OF PROCEDURE (*cont.*). INCIDENTAL RULES OF PROCEDURE 668

XV THE LAW OF PROCEDURE (*cont.*). PRAETORIAN REMEDIES. 712

INDEX 741

LIST OF BOOKS AND PERIODICALS CITED
BY A MUCH ABBREVIATED TITLE OR REQUIRING AN INDICATION OF THE EDITION USED

Accarias, Précis: Précis de Droit Romain, C. Accarias, 4me Éd.
Affolter, Inst.: Das Institutionensystem.
Archiv f. c. Pr.: Archiv für civilistische Praxis.
Bertolini, Obblig.: Le Obbligazione, Parte Speciale, G. Bertolini.
Beseler, Beiträge: Beiträge zur Kritik der Römischen Rechtsquellen, Gerh. Beseler.
Bethmann-Hollweg, C. P.: Der Römische Civilprozess, M. A. von Bethmann-Hollweg.
Bruns: Fontes Iuris Romani, ed. C. Bruns, Ed. 7a, ed. O. Gradenwitz.
Buckland, Slavery: Roman Law of Slavery, W. W. Buckland.
Bull.: Bullettino dell' Istituto di Diritto Romano.
Collinet, Études Hist.: Études historiques sur le droit de Justinien, É. Collinet.
Cornil, Aperçu historique: Droit Romain, Aperçu historique sommaire, G. Cornil.
Costa, Profilo storico: Profilo storico del Processo Civile Romano, E. Costa.
—— Le Acque: Le Acque nel Diritto Romano, E. Costa.
—— Storia: Storia del Diritto Romano Privato, E. Costa.
Cuq, Manuel (Man.): Manuel des Institutions juridiques des Romains, E. Cuq.
Daremberg et Saglio: Dictionnaire des Antiquités grecques et romaines, sous la direction de Ch. Daremberg et E. Saglio.
D.P.R.: Le Droit Public Romain, par Th. Mommsen, traduit par P. F. Girard.
Esmein, Mél.: Mélanges d'histoire de droit, A. Esmein.
Ét. Girard: Études d'histoire juridique, offertes à P. F. Girard, par ses Élèves.
Fitting, Alter und Folge: Alter und Folge der Schriften Römischer Juristen, von Hadrian bis Alexander, H. Fitting, 2te Bearbeitung.
Gibbon (Bury): Decline and Fall of the Roman Empire, E. Gibbon, ed. J. B. Bury.
Girard, Manuel: Manuel élémentaire de Droit Romain, P. F. Girard, 6me Éd.
—— Mélanges: Mélanges de Droit Romain; Histoire des Sources, P. F. Girard.
—— Org. Jud.: L'Organisation judiciaire des Romains, I, P. F. Girard.
—— Textes: Textes de Droit Romain, P. F. Girard, 4me Éd.
Gött. Gel. Anzeigen: Göttingische gelehrte Anzeigen.
Heumann-Seckel: Heumanns Handlexicon in den Quellen des Römischen Rechts, 9te Aufl. ed. E. Seckel.
Huschke: Jurisprudentia Anteiustiniana, P. E. Huschke, Ed. 5a.
Ihering, Geist: Geist des Römischen Recht, R. von Ihering.
Jobbé-Duval, Proc. Civ.: Études sur l'histoire de la Procédure, E. Jobbé-Duval.
Joers, Röm. Rechtsw.: Römische Rechtswissenschaft der Republik, P. Joers.
Karlowa, C. P.: Der Römische Civilprozess, O. Karlowa.
—— R. Rg.: Römische Rechtsgeschichte, O. Karlowa.
Keller-Wach, C. P.: Der Römische Civilprozess, F. L. von Keller, 6te Aufl., ed. A. Wach.
Kipp, Gesch. d. Quellen: Geschichte der Quellen, Th. Kipp, 3te Aufl.
Krueger, Röm. Rechtsq.: Geschichte der Quellen und Litteratur des Römischen Rechts, P. Krueger, 2te Aufl.
Lenel, E. P.: Das Edictum Perpetuum, O. Lenel, 2te Aufl.
—— Paling.: Palingenesia Iuris Civilis, O. Lenel.
L.Q.R.: Law Quarterly Review.
Marquardt, Privatl.: Privatleben der Römer, J. Marquardt.

Mélanges Appleton: Mélanges Ch. Appleton; études d'histoire du Droit, dédiées à M. Ch. Appleton.
Mélanges Girard: Etudes de Droit Romain, dédiées à P. F. Girard.
Mitteis, R. Pr.: Römisches Privatrecht, L. Mitteis, 1.
—— Reichsr. und Volksr.: Reichsrecht und Volksrecht in den Östlichen Provinzen, L. Mitteis.
Mommsen, Ges. Schr.: Gesammelte Schriften, Th. Mommsen.
—— Staatsr.: Römisches Staatsrecht, Th. Mommsen, 3te Aufl.
—— Strafr.: Römisches Strafrecht, Th. Mommsen.
Moyle, Instt. Iust.: Imperatoris Iustiniani Institutionum Libri Quattuor, with commentary, J. B. Moyle, 5th Ed.
—— Sale: Contract of Sale in the Civil Law, J. B. Moyle.
N.R.H.: Nouvelle Revue Historique de Droit Français et Étranger.
Partsch, Neg. Gest.: Studien zur Negotiorum Gestio, 1 (Sitzungsberichte der Heidelberger Akad., 1913).
—— Schriftformel: Die Schriftformel im Römischen Provinzialprozesse, J. Partsch.
Pauly-Wissowa: Paulys Real-Encyclopädie der Classischen Altertumswissenschaft, Neue Bearbeitung, ed. G. Wissowa.
Puchta, Inst.: Cursus der Institutionen, G. F. Puchta.
Revue Gén.: Revue générale du droit, de la législation et de la jurisprudence.
Riv. It. p. l. Sc. Giu.: Rivista Italiana per le Scienze Giuridiche.
Roby, Introd.: Introduction to the study of Justinian's Digest, H. J. Roby.
—— R.P.L.: Roman Private Law in the Times of Cicero and of the Antonines, H. J. Roby.
Savigny, System: System des heutigen Römischen Rechts, F. K. von Savigny.
Sohm (Ledlie): Sohm's Institutes of Roman Law, translated by J. C. Ledlie, 2nd Ed.
Vangerow, Pand.: Lehrbuch der Pandekten, K. A. von Vangerow, 7te Aufl.
Van Wetter, Pand.: Pandectes, P. van Wetter.
Willems, D. P.: Droit Public Romain, P. Willems, 7me Éd.
Windscheid, Lehrb.: Lehrbuch des Pandektenrechts, B. Windscheid, 9te Aufl.
Z.S.S.: Zeitschrift der Savigny-Stiftung, Romanistisches Abteilung.

(References for Roman Juristic Sources are to the Berlin Stereotype edition of the Corpus Iuris Civilis, to Mommsen's edition of the Codex Theodosianus and to Girard's Textes. Any exceptions are noted at the reference.)

CHAPTER I

THE SOURCES OF THE LAW IN THE EMPIRE

I. Legislation in the Republic, p. 1; *Comitia* in early Republic, 2; II. Late Republic, 4; *Comitia, ib.*; Senate, *ib.*; Praetor, 5; Augustus, 6; III. *Leges* in the Empire, 7; IV. *Edicta Magistratuum*, 9; Julian's revision of the Edict, 10; V. *Senatusconsulta*, 13; VI. *Principum Placita*, 16; VII. Edicts of the Emperor, 18; *Decreta*, 19; VIII. *Rescripta*, 20; IX. The Jurists, 21; *Ius Respondendi*, 23; X. The two Schools, 27; XI. The Juristic Literature, 28; Gaius, 29; Julian, 30; Papinian, 31; Paul, *ib.*; Ulpian, 32; XII. Cessation of great Jurists, 33; Law of Citations, 34; XIII. Remains of Juristic Literature, 35; Barbarian Codes, 36; XIV. Late Imperial Legislation, 38; *Codex Gregorianus, ib.*; *Codex Hermogenianus, ib.*; *Codex Theodosianus*, 39; XV. Justinian's legislation, 40; First Code, *ib.*; Digest, 41; Arrangement, 42; XVI. Interpolations, 44; XVII. The Institutes, 46; The 50 Decisions, *ib.*; *Codex Repetitae Praelectionis*, 47; the *Novellae Constitutiones, ib.*; XVIII. Character of Justinian's legislation, 48; Legal Education, 49; XIX. Organisation of the Empire, 50; XX. Custom, *Ius civile, gentium, naturale*, 52; *Ius Gentium* and the Edict, 55; *Aequitas, ib.*

I. Though the history of the modes of formation of Law[1] in earlier Rome is outside the scope of this book, it is convenient to have an outline of the main facts before us in order the better to understand the material with which Augustus had to deal in his reconstruction. The story may be said to begin with the XII Tables. There are indeed traditions of legislation by the more or less legendary kings[2], of a collection of these *leges regiae* issued by one Papirius about the time of the foundation of the Republic[3] and of a commentary on the *Ius Papirianum* by Granius Flaccus[4], not long before the end of the Republic, and there are what purport to be citations from these *leges regiae* by various later writers, mostly non-legal[5]. But it is doubtful whether the *leges regiae* are anything more than declarations of ancient custom. They are largely of a sacral character, and in any case they play no important part in later law. The XII Tables are of vastly greater importance. They were a comprehensive collection or code of rules framed by officers called *Decemviri*, specially appointed for the purpose, perhaps in two successive years, and superseding for the time being the ordinary magistrates of the Republic. They were enacted as a Statute, or Statutes, about 450 B.C.[6] by the *Comitia Centuriata*, perhaps the first express

1 See Krueger, *Röm. Rechtsquell.* 3–82; Kipp, *Gesch. d. Quellen*, §§ 5–10. 2 Krueger, *op. cit.* 3 sqq. 3 1. 2. 2. 36. The *praenomen* of Papirius is variously stated. 4 50. 16. 144. 5 The references are collected in Girard, *Textes*, 3 sqq.; Bruns, 1. 1 sqq. The great majority are attributed to the earlier and certainly mythical kings. 6 On the sceptical views sometimes expressed as to this early date and the story of the *Decemviri* generally, see Girard, *Mélanges*, 1 sqq.; Greenidge, *Engl. Hist. Rev.* 1905, 1.

legislation, in the Roman State, affecting the Private Law. They consisted for the most part of ancient Latin custom, but there was some innovation and apparently some incorporation of rules of Greek Law. They have not survived in their original form, but have been partially reconstructed from the numerous references to them in later legal and lay writings, some of which purport to give the actual wording of particular rules, though in all cases this is in a much modernised form[1]. Though they were in fact in great part superseded by later legislation long before the end of the Republic, they continued to be held in great reverence. Livy describes them as the "*fons omnis publici privatique iuris*[2]," and citations and allusions are found even in Justinian's compilations. But the XII Tables, comprehensive as they were, did not contain the whole law. They stated general rules: the countless details, especially of form, were left to be elucidated by officials. In early Rome, as in other nascent civilisations, there was no great difference between religious and legal rules and thus those to whom it fell to expound the laws and advise thereon, and this not merely informally, but by virtue of their official position, were priestly officials, the Pontiffs[3]. In this age it does not appear that any authority was thought of as capable of altering the provisions of the XII Tables: these were a fundamental law. But while civilisation is advancing, the law cannot stand still, and in fact the power of *interpretatio* and formulation placed in the hands of the Pontiffs[4] was in effect a power to alter the law, by ingenious interpretations, some of which we shall meet with later on[5]. There is not much to be said for the logic of these interpretations, but there can be no doubt of their utility.

Of express legislation there was, to the middle of the Republic, but little, and what did occur was mainly on Constitutional matters[6]. Of the various popular assemblies the oldest was the *Comitia Curiata*. This was an assembly of the whole people, or rather of all heads of families, grouped in 30 *curiae*, the *curia* being the voting unit. Each *curia* consisted of a number of *gentes*, or clans, the members of which were connected by a real or assumed relationship[7]. It is doubtful whether this body ever exercised legislative power in the ordinary sense. Important

1 Of the various reconstructions that now most usually accepted may be seen in Girard, *Textes*, 9 sqq., together with an account of the evidence on which the necessarily somewhat speculative attribution of individual provisions to their proper *Tabula* is based. 2 Livy, 3. 34. 3 Krueger, *op. cit.* 27; Mommsen, *Staatsr.* 2. 18 sqq.; *D.P.R.* 3. 19 sqq. 4 See the much discussed D. 1. 2. 2. 6 as to the relation of the pontiffs to the public. 5 *E.g. post*, §§ XLVII, LXXXVII. 6 See Karlowa, *Röm. Rg.* 1. 116 sqq. 7 See Mommsen, *Staatsr.* 3. 9 sqq., 30 sq., 90 sqq.; *D.P.R.* 8 sqq., 32 sq., 98 sqq., as to the conception of a *Gens*, the introduction and position of *minores gentes*, the extension of the notion to plebeians and the vote of these in the *Comitia Curiata*.

as its functions[1] were, they belong, in the main and apart from formalities, to an age before legislation was thought of as an ordinary method of law reform. The *Comitia Centuriata* was, in historical times, a much more important body. The centuriate organisation, which was existing, at the latest, soon after the foundation of the Republic, was a grouping of the whole people, patrician and plebeian, as a military force, on an arrangement attributed to Servius Tullius. The grouping was into *classes*, subdivided into *centuriae*, and, when the body acted as a political assembly, the voting unit was the *centuria*. The *classes* consisted of one *classis* of *Equites* and five *classes* of *Pedites*[2]. The *centuriae* within each class were divided into an equal number of Senior and Junior, but the number of *centuriae* assigned to the *Equites* and the *prima classis* amounted to more than half of the total number[3]. As the Senior centuries were in the main employed in home defence, this arrangement put the practical voting power, in this assembly, into the hands of the older and the well-to-do, a result not seriously affected by the fact that the very poor, not subject to regular military service at all, were constituted into one *centuria* for voting purposes[4]. As the total number was 193, this gave them no real power, but it served to secure an odd number of voters. Such a body was necessarily conservative, and it must also be remembered that it could vote only on propositions submitted by the presiding magistrate, who in the earlier part of the Republic was always a patrician, that it was usual, if not legally necessary, to submit the proposal for the previous approval of the Senate[5], and that in addition a *lex* of the *centuriae* required *auctoritas patrum*, which is commonly supposed to mean approval of the patrician members of the Senate[6]. This approval which had formerly followed enactment by the *comitia* was made to precede the vote by a *lex Publilia Philonis*[7], traditionally dated 339 B.C., and soon became unimportant. A considerable amount of legislation seems to have been effected by the *Comitia Centuriata*, the *Comitia Maxima*[8]. A third assembly of the whole people was the *Comitia Tributa*. The voting unit of this body was the *tribus*, a subdivision, essentially local, of the whole territory of the State. Tradition assigns the establishment of these local tribes to Servius Tullius, the number increasing as the State grew, till it reached

1 See Willems, *Droit Public Romain*, 36 sqq. 2 Originally only the highest group was a *classis*, the others were *infra classem*, but in historic times the organisation was as stated in the text. See Mommsen, *Staatsr.* 3. 262 sqq.; *D.P.R.* 6. 1. 297 sqq. 3 Mommsen, *Staatsr.* 3. 254, 267; *D.P.R.* 6. 1. 288, 302. 4 *Proletarii, capite censi.* The chief authorities are Livy, 1. 43 and Dion. Halic. 4. 20 sqq. The accounts do not agree in detail, and historical evolution is obscured. The provision for an odd number of votes seems to have been observed in the gradual extensions of the Tributal system (below). 5 Mommsen, *op. cit.* 3. 1037 sqq.; *D.P.R.* 7. 236 sqq. 6 *Ibid.* 7 Livy, 8. 12. 8 Cic. *de legg.* 3. 4. 12; Girard, *Textes*, 20.

the maximum, 35, about 240 B.C.[1] This body seems to have had the power of legislation very soon after the enactment of the XII Tables[2], but there do not seem to have been many *leges tributae* in the earlier part of the republic. As in the case of the *Comitia Centuriata*, the proposal by the presiding magistrate was usually submitted for the previous approval of the Senate, and *auctoritas patrum* was required[3].

II. In the later Republic the law had become secularised. The Pontificate having been thrown open to plebeians[4], the control of the Pontiffs over legal development lost its old value to the patricians as a weapon against plebeian aggression, and with the gradual passing of power into the hands of the plebeians the pontiffs practically disappeared as factors in the development of the ordinary law. Their place as advisers and expounders was taken by professed jurists whose action was entirely unofficial, but who as advisers to magistrates, as well as to private persons, exercised great influence and became very prominent figures in the later centuries of the Republic[5]. Little of the writings of these *veteres* remains[6], but it was the beginning of a rich literature to which we owe the greater part of our knowledge of the Roman Law.

Legislation by the *Comitia* now covered a rather wider field but it still remained a relatively unimportant source of private law. The *Comitia Centuriata* legislated little[7]: its most important influence on the law was exercised by its appointment of the higher magistrates. Legislation was carried on to some extent by the *Comitia Tributa* and in an increasing degree by the assembly of the *plebs* alone, *concilium plebis*[8], which, in historical times, was also based on the tributal organisation. This assembly, presided over by a tribune of the *plebs*, was active from early times and there was early legislation on constitutional questions, enacted by that body and approved by the Senate, which was regarded as binding on the whole community[9]. Its enactments, properly called *plebiscita*, were often called, as binding the whole community, *leges*, though in strictness this name does not cover any *rogationes* except those in a *comitia*, *i.e.* of the *populus*. They never needed *auctoritas*

1 Mommsen, *op. cit.* 3. 161 sqq.; *D.P.R.* 6. 1. 180 sqq. 2 As to the confused story of the validation of *leges tributae* and plebiscites by the *l. Valeria Horatia* (449 B.C.), *l. Publilia Philonis* (339 B.C.) and *l. Hortensia* (about 287 B.C.) see Mommsen, *Staatsr.* 3. 1037 sqq.; *D.P.R.* 7. 236 sqq.; Kipp, *Gesch. der Quellen*, § 6, n. 5, and the literature there cited. 3 Mommsen, *op. cit.* 3. 1040; *D.P.R.* 7. 240. 4 According to Livy, 10. 6, by a *l. Ogulnia*, 300 B.C. Tiberius Coruncanius, the first plebeian *Pontifex Maximus* was also the first public teacher of law, D. 1. 2. 2. 38. 5 Jörs, *Röm. Rechtswissenschaft*, 1. ch. 2. §§ 18–25, especially 24. 6 See Bremer, *Jurisprudentia Antehadriana*, vol. 1. 7 Thus difficulties from concurrent powers were avoided. In any case they would be lessened by the reference to the Senate, and by the reorganisation of the *C. Centuriata* which to an extent not fully known assimilated it to the *Com. Tributa*, Mommsen, *op. cit.* 3. 270; *D.P.R.* 6. 1. 304 sqq. 8 Mommsen, *op. cit.* 3. 150 sqq.; *D.P.R.* 6. 1. 166 sqq. 9 *E.g.*, *lex Icilia*, 456 B.C.; *lex Canuleia*, 444 B.C.

patrum, but as above stated they did not bind any but plebeians unless previously approved by the Senate. This requirement seems however to have been abolished by the *l. Hortensia*, itself a plebiscite, about 287 B.C.[1] It is probable that most of the later legislation was by this body, though the recorded story does not clearly distinguish its acts from those of the *Comitia Tributa*.

It will be seen that the Senate had an important share in legislation: it had indeed much more than has been stated. But, though it issued administrative decrees, some of them very like laws[2], but essentially instructions or advice to officials, any account of its earlier activities in this field will more conveniently be given in connexion with the story of its acquisition of legislative power in the Empire[3].

The most important new factor in the late Republic remains to be stated. All the Roman magistrates had the right to issue edicts, *ius edicendi*[4], but while the Edicts of the Curule Aediles were of some importance in certain branches of the law[5], those of the Urban and Peregrine Praetors and the Provincial Governors, who administered justice respectively between *cives* in Italy, in cases in Italy[6] in which those without *commercium* were concerned (*peregrini*[7]) and in the Provinces, were far more significant in legal history. The edict of the *Praetor Urbanus* was in fact by far the most potent instrument of law reform in the last century of the Republic.

The control of litigation, *iurisdictio*, was transferred from the Consuls to the newly created Praetor by one of the Licinian Rogations in 367 B.C.[8] While litigation was conducted by the ancient system of *legis actio*, this meant, probably, little but formal and almost ministerial co-operation[9]. But the *l. Aebutia* of about 140 B.C., authorising the use, instead of the *legis actio*, of the more elastic *formulae* framed by the Praetor himself and variable as need arose, resulted in a great change in the position of the magistrate. He was now found refusing actions where civil law gave them, giving them where it did not, creating new defences and so forth. By this means he introduced, side by side with civil law rights and duties, another system, technically, and in some cases practically, less effective than civil law rights and duties, but in

1 Mommsen, *op. cit.* 3. 159; *D.P.R.* 6. 1. 178. 2 See for surviving instances, Girard, *Textes*, 129, 130. 3 *Post*, § v. 4 Not the Quaestors, Mommsen, *op. cit.* 1. 203; *D.P.R.* 1. 231. 5 *Post*, §§ CLXXII, CCV. 6 Both praetors sat at Rome, but both had jurisdiction over all cases except so far as local jurisdictions were created or recognised. Of these the most prominent was that of the provincial governors. But in the cities of various kinds in Italy there were many local jurisdictions which more or less excluded the Court at Rome. As to these see Girard, *Org. Jud.* 1. 272 sqq. 7 *Post*, § XXXVI. 8 Livy, 6. 42; Mommsen, *op. cit.* 2. 193; *D.P.R.* 3. 221. 9 His powers under this régime are much disputed, see *post*, §§ CCVII, CCXIV.

the end completely transforming the working of the law[1]. How far this change resulted directly from the *lex*, the exact provisions of which are not recorded[2], is not very clear. But as the Praetor's edict remained in force only for his year of office, and could be changed by his successor, so that a rule which worked badly could be stopped and one which worked well carried on[3], it is likely that it was in great part an aggression accepted by the Senate and the people as being a convenient form of experimental legislation, all the more so since the *comitia*, nominally an assembly of the whole people could not adequately represent a population scattered over all Western Europe, and was in fact little more than the Roman mob.

When, after a long period of exhausting civil war, Augustus became undisputed master of Rome it was clear to him that the first great need of the State was reorganisation and good administration. It was clear also that the old republican methods, already in decay before the civil wars, could not really be revived. The State had outgrown them and it was their inefficiency under modern conditions which had rendered possible the domination of one man after another which culminated in the Dictatorship of Caesar. But though these institutions could not be restored, the pious reverence for them which still existed made them convenient instruments for him in his reconstruction. The history of the previous 150 years had shewn that avowed despotism, however well meant, gave no promise of stability. Thus his course was marked out for him. He was a conservative wherever conservatism was possible[4]. One of his earliest acts was one of the most significant. The Triumvirate (of which he had been a member), whose régime had ended in collapse and civil war, had received full legislative power. This Augustus renounced and restored to the popular assembly in which it was traditionally vested[5]. On the other hand he claimed and received the fullest magisterial authority. He had *tribunicia potestas*[6] in Rome and proconsular power through the empire. And, since power for a year only was of little use to the founder of a new political system, and had shewn its unsuitability to existing conditions, he had these powers conferred on him for life, though this was hardly more consistent with true republican notions than supreme legislative power would have been.

1 The effects of his changes are seen in almost every branch of the law; see Jörs, *op. cit.* 158 sqq. 2 *Post*, § CCXIV. 3 His edict for his year is *E. perpetuum*, special edicts for temporary purposes are *E. repentina* (Cicero, *Verr.* 2. 3. 14. 36, not official). A provision carried on from the last praetor is *E. praelatum* as opposed to *E. novum*. That part habitually carried on is *E. tralatitium*. 4 Heitland, *Shorter Hist. of the Rom. Repub.* 508. For a study of the policy of Augustus, see Id., *Hist. of Rom. Repub.* 3. 509 sqq; 5 See on all these matters, Mommsen, *op. cit.* 2. 745–800; *D.P.R.* 5. 1 sqq. 6 He is not Tribune, though he has the powers. The ordinary tribunes continue with dwindling powers.

III. We have now to consider the different Sources of Law in the Empire, beginning with those which survived from the Republic.

Leges. Enactments of the popular assembly[1]. The surviving records tell us of many *leges*, but these are spread over 500 years and are not numerous enough to suggest that they were ever a main source of private law[2]. This view is confirmed by a study of their subject-matter. Apart from the XII Tables the earlier republican *leges* are constitutional[3] and though in the later republic their field is wider, still most of them deal with matters closely connected with public order[4], and the same is true of those enacted after the accession of Augustus[5]. There are many in his reign, several under Tiberius, one or two under Claudius and one under Nerva[6]. After this the only *lex lata* we hear of is the *lex de imperio*, conferring his various powers on a new emperor; the part of the *Comitia* being merely formal[7].

It must not be supposed that the legislation of this period was in any real sense legislation by a popular legislative body. The Emperor restored the legislative power not because he wished the people to make their own laws, but because he desired to make use of what reverence existed for the ancient institution in order to give effect to his own wishes, along the line of least resistance. No one knew better than Augustus that the *Comitia* were quite unfit to exercise legislative power. It must however be remembered that these bodies had never at any time had a

1 *Ll. latae*, as opposed to *ll. datae*, imposed by a magistrate duly authorised on a community under his charge, and *ll. dictae*, a name sometimes applied to laws laid down for private domains of the Emperor. 2 As to mode of promulgation of *ll.* and *scc.* see Mommsen, *Ges. Schrift.* (*Jur.*) 3. 290. Ulp. (*Reg.* 1) classifies *ll.* under three heads: A *l. perfecta* annuls the act forbidden; most of the later *leges* are of this type. A *l. minus quam perfecta* inflicts a penalty but leaves the act valid, *e.g.* the *l. Furia Testamentaria* (G. 4. 23; *post*, § CXIX) and the *l. Marcia* (G. *ib.*). A *l. imperfecta* merely forbids the act, *e.g.*, *l. Cincia* (*Fr. Vat.* 266 sqq.; *post*, § XCI), the prohibition in this case being made effective by an *exceptio*, if it is sought to enforce the forbidden *obligatio*. It is suggested that earlier legislation takes this form because it is by way of plebiscite, and thus can not alter the civil law, the fact that it is later than the *l. Hortensia* being explained as meaning only that an old form has survived its purpose. This would be more weighty if we had *ll. centuriatae perfectae* between the XII Tables and the *l. Hortensia*. Another view suggested by a text of Ulpian (24. 2. 11. pr.) is that legislation could not directly affect an act formally valid in the civil law, to which Mitteis objects (*R.Pr.* 1. 247) that it is little more than giving the rule as a reason for itself. But the notion of fundamental legal principles which a legislator cannot alter is very general. 3 Even *l. Canuleia* (444 B.C., *post*, § XLI). 4 *E.g.* the long series of statutes establishing procedure in criminal law (see Mommsen, *Strafr.* 202 sqq.), those regulating remedies against debtors, the old order having caused grave public danger, those regulating civil procedure (*post*, §§ CL, CCXIV), in effect a successful revolt against the old patrician order of things. 5 *E.g.* laws on manumission (*post*, § XXVIII), and laws dealing with the encouragement of marriage (*post*, §§ CIII, CXI, CXXXIV). 6 A *l. agraria* (47. 21. 3. 1). See Krueger, *Röm. Rechtsq.* 89. 7 Bruns, 1. 202; Girard, *Textes*, 107. It may have been a senatusconsult confirmed by a *lex*. Mommsen, *Staatsrecht*, 2. 878 sqq.; *D.P.R.* 5. 154.

right to initiate legislation. They voted only on a proposal submitted by the presiding magistrate, on whom therefore all depended. By virtue of his permanent *tribunicia potestas* the Emperor could convoke the plebeian assembly and submit proposals to them, and there is no doubt that the more important *leges* of this time were so voted. When, as was sometimes the case, he held the Consulship he could do the same with the centuries, but the people in their centurial organisation do not seem to have legislated, at any rate in this age. When he restored to the *Comitia* their legislative power, he restored also the power of choosing the magistrates, which, also, had been conferred on the Triumvirate. And this was not a question of submitting a nominee to the vote, so that the worst that could happen would be his rejection: the *Comitia* could choose whom they would. This would clearly not have suited Augustus, and accordingly, in his reconstruction, when he abandoned the power of election he provided that he should have the right of deciding whether a particular candidate was eligible and of commending particular candidates, which was equivalent to a direction to choose him, and was so understood. The result was that he completely controlled the magistracy and thereby the submission of proposals of law to the Assembly[1]. Very soon the security was carried further. Tiberius transferred the selection of magistrates to the Senate[2], which by this time consisted entirely of the Emperor's nominees. Thus the positive part of the people in legislation was very unreal. But if they could not choose what they would consider, they could at least choose what they would refuse, and this power they exercised. We know that they refused, for many successive years[3], to pass the comprehensive legislation on marriage which ultimately took effect in the *l. Iulia de maritandis ordinibus* and the *l. Papia Poppaea*[4].

These *leges* seem to have all been enactments of the Tributal Assembly[5], and to have been submitted by or for the Emperor by virtue of his *tribunicia potestas*: there is no trace of any legislative proposals by the actual *Tribuni plebis*. Though the centuries still met in the *Comitia Centuriata* their power was confined to the election of magistrates, and even this, as we have seen, they lost under Tiberius. They still continued to issue a formal *renunciatio* of the name of the person elected till the third century, when the *Comitia* disappeared altogether[6].

1 Mommsen, *Staatsrecht*, 2. 916; *D.P.R.* 5. 198. 2 Tacitus, *Ann.* 1. 15. 3 See Karlowa, *R.Rg.* 1. 617. 4 *Post*, §§ CIII, CXI, CXXXIV. 5 As to the machinery of voting see Mommsen, *Staatsr.* 3. 380 sqq.; *D.P.R.* 6. 1. 437 sqq. 6 *Ib.* p. 348; *D.P.R.* 6. 1. 397. In other matters the power of the *Comitia* was much cut down by Augustus. He took into his own hands foreign relations: the making of war and treaties (see Willems, *Droit Public Romain*, 418 sqq., and the *lex curiata de imperio Vespasiani*, Girard, *Textes*, 107; Bruns, 1. 202). So too he removed the little that was left of criminal jurisdiction in the

IV. *Edicta* of the Magistrates[1]. Among the attributes of the Emperor was of course a *ius edicendi*, which will be considered later: for the present we are concerned with the older Edicts of the republican magistrates.

The re-establishment, in form, of republican institutions, which was, as we have seen, part of the scheme of Augustus, meant that the *ius edicendi* of the magistrates continued unaltered, and the edicts of the Urban and of the Peregrine Praetor, that of the Aediles and the Provincial Edicts continued to appear for some centuries. As to the Provincial Edicts it is to be remembered that Augustus divided the provinces into two groups. One group, the Senatorian provinces, were governed by republican magistrates and ex-magistrates in the old way, but all provinces of military importance, and all newly acquired provinces, were kept under the direct control of the *Princeps*, and put in charge of new imperial officers called *Legati Caesaris*, with the powers of Praetor (*pro praetore*), who held office as it seems at the will of the Emperor, and often for many years, being regarded as representatives of the Emperor rather than as independent magistrates[2]. They issued edicts in the ordinary way except that it appears that in these provinces the edict of the aediles was not issued[3], and it may be, though the point is uncertain, that its principles were not applied.

But though the Edicts still issued, they were of less importance as sources of new law. Already in the Republic the pace of reform by this method had begun to slacken. The new Praetor tended simply to carry on the old edict. New clauses were few, so that the Edict tended to be wholly *praelatum*, carried on from the former Praetor, and, indeed, as many clauses had long been, *tralatitium*, traditional, regularly carried forward[4]. This tendency is accentuated, as might be expected, under the new régime. Such changes as do occur appear to be of three types. First, obsolete clauses drop out. Secondly, existing clauses are from time to time modified as occasion requires. We can, for instance, trace this process in the case of the interdict *unde vi*[5], and in the Edict of the Aediles as to defects in things sold[6]. Thirdly, new clauses are added. It is in relation to these that the change in legislative method is most obvious, for, in no single case, so far as is known, is any new clause added on the initiative of the Praetor himself. In every case the change made is merely provision in the edict of machinery for giving effect to changes

Comitia and transferred it to *Quaestiones perpetuae*, though the Senatorian jurisdiction which soon came into existence overshadowed this. Mommsen, *Staatsr.* 2. 958; *D.P.R.* 5. 246.

1 Gai. 1. 6. 2 Mommsen, *Staatsr.* 2. 1087 sqq.; *D.P.R.* 5. 395 sqq. 3 Gai. *ib.* 4 But the edict does not lose its importance: the latest jurists speak of the *ius honorarium* as the "*viva vox iuris civilis*," 1. 1. 8. 5 See Lenel, *Ed. Perp.* 445 and *post*, § CCXLIX. 6 Lenel, *op. cit.* 530.

in the law made by other agencies[1]. Thus the *lex Papia Poppaea*, in regulating the law of succession for the encouragement of marriage, gave in certain cases *bonorum possessio*[2], the praetorian right of succession, instead of the civil law right, *hereditas*. Why this was done we need not consider, but it resulted in a new clause in the Edict, promising *bonorum possessio* wherever a statute required it[3]. When *fideicommissa*, bequests in trust, were recognised, the ordinary Praetor had nothing to do with them: they were administered by a new officer, the *Praetor fideicommissarius*[4]. But when the *sc. Trebellianum* enacted that where a *hereditas* had been handed over under such a trust, all the actions that lay at civil law to and against the *heres* should lie to and against the *fideicommissarius*, this brought the matter into the Praetor's sphere: *formulae* were provided, in the Edict, of *actiones fictitiae* for this case[5], but, it must be remembered, there was no edict about them. The *sc. Macedonianum* forbidding loans to *filiifamilias*, and the *sc. Velleianum*, forbidding surety by women were made effective by suitable provisions in the Edict[6].

It should be added that new magistrates with special functions created by the Emperor for various purposes, with the name of Praetor, *e.g.*, *Praetor fideicommissarius* just mentioned, *tutelaris*[7] and *de liberalibus causis*[8] never acquired the right of issuing Edicts: it was no part of the imperial scheme to extend praetorian institutions.

The next step in the history of the Edict is Julian's revision of it. Soon after 125 A.D. Hadrian ordered Julian to put the Edict into permanent form, a death-blow, as it was intended to be, to all further praetorian initiative. Practically all we know of his instructions is what Justinian tells us 400 years later[9], for Pomponius' account stops short of this event. The new Edict received statutory force by a Senatusconsult[10], and that Julian's work on the Edict was traditionally regarded as of great importance appears from the fact that he is repeatedly spoken of as *compositor*, *conditor* and *ordinator* of the Edict[11]. We have now to consider what is known as to what he actually did.

1 See Karlowa, *R.Rg.* 1. 629. **2** See, *e.g.*, Gai. 3. 50. **3** D. 38. 14. **4** Inst. 2. 23. 1. **5** Gai. 2. 253. The various ancillary protections which the edict provided for legatees were gradually extended to *fideicommissa*, but it is likely, as Lenel holds (*op. cit.* 356) that this was done by juristic practice and not by edict. **6** 14. 6. 11; 16. 1. 6; Karlowa, *loc. cit.*, thinks that when the *l. Aelia Sentia* prevented slaves freed under 30 from being citizens, there must have been an alteration in the edict bringing them under the clause protecting those informally freed (*post*, § XXVII). But we do not know the form of that clause, and it may have been wide enough (such clauses were usually in very general terms) to cover them. Further it is not impossible that the *l. Iunia*, which gave such persons the legal status of Latins, may have been already passed (*post*, § XXVIII) so that the clause in the edict was already obsolete. In any case such a clause must have had a very short life. **7** 26. 1. 6. 2, *post*, § LIII. **8** C. 4. 56. 1. **9** *Const.* "*Tanta*," 18. **10** *Ibid.* **11** See the references in Krueger, *Röm. Rechtsq.* 94; Girard, *Mélanges*, 200.

(*a*) *The Urban Edict.* In the first place it seems that he added little. Only one new clause is known and it is called *nova clausula* of Julian[1]. "A" new clause is not necessarily "the" new clause, but the language suggests that Julian was not active in this direction. It has been made clear, further, by Lenel, and by very ingenious researches of Girard, that he did not alter materially the general order of the Edict[2]. No doubt there was a good deal of refining and restating of individual rules, but that leaves little trace. It is indeed in relation to the *formulae* of actions that Julian seems to have done most. In the Edict before his time all the various *formulae* were in an appendix at the end. There were other appendixes, *i.e.* the interdicts, the *exceptiones* and the *stipulationes praetoriae*, which he left where they were. But he dealt differently with the *formulae.* Under each edict, or, in some cases, group of edicts, he put the appropriate *formulae*, and, following these, usually, the *formulae* for the civil actions connected with the same matter. Thus the Publician edict was followed by the *formula* for the *actio Publiciana*[3] and this by the *formulae* for claims of civil ownership and the like. There was of course no edict relative to these or any other civil remedy[4].

The Edict was divided into a number of titles with separate rubrics under which there was an edict or group of edicts. There is no trace of any division into express main parts, and the question what was the principle of its main arrangement is too controversial for us to consider in detail. Lenel holds[5] that it was essentially in four parts with the three appendixes. The first part dealt with the initiation of litigation up to the issue of the *formula*, the fourth with matters subsequent to judgment. The three appendixes were in the order in which they would come into question in litigation. As to the second and third parts he is less certain, but he considers that the second part was concerned with litigation in the ordinary form before a single *iudex*, while the third was concerned with other forms, especially the recuperatory procedure[6]. Each contained matters which will not fit into this scheme. These he explains as cases of attraction: matters of which the chief aspects concerned, *e.g.*, the third section, appeared there, even though subsidiary parts of them belonged to the second. But all this is somewhat uncertain.

(*b*) *The other Edicts.* It is clear that Julian's task covered them all, but it is also clear that he did not, as is sometimes said, incorporate them all in one document, for there is evidence of their continued existence in a separate form. Even the Edict of the Aediles, though the jurists commented on it as a sort of appendix to the Praetor's Edict, does

1 37. 8. 3. 2 Lenel, *E.P.* 18; Girard, *Mélanges*, 177 sqq. 3 *Post*, § LXX.
4 Girard, *Mélanges*, 300 sqq. 5 *Op. cit.* 14. 6 *Post*, § CCXVII.

not seem to have been such in fact[1]. Gaius still treats it as a separate document[2]. So too the Peregrine Edict still existed. Gaius wrote a commentary on the Urban Edict which seems to shew that there were still two[3], though the difference would not be great. Little indeed is heard of the Peregrine Edict afterwards, a result no doubt of Caracalla's edict on *civitas*[4]. Similarly the Provincial Edict continued: Gaius wrote a commentary on it[5]. But it is an unsolved question whether, after Julian, there was one general *Edictum Provinciale*, applicable in all Provinces, with such special clauses as local circumstances might require, or, as there formerly had been, a separate edict for each Province. In any case, the different Edicts would be much alike.

The immediate effect of the revision or codification was to put an end to the Edict as a source of new law, for we are told that Hadrian provided that if experience shewed a need for further changes, these were to be made not by the magistrate, but by *imperialis sanctio*[6], which seems to mean not merely by authority of the Emperor, but by imperial enactment, so that the Edict was fixed for ever. Even if the text were taken in the other sense it would still remain true that the Edict could not in future initiate changes, but only register them. In fact however though there have been attempts to find new clauses added after Julian's time, none of them has resisted criticism[7]. The Edict so settled was confirmed by a Senatusconsult which bound the magistrates to follow it[8], and may be said to have given it the force of law[9]. The Edicts were still issued by the various magistrates on entry on office, though they had now no control over the content. They may have lasted as long as the offices did, *i.e.* for the Peregrine Praetor till the third century, and for Urban Praetors and Provincial Governors till the fourth.

1 Karlowa maintains (*R.Rg.* 1. 631) that it was henceforward an appendix to the praetor's edict, but the remark of Justinian which he cites in support of this view (*Const.* "*Omnem*," 4) is more usually held to refer merely to its inclusion in the commentaries. 2 Gai. 1. 6. 3 See, *e.g.*, 28. 5. 32. 4 *Post*, § XXXVII. 5 See, *e.g.*, 28. 5. 31. 6 *Const.* "*Tanta*," 18. 7 Many *utiles actiones* and the like were invented by the great lawyers, after this time, so that much of what would have been edictal law in earlier days came in without express legislative authority at all. Whether the *formulae* were added to the edict we do not know. 8 *Const.* "*Tanta*," 18. 9 Girard (*Manuel*, 53) thinks it inaccurate to say that it had "force de *loi*" since this would have ended the distinction between *ius honorarium* and *civile*, which nevertheless remained till the time of Justinian. But the proposition may be understood as expressing the fact that the rules were now binding on all persons until repealed, like any other law, which was not true of the old edict, which lapsed in a year. The fact that the machinery remained distinct is immaterial: it was equally true for another century of all rules enforced by *cognitio extraordinaria*. It was still a distinct branch of the law, established by *sc.* which by that time had the force of law. The *l. Papia Poppaea* was not less a statute because it created *Bonorum Possessio* for certain cases and this was enforced by praetorian machinery. It was only by giving civil remedies where there were praetorian rights that Justinian fused the systems and this was done only imperfectly.

V. *Senatusconsulta.* The Senate of the Republic had no legislative authority, but the course of events early in the empire cannot be understood without some knowledge of the part played by the Senate in earlier days in this sphere. Throughout the later republic the Senate became more and more the real governing body of the State[1]. The *l. Ovinia*[2], which filled it with ex-magistrates, greatly increased its weight, and few magistrates cared to enter on a struggle with such a body. In the bad days which preceded the empire it was the only body which had any real stability. The starting-point of its legislative power was the fact that it had long been the body whose function it was to direct the magistrates. There are indeed many *senatusconsulta* of republican times[3], some of which look like laws, but, if carefully looked at, are seen to be merely directions to magistrates to act in particular ways and in particular to lay down certain rules in edicts. At first they are merely requests, probably only in form, and we must not forget that the name *Senatusconsulta* is best suited to orders which had of themselves no binding force. The later ones are more obviously directions, but it is still true that it is the magistrate, the officer of the Senate, who actually lays down the rule[4].

Another point to note is that in early times all projects of law were first approved by the Senate and had, after enactment, to be approved by the *patres* (*auctoritas patrum*) before they became law. It is not necessary to go into the confused story of the disappearance of these requirements as matter of law[5]: the important point for us is that there is good evidence that this consultation of the Senate continually occurred as a fact in the later republic[6]. Further, the Senate could declare any law invalid for defect of formality or disregard of auspices[7]. It had also the power of dispensing from or suspending laws in urgent cases, *i.e.* of directing a magistrate not to apply a given law in a certain case or for a time. This required confirmation by the *Comitia* as soon as possible after the fact, but by 150 B.C. it seems to have been freely done without this confirmation. In the last half-century of the republic the restriction of urgency disappeared in practice. An attempt was made to get rid of the power, but it led only to a *lex* of about 66 B.C., which confirmed it, requiring, however, the presence of at least 200 senators and a subsequent vote of the assembly[8]. It could issue orders in relation to those branches of administration which were under its care, notably

1 Mommsen, *Staatsr.* 3. 1024 sq.; *D.P.R.* 7. 219. 2 Festus, s.v. *Praeteriti* (*senatores*). See Willems, *Droit Publ. Rom.* 185 sqq. 3 Girard, *Textes*, 129 sqq.; Bruns, 1. 164 sqq. 4 See Kipp, *Gesch. der Quellen*, 62. 5 Mommsen, *Staatsr.* 3. 1037 sqq.; *D.P.R.* 236 sqq. 6 Mommsen, *Staatsr.* 3. 1045; *D.P.R.* 7. 243. 7 Willems, *Droit Pub.* 157, 185. 8 Willems, *Le Sénat Romain*, 2. 118.

in foreign relations, the distribution of *provinciae* among magistrates, and the supervision of religious organisations so far as their functions concerned the State. In the late republic it could relax the rules of procedure for the *Comitia* or for itself: it could give exemptions from foreign service, and authorise triumphs[1].

All this shews a good foundation for the acquisition of legislative power which occurred soon after the founding of the empire.

We have seen that Augustus sought to galvanise the *Comitia*, for his own purposes: he did precisely the same for the Senate, an easier task since that body had not so utterly decayed. It was not his plan that the Senate should have any real power. As a part of his reorganisation he fixed its numbers at 600. The membership was to be revised annually and, when he held the office of Censor, the Emperor nominated to all vacancies[2]: under Domitian and after, indeed, he nominated always[3]. As *Princeps Senatus* he had the right to preside, and the Senate, like other bodies, could consider only what was submitted to it by its president. It could be no more than a mouthpiece of the Emperor. The power of making general *senatusconsulta* with the force of laws was never actually conferred on the Senate. Some texts which have been cited as attributing the conferment to various persons do not for the most part deal with the point at all[4]. Theophilus, writing in the sixth century attributes the change to the *l. Hortensia*[5], but no weight attaches to this. The true account is to be found in the jurists. Pomponius treats it as an inevitable outcome of the decay of the *comitia*[6]. Gaius shews that there had been disputes as to the existence of the power[7], which indicates a gradual growth. It was a gradual usurpation encouraged by the Emperor for obvious reasons, and it seems clear that the starting-point was the old directions to magistrates. Nearly all the *senatusconsulta* of the first half-century of the empire were really directions to magistrates. Thus the well-known *scc. Velleianum* and *Macedonianum*[8] operated as directions to the Praetor to insert *exceptiones* in his Edict. Others were mere extensions and interpretations of existing laws, *e.g.* those under the *l. Fufia Caninia*[9]. It is possible that the right was not fully recognised until the *Comitia* had quite ceased to legislate,

1 Willems, *D.P.* 185 sqq. 2 Suetonius, *Augustus*, 35; Willems, *D.P.* 441 sqq. 3 Willems, *D.P.* 443. 4 Suetonius says of Julius Caesar (*Jul.* 41): "*comitia cum populo partitus est.*" Tacitus says of Tiberius (*Ann.* 1. 15): "*tum primum e campo comitia ad patres translata sunt.*" In each case the context shews that these obscure expressions have to do with appointments of magistrates. 5 Theoph. *ad. Inst.* 1. 2. 5. 6 1. 2. 2. 9. 7 Gai. 1. 4. 8 The language of 16. 1. 2. 1 is very significant. 9 The *sc. Silanianum* (A.D. 10) which orders that the will of a murdered man is not to be opened till his slaves have been put to the torture is sometimes treated as a direct alteration of the civil law, but it was a direction to the magistrate embodied in the edict. Lenel, *E.P.* 352.

and Girard finds no clear case till the *sc. Tertullianum* of Hadrian's time[1]. Krueger points out that *senatusconsulta* have no official name: many have none. It was customary to give them the name of the Consul at the time of their enactment in a lengthened adjectival form, but that this was not official appears from the fact that it was sometimes his *nomen*, sometimes a *cognomen*, and in one well-known case—the *Macedonianum*—the enactment is named after the man whose misconduct produced it[2].

If the Senate ever had any independence in legislation it soon lost it. Very early the practice appeared of submitting to the Senate the proposals already drafted by a committee or *consilium*, the Senate merely voting. The committee was intermittent and its constitution varied. Its relation to the *Consilium Principis* which is found in full operation after Hadrian is not very clear, and opinions differ on the question whether they were independent developments, or the latter grew out of the former[3]. The Emperor himself proposed the most important *scc.*, and it is pointed out by Mommsen[4] that no other person is ever in the empire described as *auctor senatusconsulti*. He acted sometimes personally, sometimes by a representative who read his *Oratio*, and before long there was always a written *oratio*, whether the Emperor was present or not. The vote was so much a matter of course that the *oratio* came to be regarded even by the lawyers as the real source of law: they referred to it rather than to the formal vote which made it effective. Karlowa points out that there are traces in the language of surviving *orationes* of a transition from language of request to command[5]. The seven witnesses who are so common in the later Roman Law appear here: the formal record of the senatusconsult was accompanied by the *signatio* of seven senators, who took part in the vote[6].

In the later days of *senatusconsulta* the jurists habitually speak of them as laid down by the Emperor. How long they continued to be issued is uncertain, but the last of which anything is known is spoken of in the life of Probus (A.D. 276–282), and the language is instructive. The writer after recording the *oratio* and the resulting senatusconsult adds that the Emperor by a second *oratio* "*permisit patribus*" certain things, amongst others "*leges quas Probus ederet senatusconsultis propriis consecrare*[7]." They were allowed to go through the form of registering imperial enactments. It was time for them to cease.

1 *Manuel*, 57. 2 14. 6. 1. pr. 3 See Krueger, *Röm. Rechtsq.* 116. 4 *Staatsr.* 2. 899; *D.P.R.* 5. 178. 5 *R.Rg.* 1. 644. 6 Karlowa, *op. cit.* 1. 646. 7 *Vita Probi*, 13. 1.

VI. *Principum Placita*. We have seen that when Augustus became sole ruler he renounced and restored to the popular assembly the legislative power which had been conferred on the triumvirate. We have also seen that this was in no way designed to restore power to the people: it merely provided him with a means of making his will effective in an indirect way. The language of the *lex regia* by which power was conferred on him might be understood to give him legislative power[1], but it is fairly clear that it merely gave him absolute discretionary power in administrative matters. The earlier emperors were regarded as subject to the laws, as no more than chief magistrates. Some texts speak of them as *legibus soluti*[2], but these are in the Digest and torn from their context. When their source is looked into it becomes clear that they originally referred to specific statutes and express the undoubted fact that the Emperor could dispense himself from, and could be, and often was, excluded from, the operation of particular statutes. But from some time in the third century the Emperor began to be regarded as above the law[3].

From the beginning however the Emperor exercised a certain legislative power. Late in the republic it had been usual to authorise magistrates to make laws for communities which had become part of the State, laws so made being called *leges datae*[4]. The Emperor seems to have been regarded as tacitly authorised to do this, but these *leges datae* are of small importance for us[5]. The same may be said of *ll. dictae*, statutes imposed by the Emperor on regions regarded as in his private ownership, *i.e.* not the imperial provinces, but the Emperor's private domains[6]. Much more important for our purpose was the gradual transfer to the Emperor of the power to dispense from, and to suspend, to interpret and even to extend *leges*, a transfer which was already beginning in the time of Augustus.

Actual legislation was thus very early and it was fully recognised by the time of Hadrian that the Emperor could make for all purposes what were in effect laws. Theoretically there was however a certain inferiority, and the progress is shewn in three well-known texts. Gaius says that the Emperor's enactments "*legis vicem obtinent.*" Ulpian a little later says that "*legis vigorem habent*" and, immediately after, he says, or is made to say "*leges esse*[7]." This is very different from the attitude of Augustus. *Fideicommissa* were really his work, but he did not enact that they

1 Girard, *Textes*, 107; Bruns, 1. 202. 2 *E.g.* 1. 3. 31. 3 Karlowa, *op. cit.* 1. 826. 4 See specimens in Bruns, 1. 120 sqq. 5 From some of them we can gather that institutions and ideas had already appeared in Roman Law of which we have no other equally early trace. 6 The best known instance is the *lex metalli Vipacensis*, Girard, *Textes*, 119; Bruns, 1. 289. 7 G. 1. 5; D. 1. 4. 1. pr. and 1.

should be valid. He directed the consuls to enforce them in a few individual cases, "*semel iterumque gratia personarum motus*," rather, apparently, as a matter of *mores* than as a legal system, and they only gradually became a settled institution, "*paulatim conversum est in adsiduam jurisdictionem*[1]." The permanent officers to deal with them were no doubt appointed by the Senate.

In his legislative work as in other branches the Emperor was assisted by a *Consilium*, older than Hadrian, but first put on an organised footing by him[2]. It was a large body containing a number of jurists, the chief member being the *Praefectus Praetorio*, often a lawyer. In the later empire this body came to be called the *Consistorium* and its principal member was the *Quaestor Sacri Palatii*, also, it seems, usually a lawyer[3]. But the *Consilium* was merely advisory: its members had no vote and the Emperor decided all questions himself. Several cases are recorded in which he decided against the sense of the great lawyers on the *Consilium*[4].

By the end of the third century the Emperor was sole legislator. The jurists had difficulty in finding a basis for his right, but they settled on the *lex regia*[5], though this was not intended to give the power: it was in fact a gradual encroachment.

When, early in the fourth century, the Empire was divided into two parts, Eastern and Western, these two halves, retaining their character as parts of the same empire, were governed by two emperors with coordinate authority. The law of one was the law of the other, and thus any law promulgated in either region was at once law in the other[6]. This did not, it could not, work well, and Theodosius the Great when, in A.D. 439, he put his codification into force, provided that future legislation by the Emperor of one part should not be law in the other until it had been promulgated by the Emperor of that part[7]. This too might have led to difficulties, but not long after, the Western Empire ceased to exist[8].

There is some difficulty about the nomenclature of imperial enactments. The word *placitum* covers them all, but it is not technical and

1 Inst. 2. 23. 1. 2 *Vita Hadriani*, 18, where, however, the special reference is to judicial action; *ante*, 15, n. 3. 3 This office was held by Justinian's great adviser, Tribonian; Inst. Proem. 3. 4 4. 4. 38. pr.; 14. 5. 8. On this *consilium* see Mommsen, *Staatsr.* 2. 988; *D.P.R.* 5. 279. 5 1. 4. 1; Gai. 1. 5, whose language, basing it on *imperium*, shews the unreality of this explanation. 6 Krueger, *op. cit.* 310. 7 *Ib.* 331. 8 At the time of Justinian's codification Italy was not part of his empire, and (though he contemplated conquest) there is not much sign that he contemplated its operation anywhere but in the East. This fact and the essentially eastern character of his legislation are brought out by Collinet, *Études historiques sur le droit de Justinien*. So long as both Empires existed laws bore the names of both Emperors. It is usually easy from internal evidence, to tell in which Empire the law was enacted.

it would include decisions which are not legislation. The most commonly used general term is *Constitutio*, but there is confusion as to what that term covers. Gaius includes under it *Edicta*, *Decreta* and *Epistolae* or *Rescripta*. No jurist includes *Mandata*. In one text *Constitutiones* are opposed to *Rescripta*[1], and a rubric distinguishes them from *Edicta*[2]. Ulpian gives much the same account as Gaius, but says the name is not technical—"*quas volgo constitutiones appellamus*[3]." The point is not important: all of them might make law and none always did. Of the enactments with which we are concerned, the great majority are rescripts, till late in the empire.

Each form of enactment has its own history and they must be considered separately[4].

VII. *Edicta*. The Emperor, as chief magistrate, had the *ius edicendi*, and imperial *Edicta* are found from the time of Augustus. As might be expected, the earlier *Edicta* follow the republican pattern: they do not usually embody any actually new developments, but are mainly concerned with extensions and corrections of existing legislation. As the power of the Emperor grew this was disregarded, and in Hadrian's time and thereafter law was freely made by Edict. These continued to be issued throughout the empire. A number of Justinian's are in existence: the edicts of later law are however of little importance for us: they are concerned with public matters. But many rules of classical law are based on imperial Edict[5].

The republican magistrate had power only for a year, and in a determined area, and the force of his Edict was limited in the same way. But the Emperor had magisterial authority over the whole empire for life, and his Edict had force therefore everywhere, and for his life. The better view seems to be that it failed at his death, in the first two centuries, for though a text speaks of an Edict of Augustus as having been abolished after his time[6], this is not conclusive: Edicts were frequently renewed by the successor, and this may well have been so renewed and afterwards withdrawn. This frequent renewal would tend to become tacit, a process helped by the development of the notion that the Emperor's orders "*legis vicem obtinent*[7]." In any case there is no sign that they were regarded in later law as so perishing.

The Emperor issued Edicts not by virtue of any particular magistracy, but under his general imperial authority. They were not published through an official, but directly by the Emperor.

1 C. 2. 42. 3. pr. 2 C. Th. 1. 1. 3 1. 4. 1. 1. 4 As to mode of promulgation of imperial enactments see Mommsen, *Ges. Schr.* (*Jur.*), 2. 178 sqq. 5 *E.g.* C. 7. 6. 1. 3; Inst. 3. 7. 4; Inst. 2. 6. 14. See Mommsen, *Staatsr.* 2. 906; *D.P.R.* 5. 186. 6 28. 2. 26. 7 Karlowa, *R.Rg.* 1. 647.

Decreta[1]. These were judicial decisions of the Emperor, which might be on hearings in first instance, where the Emperor was sitting in his capacity as magistrate, or on appeals which had reached the imperial *auditorium*, or, brought about by *supplicatio* of some private person, operated as a sort of overriding equity[2]. We are told indeed that they might be *interlocutiones*, *i.e.* the Emperor might intervene at any stage in a legal process and issue a *Decretum* which would tie the hands of the official in charge of the case. In one recorded case it is not clear that there had been any litigation at all, but the Emperor was in some way informed of an apparent injustice which was being done in accordance with law, and at once issued a *Decretum* deciding the matter in a way certainly inconsistent with the existing law[3]. It is plain that the great majority of *Decreta* made no new law: they were merely decisions on the existing law. But Gaius and Ulpian tell us[4] that where they did make new law or settle doubts they had the force of law. It was not necessary that the *Decretum* should purport to lay down a new rule: if it actually did so, the rule was law. It seems that those which did this were published while others were not, at any rate till the third century. By this time *Decreta* had become less important. Most of them had been decisions on appeal of some sort, and a practice developed of taking appeals by method of Rescript. Instead of appeal by the parties, there was a sub mission of the case by the magistrate or judge, somewhat like the English practice of "stating a case," and the Emperor's decision would be by Rescript. When it is remembered that the primary purpose of a *Decretum* was not to make new law, and that it only gradually tended to do this, it becomes clear that its history as a source of law is not a long one. Recorded *decreta* in private law are few, and mostly on small points[5].

VIII. *Epistolae, Rescripta, Subscriptiones*[6]. These were in principle answers to enquiries. *Epistolae* were answers to officials, embodied in a separate document, issuing from the office *ab epistulis* and addressed to the enquiring official. *Subscriptiones* were answers to enquiries or petitions from private persons endorsed on the application itself, issuing from the office *a libellis*[7] and returned to the applicant. These latter do not seem to have been published in any way. The name Rescript was applied to both, though more commonly to *Epistolae*. There were also *Rescripta* issued to an official without any previous application, though here the name seems to be misplaced[8]. It seems from the evidence

1 See Karlowa, *op. cit.* 649; Krueger, *Röm. Rechtsq.* 103; Kipp, *op. cit.* 72. 2 *Post*, § ccxxvii. 3 40. 5. 38. 4 G. 1. 5; D. 1. 4. 1. 1, 2. 5 See 48. 7. 7; 40. 5. 38; Paul made a collection of imperial *decreta*; see Lenel, *Palingenesia*, 1. 959. 6 Karlowa, *op. cit.* 1. 650; Kipp, *op. cit.* 73; Krueger, *op. cit.* 304. 7 See Willems, *D.P.R.* 436. 8 Kipp, *loc. cit.*

that law or etiquette prevented any but high officials from applying for a Rescript.

Rescripts were not primarily intended to change the law, but to explain it to the applicant, and at first they merely did this. *Epistolae* are found as early as Trajan and *Subscriptiones* at any rate under Hadrian[1]. From that time both were common: they are supposed to have owed their increasing importance as sources of law to the cessation of legislation by the Praetor's Edict, changes now being made by *imperialis sanctio*[2]. As in other forms the power of making law by Rescript was based by the jurists on the *l. regia*[3]. The increase in frequency and importance of Rescripts is also in part due to the fact already noted that after Hadrian in later law the method of appeal by statement of the case by the magistrate largely superseded ordinary appeal by the parties. As in the case of *Decreta*, Rescripts which were not intended to alter the law do not seem to have been published, at any rate till the third century. It should be added that though Rescripts which were in effect decisions on appeal were common, so also were Rescripts on application before the decision: these were remitted to the Court and bound it. If the application contained allegations of fact the Emperor did not enquire into these: his Rescript was sometimes expressly conditional on their truth, and even if this was omitted the principle held good, and the Court must look into the facts before deciding[4].

There remained one great practical difficulty in the use of Rescripts. As we have seen, their primary purpose was not law reform: it was only gradually and incidentally that they gained this function. There were thus four classes: (*a*) those which merely stated the law, (*b*) those which laid down a new rule but were *privilegia*, not intended for general application[5]; (*c*) those which embodied a change for general application, (*d*) those which laid down a new rule, but were in fact errors and were not intended to do so. How was the Court to determine to which of these classes a Rescript brought to its notice belonged? In some cases the matter was clear: the Rescript expressly said that it was or was not to be taken as a precedent. But in many cases, and especially where the Rescript embodied an error, this would not appear. These difficulties were felt and in the later Empire there was legislation to deal with the matter. Constantine enacted that Rescripts *contra ius* were not to be binding in future cases, while those which laid down *publica iura* were[6], but this left the Court still to determine which were which. Arcadius

1 Krueger, *op. cit.* 104. 2 *Ante*, § IV. 3 1. 4. 1. 1. 4 49. 1. 1. 1; C. 1. 21. 1.
5 1. 4. 1. 2. A poor authority says that Macrinus deprived all rescripts of his predecessors of any authority as having been very likely given by favour. *Vita Opilii Macrini*, 13.
6 C Th. 1. 2. 2.

provided that *Epistolae* were not to be binding in future cases[1] (which suggests that Constantine's law had in fact deprived *subscriptiones* of all authority). Valentinian III limited this by providing that they were to be binding if expressed to be binding in future cases[2]. Justinian provided that even where there was no such declaration, if the Rescript, or other form of imperial pronouncement in its terms laid down a general rule, this was to apply in future cases, though not so expressed[3].

Mandata[4]. These are of small importance in private law. They were usually administrative directions to provincial officials, but occasionally laid down rules of law. *Mandata* operated only for the life of the issuing emperor and only in the region to which they were addressed, but in fact they were renewed and often addressed to many districts. And as the Emperor could make law in any form he chose, he could do it by Mandate. They are occasionally quoted by jurists[5], but there is little trace of them in later law.

When, as happened by the third century, the Emperor's right to make law was fully recognised, with the corollary that its form was his own affair, any utterance of his being binding, and when, in addition to this, he became sole legislator, at latest by the fourth century, it is plain that any distinction between modes was of secondary importance. Much confusion of terminology arose. The name Edict was applied to provisions for special districts: nearly all Justinian's Edicts would have been more accurately called *mandata*. It became usual to call imperial enactments *leges*. Many of the important enactments of later emperors in the Code of Justinian are what are called *leges generales* or, somewhat confusingly, *leges edictales*, and hardly conform to the classification above stated. Some appear in the form of *Orationes ad Senatum*, a reminiscence of the earliest form of imperial enactment, but of a different character. The Senate had changed: it was now little more than a town council. The enactment was addressed to it as a convenient mode of publication which would also be gratifying to the Senate and population of the city. There was no question of any co-operation by the Senate: there was no senatusconsult[6].

IX. The Jurists. As has been observed, the jurists of the classical age are the real builders of the great fabric of Roman Law which we study. Space does not admit of more than a brief statement of the main points of interest in their history.

1 C. Th. 1. 2. 11. 2 C. 1. 14. 3 3 C. 1. 14. 12. 4 Krueger, *op. cit.* 109. 5 Coll. 11. 7. 4. 6 See on all this, Krueger, *op. cit.* 301 sqq.; another method of the late period is *Pragmaticae Sanctiones* or *Pragmaticae Formae*. Most of these resemble *leges datae* or *mandata*, but a few contain new general rules of private law. Sometimes they are declared to be *leges generales*. Some are called *Pragmatica Rescripta*.

THE FUNCTIONS OF THE JURISTS[1]. The account which Cicero gives[2] of the jurists of an earlier age as constantly consulted on every kind of affair, juristic or not, had ceased to be true of his own time. But the picture which he draws here and there of the jurists remains in broad outline true for the age of classical jurisprudence. He states their *interpretatio* as a source of law side by side with laws and edicts[3]. He tells us in passages which make no pretence of scientific exactness, but which no doubt give a true enough account that the business of the jurist is three (or four) fold[4]:

(*a*) *Respondere*. This was giving advice on consultation, not merely to private persons, but to *iudices* and magistrates, and not necessarily formally, as in the case of privileged *responsa* shortly to be considered, but in any form and place, even in the course of a walk across the Forum[5].

(*b*) *Agere*. This was guiding the conduct of lawsuits. The jurists did not act as advocates: this was the business of the *oratores*, the class of which Cicero was the ornament. What the jurist did was to instruct the advocate on the points of law involved and help him with advice.

(*c*) *Cavere*. This was assistance in the performance of legal transactions and might well include what Cicero calls *scribere*, the preparation of legal documents.

He also mentions as the duty of the good jurist, instruction. This does not mean the ordinary routine of elementary teaching in law: that was presumably then, as later, in the hands of professional teachers. The great men may have acted as chiefs of legal schools[6], but for the most part their teaching consisted in permitting younger men to be present at consultations, with, no doubt, an occasional informal talk on a point which had arisen.

Their *responsa* were usually written, and, where they were in connexion with litigation, either sent direct to the *iudex* or put in by the *orator*. Apart from the privilege of the *ius respondendi* they were in no way binding on the *iudex*[7]: they owed their weight to the personal reputation of the jurist, but unlearned *iudices*, who were mere private persons, would tend to follow them, and thus they exercised a great influence on the law. The jurist held no official position and took no fees. It was not directly as a means of living that this career was entered on, but as one of the surest roads to popularity[8] and eminence

1 See Jörs, *Römische Rechtswissenschaft der Republik*, §§ xx–xxiv. 2 *De Orat.* 3. 33. 133–135. 3 *Topica*, 5. 28. 4 *De Orat.* 1. 48. 212; *Pro Murena*, 9. 19. 5 *De Orat.* 3. 33. 133. 6 *Post*, § x. 7 Cicero tells us of a decision in direct opposition to the view of Q. M. Scaevola, one of the greatest jurists of his time. *Pro Caec.* 24. 67–69. 8 See D. 1. 2. 2. 37 for the story of C. Scipio Nasica who was given a house on the *Via Sacra* by the State "*quo facilius consuli posset.*"

in public life, and to the rewards of public office. The careers of soldier, orator and jurist are repeatedly spoken of as the most honourable open to a citizen[1], and of these, under imperial conditions, the last was by far the most independent.

The activities above mentioned do not exhaust their modes of exercising influence in the law. They occasionally acted as assessors to a *iudex* and practically dictated his judgment. Still more often they were assessors or *comites* to the magistrates, who were not necessarily lawyers, guiding them in all legal questions[2]. There is no doubt that much of the Praetor's Edict was due only nominally to him, but was the work of his more learned councillors. Further, they were active in producing juristic literature, a topic to which we shall recur[3], since for the purposes of legal development it was their most important work.

The *ius respondendi.* It is recorded that at an early date in the empire certain jurists were given the right *publice respondendi*, *i.e.* of giving *responsa* under seal and authorised by the Emperor, which were binding in the case in connexion with which they were issued. Pomponius tells us in a passage which is rather corrupt[4], that, before Augustus, lawyers gave *responsa* in any form or conditions they liked, but that Augustus, to increase their authority, gave certain jurists the right *publice respondere*, or, as he also puts it, to give *responsa ex auctoritate principis*, such *responsa* being under seal, and so sent to the *iudex*. The Institutes[5] tell us that *Caesar*, *i.e.* some emperor, had anciently provided that where the opinion of a jurist who had the *ius iura condere* was submitted to a *iudex*, it bound him, but not if the opinions submitted disagreed. Till a century ago this was substantially all the evidence and the text of the Institutes was naturally coupled with that of the Digest, which said nothing about binding effect, and the result arrived at that Augustus made the opinions of privileged jurists binding on the *iudex*. Early in the last century Gaius became available and a passage was found which was plainly the source of the text in the Institutes. But Gaius says that Hadrian made *responsa* bind the *iudex* if they were in agreement[6]. It was thus no longer obvious that Augustus made them binding and different opinions began to appear. The majority of writers however still hold to the view that it was Augustus who gave *responsa* binding force, and they explain the text of Gaius as meaning that Hadrian settled a difficulty which had arisen where conflicting opinions were given by equally privileged jurists. Apart from the foregoing texts this rests partly on a text of Seneca, written before Hadrian's time, which says incidentally that *responsa* of jurists *valent*[7] though no

1 See Jörs, *op. cit.* 255. 2 Cicero, *Topica*, 17. 65. 3 *Post*, § xi. 4 1. 1. 2. 49.
5 Inst. 1. 2. 8. 6 Gai. 1. 7. 7 Seneca, *Epist.* 94. 27.

reasons are assigned, and partly on *a priori* considerations such as the consistency of the device with the general policy of Augustus. But in fact it would not be like his method elsewhere. His changes were made by utilising the revived republican machinery, worked by him in the strong position of chief magistrate. He had power enough to do what he liked, but within the system he framed he could not himself have bound the *iudex* to any particular judgment. It is difficult to see how he could have authorised anybody else to do so. On the other hand the method of attaching the jurists to himself and making their power appear an emanation from his own, by giving the chief among them a sort of patent of precedence, which would inevitably in the long run mean *de facto* authority, was exactly on his lines.

No juristic text suggests that Augustus made *responsa* binding. Gaius, whose text is corrupt but explicit on this point, says that Hadrian made them binding if they agreed, and does not mention Augustus. It is said indeed that Augustus laid down a general rule and Hadrian a necessary corrective. It is surprising that so obvious a point should not have called for settlement for more than a century, and that Gaius should have ignored the real source of the rule.

Pomponius in his long discussion[1] shews that in his time there had been no fundamental change. He states the sources in historical order, and in his list the *interpretatio prudentium* appears as part of the unwritten law, a synonym for *ius civile* in the old sense. It is mentioned after *lex* and before *plebiscitum* and is clearly the *interpretatio* of the old jurists. Then come the later sources, but there is no reference to *responsa*, from which the inference is that they were no more sources of law than they had been for centuries. He was writing before Hadrian's changes, at any rate he does not mention the revision of the Edict. For Gaius the *responsa* are part of the written law. In a scheme which is apparently historical he puts *edicta* after *principum placita*, which shews that he is referring to Julian's revision, and *responsa* after *edicta*[2]. This suggests that the authoritative *responsa* as he knew them were due to Hadrian. If Pomponius really meant to tell us of such an important change he was unfortunate in omitting the main point[3].

1 1. 2. 2. 5, 6, 35 sqq. 2 Gai. 1. 2. 3 Pomponius (1. 2. 2. 50) mentions another rescript of Hadrian which has been supposed to create difficulties. After stating Augustus' enactment he adds: "*et ideo Hadrianus cum ab eo viri praetorii peterent ut sibi liceret respondere rescripsit eis hoc non peti sed praestari solere, et ideo si quis fiduciam sui haberet delectari se ad respondendum se praepararet.*" This corrupt text has been amended so as to support various hypotheses. It has however nothing to do with his legislation. It is not a legislative act. Pomponius cites it as a commentary on the enactment of Augustus, and especially on the words "*ex auctoritate eius.*" The applicants omitted the important part, and Hadrian says no authority is wanted for what they ask for. It is a little jest of his: he was partial to jests (*Vita Hadriani*, 20, 25). The only significance of the text for

It is clear that a change in the position of the jurists did occur under Hadrian. Their *responsa* were now *ius scriptum*. They began freely to hold imperial magistracies, *praefecturae*, etc.[1] The only jurists not alive under or after Hadrian who are known to have issued *responsa* are Labeo[2], who probably never had the *ius respondendi*, and Sabinus, who received it from Tiberius[3]. Collections of them were very usual forms of literature after the time of Hadrian[4].

The remark of Seneca implies no more than *de facto* authority: one accepts an expert's opinion whether he gives his reasons or not. Cicero might have said it[5]. So too Caligula is reported to have said that he would destroy the jurisconsults: "*se mehercule effecturum ne quid respondere possint praeter eum*[6]." This too implies no more than practical weight and neither Seneca nor he distinguishes between one class of lawyers and another.

It has been suggested that Augustus made *responsa* binding for the actual case and Hadrian for future cases as well, but there seems no real evidence for this half-way house. The better view then seems to be that Augustus did not change the legal position of *responsa*, but that a license from the Emperor could not fail, before long, to give these privileged *responsa* an overriding influence on the mind of the judge, that this is the régime to which the texts of Seneca and Suetonius refer, and that Hadrian set the matter on a regular footing, using the full legislative power which he undoubtedly had and Augustus had not[7]. It seems clear that whatever the nature of Augustus' change it did not bar unprivileged jurists from giving *responsa*[8]. Augustus is not likely to have given his opponent Labeo the *ius respondendi*, but he issued a volume of *responsa*. It is most probable that in later times only the privileged jurists issued such books.

The question remains: what were the limits of Hadrian's authorisation? The most probable answer is that his authorisation extended

legal purposes is the further evidence it provides for the view that the *auctoritas* Augustus provided had not so far affected the position of the jurists, but that error as to its purport was possible, and that it shews that he did not prevent unauthorised jurists from giving *responsa*.

1 Cassius and Pegasus however had held imperial magistracies. Roby, *Introd. to Digest*, cxlv, cli. **2** Coll. 12. 7. 3 (cf. D. 9. 2. 27. 8 where the ref. to Labeo is omitted. The work is not in the Florentine index). **3** 1. 2. 2. 48. **4** See the Florentine index. **5** See Cicero, *Topica*, 5. 28. **6** Suetonius, *Caligula*, 34. The words being corrupt have been amended by reading *rem* for *eum*. This is inconsistent with the rest of Suetonius' language, and it is unlikely that Suetonius meant to charge the emperor with such an innocent remark as this. **7** Of recent writers Karlowa, *R.Rg.* 1. 660 and Krueger, *Röm. Rechtsq.* 121, hold that Augustus made them binding for the case. Girard, *Man.* 79, inclines to this view but only as the more probable. Kipp, *Gesch. d. Q.* 110 and Cuq, *Man.* 53, reject it. Jörs, *Quellen*, 84, seems to leave the matter open. **8** Karlowa, *op. cit.* 659, holds that others might give *responsa* but these might not be cited in court.

only to the case for which the *responsum* was obtained[1]. But this is difficult to reconcile with the language of Gaius, who speaks of *sententiae et opiniones* of those to whom it has been allowed *iura condere*. Justinian says much the same except that he does not mention the Emperor concerned. This language suggests a much wider authorisation, and many views are held[1]. The words *iura condere* have led some to hold that *responsa* were binding in future cases. The words *sententiae et opiniones* have led to the improbable view that all the writings of privileged jurists were binding. But literary work is a different matter from advice to clients, and it would be impossible to give binding force to the speculative opinions of any living man however distinguished. The other view has more to be said for it, but it is unlike the Emperors to set up an authority so little under their control. The text is corrupt[2]: opinions differ as to the degree of corruption, but the only part that can be really relied on is the reference to Hadrian. Ancient works which have existed for generations in manuscript, repeatedly recopied, undergo a steady process of corruption largely by the incorporation into the text of marginal comments. Something of this sort has happened here; how much is uncertain, but enough to disentitle us to draw inferences from the wording. There is a sufficient cause in this case. Later in the empire there was legislation giving authority to the writings of deceased jurists[3], a very different matter. It is easy to see how in view of this legislation such glosses would creep into the text.

Whatever be the scope of *ius respondendi* it would seem important enough for the fact that he had received it to have been recorded in the information we have as to any jurist. But, though we may assume that it was not granted to many at the same time, it was probably granted to all who were in the Emperor's *consilium*, and yet we do not know that this was so. Only of two jurists do we know that they had this privilege. One is Sabinus at the beginning, who received it from Tiberius[4], the other is an otherwise unknown man, Innocentius, who received it from Diocletian[5], so that the grant of the privilege survived the age of the great jurists[6].

1 Glasson, *Étude sur Gaius*, cites many opinions, p. 84. Kipp appears to hold (*op. cit.* § 17) that in practice they were cited in future cases and that Hadrian confirmed this. 2 For wholesale rejection see Kniep, *Gai Comm. Primus*, 3, 105. 3 *Post*, § XII. 4 1. 2. 2. 48. 5 Krueger, *op. cit.* 296. 6 In case of conflict was the *iudex* absolutely free or must he follow one of the opinions expressed? Does the *omnium* of Gaius mean all who are cited or all the patented jurists of the time? If the latter view is correct, *responsa*, as decisive, would not play a prominent part in legislation. Neither Ulpian (*Regulae*) nor Paul (*Sententiae*) ever cites a *responsum*. Gaius cites one (3. 198), but it is clear from the corresponding text in the Inst. of Justinian that the point was still open (4. 1. 8). They are a little more freely cited in collections made before Justinian, but after legislation giving authority to writings.

X. The Conflicts of the Schools[1]. The jurists of the empire up to the time of Hadrian appear as sharply divided into two opposing groups (*scholae* or *sectae*). The two schools seem to have originated in the personal rivalry and political opposition between Antistius Labeo, the republican, a man of independent mind and prone to innovation, and Ateius Capito, the adherent of the empire, inclined to follow tradition and to rest upon authority. The growth into distinct schools may have been gradual, for the schools derive their names from later leaders, that resting on Labeo from Proculus who was the follower of Labeo's follower, Nerva, and the other from Masurius Sabinus, who was a follower of Capito, or sometimes from Cassius, who followed Sabinus. The schools seem to have had recognised leaders whom Pomponius speaks of[2] as "succeeding[3]" the one the other, a form which he never uses of the republican lawyers. He gives lists of these leaders, perhaps not complete, down to his own time, Julian, the Sabinian, being the last. Of no jurist later than Julian is it certainly known that he was attached to either school, except that Gaius speaks of the schools as still existing and of himself as a Sabinian. It is sometimes said that the schools lasted to the time of Papinian, and were ended by his greatness, which united all. But there is no evidence of their endurance to his time, and if any individual jurist ended the schools by his ascendency it is far more likely to have been Julian[4]. From the fact that in the lists given by Pomponius there are towards the end cases in which there were two leaders on each side at the same time, it has been conjectured that the schools may have perished from internal dissensions, and that, even in the time of Gaius, the schools as organisations were dead, though some jurists still attached themselves to the doctrines propounded by the one or the other.

The Sources, especially Gaius, record many disputes between the schools and others which probably are such, though they are stated as disputes between individual jurists. Many attempts have been made to determine what, if any, was the difference of principle which divided the schools. It is not necessary to go into them, for none has any wide acceptance[5] or stands the test of submission to the actually recorded opinions, but two conclusions emerge from the discussion. There is no

1 Roby, *Introd. to Dig.* cxxvii sqq.; Krueger, *op. cit.* 160 sqq. 2 No work of Sabinus or of Cassius seems to have survived to Justinian's age, for though they are very frequently cited by other jurists, there is in the Digest no direct quotation from them. Earlier jurists are directly represented, *e.g.* Proculus, Aelius Gallus, as well as Quintus Mucius and Alfenus. 3 1. 2. 2. 48. 4 See Kipp, *op. cit.* § 18. 5 See Kipp, *ib.*; Krueger, *op. cit.* § 20, and for a list of the disputes and older opinions, Chénon, *Proculeiens et Sabiniens.* See Huvelin, *Études sur le furtum*, 1. 764, for the view that the Sabinians rested on authority (Anomalisten) and the Proculians aimed at making the law logical (Analogisten).

evidence that the characteristics of Labeo and Capito were reflected in their respective schools: it is clear indeed that they were not. And many of the disputes were on rather small points in which it is difficult to see any principle at stake: those who do find such principles find different and conflicting ones from the same text.

The only other point to be dealt with is the exact meaning of the terms *scola* and *secta*, which are applied to these groups[1]. *Secta* suggests "party," groups of jurists attached to particular views and leaders, analogous to the "High" and "Low" parties in the Church of England, and perhaps this is all that it practically meant in the time of Gaius. But there is evidence of a more elaborate organisation, such as is suggested by the name *schola*. For though we speak of "schools" of opinion without necessarily implying an organisation, it is not clear that this word was so used in classical or silver Latin. When we remember how great a part in juristic activity was played by instruction, and how Pomponius speaks of the leaders as "succeeding[2]" one the other, language which he does not use of the republican jurists, the suggestion is obvious that these were real schools, of which the jurists named as leaders were the heads. It has therefore been suggested that they were modelled on the Greek schools of philosophy, definite organisations controlled by leaders sometimes nominated by the retiring chief, sometimes elected. The schools were held at definite places, and we learn from Aulus Gellius[3] that in the second century there were such *stationes docendi* for lawyers at Rome. It may therefore be that there was no necessary opposition of principle at all, but that the Proculian doctrine is only that taught at a *statio* founded by Proculus.

XI. The Juristic Literature. Literary production is very active among the classical lawyers. An attempt to classify its forms is not very helpful, but they may be said to come under five heads. (1) Books for elementary instruction, *e.g.*, *Institutiones*, *Regulae*, etc. (2) More advanced, somewhat unsystematic, treatises, *e.g.*, *Quaestiones*, *Disputationes*, etc. (3) Collections of *Responsa* for practitioners which appear to vary in the degree of systematisation thought needful. (4) Systematic general treatises on the civil law, *e.g.* Sabini *Libri iuris civilis*, or on the *ius honorarium*, *e.g.* Ulpiani *Libri ad edictum*, or on the whole, *e.g.* Juliani *Digesta*[4], and (5) Monographs on particular laws or senatusconsults, or on earlier writers or on special topics. Of this class of book Paul produced a great number[5]. The treatment is in general more systematic than that which appears to have marked earlier writings,

1 1. 2. 2. 47; Gai. 1. 196. 2 1. 2. 2. 48 sqq. 3 *Noctt. Att.* 13. 13. Bremer, *Die Rechtslehrer und Rechtsschulen.* 4 As to nature of a jurist's '*Digesta*,' Mommsen, *Ges. Schr.* (*Jur.*), 2. 90 sqq., and H. Krueger, *Z.S.S.* 37. 311 sqq. 5 See the Florentine index.

a change which is the natural result of the increased systematisation of the law itself which has already been noted.

It is impossible in the available space to give an account of the work and characteristics of the jurists individually[1], but something must be said of those who made the greatest mark on the course of the law.

Gaius[2]. He is the most mysterious person who plays a large part in the law. He seems to have been born under Hadrian and to have done most of his work in the following reigns. He was evidently a teacher and the Law of Citations[3] implies that he never had the *ius respondendi*. He does not seem to have been of much eminence in his own day, for he is never mentioned by any classical lawyer, the few allusions to a jurist by the name of Gaius being supposed to refer to Gaius Cassius Longinus[4], whom indeed it has been attempted, with little justification, to identify with him[5]. Only his *praenomen* is known. His reputation grew after his death, and it may be that Ulpian utilised his work for his own elementary treatise[6]. The Law of Citations includes him in the list of five jurists who may be cited, though he is much earlier than any of the others. But though he wrote commentaries on the Edicts they are little used in the Digest of Justinian, while much use is made of his elementary books, and they are expressly made the basis of the Institutes. He has been credited with the invention of the division of the law into *Ius Personarum, rerum, actionum*, but it is more probable that it was already traditional[7]. He was a Sabinian, the last known partisan of a school, but he did not always accept the Sabinian view[8]. There has been much controversy as to his origin and place of work. The weight of opinion, including the high authority of Mommsen, is that he was a Greek provincial, but there are not wanting dissident opinions. The evidence is really insufficient to justify a confident opinion, and much of the argument is of a very flimsy character[9].

1 See Roby, *Introd.* xci sqq.; Kipp, *op. cit.* § 18; Fitting, *Alter und Folge*, for an enquiry into the dates of their various writings. 2 Roby, *Introd.* clxxiv; Glasson, *Étude sur Gaius*; Kniep, *Der Rechtsgelehrter Gaius.* 3 *Post*, § xii. 4 See Roby, *loc. cit.* 5 See *Z.S.S.* 20, 211. 6 Recent authority is on the whole opposed to this view. See Krueger, *Röm. Rechtsq.* 248, and Girard, *Mélanges*, 325 sq., who thinks the opinion utterly without foundation. His opinion seems to rest on the fact that no contemporary reference to Gaius exists, and on the view that no inference can be drawn from similarity of plan, as it is practically certain that this was not invented by Gaius but was traditional in works of this sort. But the resemblances are not merely in plan: they are very close in detail, even to unexpected omissions and insertions. 7 *Post*, § xxi. 8 *E.g.* Gai. 3. 98. 9 See Roby, *loc. cit.*, and Kniep, *op. cit.* 9 sqq. One writer, observing that he names three Eastern cities in a certain context (D. 50. 15. 7), assumes that he puts Troas first because he was born there and Berytus second because he taught there, an argument adequately dealt with by a French critic who suggests that he no doubt put Dyrrachium last because he died there. See Glasson, *Étude sur Gaius*, 35. The latest writer (Kroll, *Zur Gaiusfrage*,

Julian[1]. Salvius Julianus is a much greater figure. We have already noticed his *ordinatio* of the Edict carried out perhaps while he was *Quaestor Augusti*[2], and, as we are told, received twice the usual stipend on account of the great learning he displayed[3]. An honorific inscription which has been found[4] shews that he held all the important senatorian offices from Quaestor to Consul, and many imperial offices as well, and that he was in the *Consilium* of Hadrian and of Antoninus Pius. He seems to have died in the reign of M. Aurelius and Verus, who describe him in a rescript as *amicus noster*. His fame did not lessen as time went on, for later Emperors speak of him in the most laudatory terms[5]. That he is not one of the five singled out for citation in the Law of Citations is no doubt due to his early date, and it is to be noted that the clause authorising citation of jurists, approved by any of the five, instances Julian among others. He was the last recorded chief of the Sabinians, but he was too strong to be bound by the traditions of any school. It seems to be more true of him than it is of Papinian that his greatness united all schools, for though we hear of one Sabinian after him (Gaius) we hear of no more Proculians, and it may fairly be presumed that the undoubted predominance of Sabinian doctrine in the later classical law was in great part due to the ascendency of Julian. No other jurist exercised so great an influence on the destinies of the law. He issued many *responsa*, and though no collected volume of them is known, they are so often mentioned and discussed by Africanus that much of his work may be regarded as a commentary on the *responsa* of Julian. His principal work was his *Digesta*, which for the most part followed the order of the Edict, but was a comprehensive treatise on both civil and praetorian law[6]. It has been thought that Justinian's compilers used this book as the basis of their scheme: in any case nearly 500 passages are quoted from it. The publication of this comprehensive work explains the absence of any volume of *responsa*: what would have been its content is in some form embodied therein[7]. The principal characteristics of Julian's work seem to be a very lucid style and a clear recognition of

revised by Erman and H. Krueger) makes him of oriental extraction but of Roman origin and Latin speech.

1 Buhl, *Salvius Iulianus*. 2 But see, *e.g.*, Appleton, *N.R.H.* 35. 623. 3 See the inscription mentioned in the next note. 4 Quoted by Krueger, *op. cit.* 183; see also Mommsen, *Ges. Schr.* (*Jur.*), 2. 1 sqq. 5 In the *Constitutio* Δέδωκεν, 18, Justinian speaks of him as the most illustrious of the jurists. The parallel text in "*Tanta*" uses somewhat less strong expressions. 6 Mommsen (*Ges. Schr.* (*Jur.*), 2. 8 sqq.) considers it to have had a theoretical rather than a practical aim. The answers to enquiries which it contains he thinks, on internal evidence, to have been in the main replies to students, not formal *Responsa* to litigants. 7 At least ten jurists published books of *responsa*, and at least seven *Digesta*. Only two are known to have published both, Marcellus and Scaevola, both late.

the fact that legal conceptions must move with the times. He seems to have played somewhat the part which Lord Mansfield did in English Law. He did a great work of co-ordination and generalisation, sweeping away unreal and pedantic distinctions. Karlowa justly observes that the appearance of Julian was epoch making[1].

Papinian. Aemilius Papinianus[2] was *Praefectus Praetorio* under Severus with whom he is said to have been connected by marriage. Under Caracalla he declined to make a public declaration approving the Emperor's murder of his brother Geta. The result was the immediate murder of Papinian. It is interesting to note that he was Prefect at York, where he may have had as assessors, Paul and Ulpian, who certainly at one time acted in that capacity. As Roby says it would be difficult to form a stronger court[3]. He was evidently regarded by those who came after as the greatest of all the jurists: we shall see that he was given a special preponderance by the Law of Citations[4], and though Justinian did away with the irrational method of assessing opinion directed in that law, he speaks repeatedly of Papinian in terms of such laudation as to shew that his ascendency had not diminished[5]. Moderns do not usually rate him so highly. Most put Julian before him and some Ulpian. In any case he was a very great lawyer, one of whose signal merits it was that he was never captious, as Paul often was. His criticism is surefooted but moderate in tone, and he speaks always from a lofty ethical point of view. No chicanery appealed to him, and doubtless part of his fame is due to this. But his work shews other merits than these. As Bruns says[6], his concise mode of statement, which brings out the essential point and only that, is an indication of the way in which his mind proceeded to fix the true relation of the facts to the general legal principle which was to govern them. But he wrote no comprehensive systematic treatise and his chief works, *Quaestiones* and *Responsa*, which cover much ground, shew a judicial and critical mind rather than intellectual fertility. In any case he was a very great figure.

Paul[7]. Julius Paulus was a contemporary of Ulpian and a younger contemporary of Papinian. He held the highest imperial offices and was long a member of the imperial council. He was an extremely voluminous writer: extracts from his works fill one-sixth of the Digest, being almost as numerous as, though much less bulky than, those from Ulpian. He enjoyed a high reputation and was one of the favoured five in the Law of Citations. He is one of the very few of whom we possess a book

1 *Op. cit.* 1. 709. 2 Roby, *Introd.* cxci; Fitting, *Alter und Folge*, 71; Krueger, *op. cit.* 220; Costa, *Papiniano*, 1. 3 sqq. 3 *Op. cit.* cxciii; Lampridius, *Vita Alexandri*, 26. 6; *Vita Pescennii*, 7. 4. 4 *Post*, § xii. 5 See Roby, *loc. cit.* 6 Cited by Karlowa, *op. cit.* 1. 736. 7 Roby, *Introd.* cci; Krueger, *op. cit.* 227; Fitting, *op. cit.* 81.

unhandled by Justinian and this we owe to the fact that his popularity led to the insertion of his work in the Code of the Visigoths for Roman subjects—the *Breviarium Alaricianum*, and to the adoption of extracts from it in other works older than Justinian. But, as the sources of our knowledge would suggest, we have it only in a very imperfect form.

There is no other jurist about whom modern opinions differ so widely as they do about the merits of Paul. It is difficult to understand these extreme divergences in view of the fact that we have a great mass of material on which to form a judgment. But he is described in turn as an extremely profound thinker, and original jurist, as an unoriginal but clear-sighted critic, as a mere compiler, popularising other men's views, and as a fanciful person of whom we sometimes doubt whether he is in his right mind. Equally remarkable are the differences of opinion on his style. For some he is a lucid writer, for others he is obscure, but only from compression, for others he is simply obscure, and there is disagreement whether this is his own fault or that of Justinian's compilers[1].

Whatever his capacities may have been, much, if not most, of his work is purely critical. He wrote many volumes of comment on earlier writers: some of it extremely useful, some of it captious. Constantine rejects his notes on Papinian because, though able, they aim rather at *depravare* than *corrigere* and this seems even from what is left not too severe a judgment of his method[2]. He delights in sharp contradiction, and in general his criticism does not give an impression of urbanity[3].

Ulpian[4]. Domitius Ulpianus[5], like Paul, held all the highest offices. He was for a time exiled under Elagabalus. He was a member of the *Consilium* under Severus Alexander, to whom he was related[6], and under Caracalla. He was murdered by his own praetorians when he was *Praefectus Praetorio*. His works fill nearly a third of the Digest and he and Paul account for nearly a half. He was one of the favoured five in the Law of Citations, and later writers and Emperors speak of him in the most laudatory terms[7]. Part at least of the praise, and the great use made in the Digest of his work is not due wholly to his personal merits. He and Paul are the latest of the great systematic writers, and, other things being equal, the later a lawbook is the better it is. The writer has the advantage of his predecessor's work, and an intelligent writer could produce a great book without contributing much of his own. It is the general opinion that this is in effect what Ulpian did. The age of progress

1 For references to these views, see Buckland, *Equity in Roman Law*, 120. 2 C. Th. 1. 4. 1. Ulpian shares the condemnation, with, so far as appears, less reason. 3 See, *e.g.*, 41. 1. 65; 49. 15. 28; 50. 16. 244. It is specially Labeo with whom he deals in this way. 4 Roby, *op. cit.* cxcvi; Krueger, *op. cit.* 239; Fitting, *Alter und Folge*, 99. 5 Jörs, Pauly-Wissowa, *Real-Encyclopaedie*, *s.v.* Domitius. 6 C. 4. 65. 4. 7 Roby, *op. cit.* cxcix.

in legal thinking was ending: it fell to Ulpian to set forth the splendid result. This view is however modern: in the middle ages Ulpian seems to have been almost another name for Roman Law.

Of him too we possess a book in something like its original form. His *Regulae* exist in an imperfect abridgement[1], made, probably, early in the fourth century, to which have been added a few fragments found in other sources. He does not seem to have written books specially devoted to criticism of earlier writers, except the notes on Papinian, which may not have been an independent book. He wrote indeed *Ad Sabinum*, but that was a recognised title for a comprehensive work on the *ius civile*, and it is rather an honour to Sabinus than anything else.

XII. The line of classical jurists ends somewhat suddenly. After Ulpian there are only Marcian and Modestinus, of whom the latter is one of the five. Two later still are indeed included in the Digest, Arcadius and Hermogenianus. But these come after a gap of almost a century and their contribution is not important.

There is room for doubt as to the causes of the decay. It is not enough to say that the principles were worked out and had yielded all they could: this misconceives the nature of legal evolution, which consists in expansion of the law to fit conditions constantly changing, and also ignores the fact that just when this cessation occurred the Roman system was getting into touch with a new ethic, that of Christianity, and was acquiring a set of new ideas from increased contact with oriental systems of thought. Change of law was still rapid: lawyers were still plentiful, but the law ceased to attract the best equipped minds. There were no doubt several causes for this. The *pax Romana* was ending. That the growth of law proceeds best in an age of order and good government is illustrated by the history of the empire in the first and second centuries. But the State was now entering on a period of disorder and bad government. Able men will not devote themselves to the severe study of the law if their labours are to be stultified by disorder and corrupt courts. No doubt there are men who will, but that sort does not produce Papinians. Kipp[2] assigns as a cause the increasing absolutism of the Emperor, who no longer gives *ius respondendi*, but seeks to make himself the source of equitable extension of the law. He adds as an instance the Law of Citations, but this is effect rather than cause, and we have seen that *ius respondendi* outlived the great jurists. Krueger notes the introduction of Christianity, which caused many

1 It is not an epitome. There is no evidence that the statements of law have been in any way altered, and there is some evidence to the contrary. But much matter has been omitted altogether, and the MS. does not extend to obligations and actions.
2 *Op. cit.* 127.

struggles physical and intellectual, and diverted men's minds to a new channel[1]. Theology at any rate soon became actively studied. Karlowa[2], besides these, associates it with a general sinking of the intellectual level, which is only another name for decay of the State.

The lack of living great jurists increases the importance of the writings of the dead. In A.D. 321 Constantine enacted that certain notes of Ulpian and Paul on Papinian were not to be of authority[3], language which implies either that the works of the great jurists had acquired *de facto* authority, or that there had been earlier legislation giving authority to some books[4]. There is evidence that some notes of Marcian were excluded in the same way[5]. In 327[6] a statute confirmed all the writings of Paul, but it is supposed that this did not cover these notes. The enactment gives special prominence to his *Sententiae*. For the next century there is no sign of further legislation of this sort. The development of the law by the settlement of points of detail, which had hitherto been the work of jurists was now done by imperial enactment, but all seems to rest on the earlier literature as a basis. In 426 came the famous *lex de responsis prudentium*—the Law of Citations[7]. Its provisions may be shortly stated as follows:

(*a*) All writings of Papinian, Paul, Gaius, Ulpian and Modestinus are confirmed and may be cited, except notes of Paul and Ulpian on Papinian. Gaius is to have the same authority as the others.

(*b*) Any writers cited and approved by any of these may be cited, such as Scaevola, Sabinus, Julian and Marcellus, provided by reason of the doubt due to their antiquity their books are confirmed by comparison of manuscripts.

(*c*) If the jurists cited disagree the majority is to be followed: if numbers are equal, Papinian. If he is silent, the *iudex* may please himself.

This law lessened the difficulties of the courts in dealing with juristic literature. It excluded a huge mass of conflicting doctrine, the relative value of which had not been determined, and which yet had to be used by the judges as a source of principle on which to base their decisions. It was even more important than it seems, for it is evident that by this time even the old *leges* were in effect looked for and applied only as they were represented in juristic writings. But the enactment is not clear and calls for remark on other grounds. It is the earliest certain

1 *Op. cit.* 297. As to the effect of Christianity on the law itself, Riccobono, *Riv. di diritto civile*, 1910, 37; Baviera, *Mél. Girard*, 1. 67. 2 *Op. cit.* 1. 932. 3 C. Th. 1. 4. 1. 4 As the *Codex Theodosianus* begins with Constantine earlier legislation would not appear in it, and it was obsolete under Justinian. 5 *Const.* "*Deo auctore*," 6 =C. 1. 17. 1. 6. 6 C. Th. 1. 4. 2. 7 C. Th. 1. 4. 3, issued in the West but operative in both empires.

reference to Gaius, who must have lived 250 years before. From the fact that his admissibility is emphasised and that no *responsa* of his are known it is conjectured that he never had the *ius respondendi*.

The rule as to the jurists approved by the five is obscure. Presumably, but not certainly, the admissibility extends to all their writings and not merely the work quoted from. What is meant by comparison of manuscripts? It is probable that in some cases manuscripts of the more ancient works were rare or non-existent. It is difficult to construe the words except to mean comparison of the extract with the original, or of different copies of the original, but it is sometimes held to mean examination of different manuscripts of the quoting authority[1].

The provisions for the case of conflict are ridiculous: opinions should be estimated by weight, not number[2]. Equally absurd is the rule that Papinian is to be better than any one but not than two. These provisions shew that scientific study of law was a thing of the past: they mark probably the lowest point reached by Roman jurisprudence. A century later, Justinian, in that part of his codification which consisted of an abridgement of the writings of the jurists, ignored the provisions of this *lex* and directed his ministers not to select any view merely because it had a majority in its favour, and not to take any notice of the rule that notes by Paul, Ulpian and Marcian on Papinian were to be rejected[3].

Theodosius, who is named with Valentinian as propounder of this law, founded or refounded a law school[4] and planned a great scheme of codification[5]. In view of the low quality of the men who were at his service, as shewn in this enactment, it is hardly to be regretted that only the earlier and simpler part of his codification was carried out.

XIII. Remains of the Juristic Literature[6]. Besides the three well-known books of Ulpian, Paul and Gaius[7], we have not much from the classical age directly. Apart from a number of small fragments we have an account by Volusius Maecianus of the abbreviations which were

1 Krueger, *op. cit.* 300. 2 A plural tribunal must decide by majority, but this is precisely because it is they themselves who have to decide. If the case is appealed, no attention is paid to the question which was the majority view in the lower court. 3 There is however in C. 9. 51. 13=C. Th. 9. 43. 1. (321) a passage excluding the authority of the notes of Ulpian and Paul on Papinian in a certain question of validity of a will. This is apparently an enactment a fortnight earlier than the general reprobation of these notes (C. Th. 1. 4. 1). The point at issue is made the subject of an express enactment. 4 C. Th. 14. 9. 3. 5 C. Th. 1. 1. 5. 6 *Collectio librorum iuris anteiustiniani*; Girard, *Textes*; Riccobono, *Fontes Iuris Romani anteiust.* 7 Besides the text of Gaius discovered a century ago, we have a very poor abridgement in the *Breviarium Alaricianum*, which has long been known, and the recently discovered *Autun Gaius* which looks like notes of lectures on Gaius, which is not very useful, but has added something to our knowledge. It is supposed to be of the fourth century, but may be earlier. It is contained in the collections cited in the previous note.

usual in describing the subdivision of a *hereditas* and for other purposes of weight and measure, and a list by Valerius Probus of *notae iuris*, which consists of the initial letters of certain common forms with their expansions. We have only a part, and that partly through mediaeval sources, but it has been made to give us a good deal of information about the edict before Julian's revision[1]. We have also a fragment on manumissions, part of a larger work, which has received the name of the *Fragmentum Dositheanum* or *Dositheum*.

Of original juristic literature after the decline and before Justinian we have practically nothing, and it may be presumed that there was not much of value. We have however some works put together in the later empire which contain, together with other matter, some juristic texts not otherwise extant. The most important is the so-called Vatican Fragments, which though only fragmentary is fairly bulky. It deals with a number of distinct topics in separate titles and consists of extracts from Papinian, Paul and Ulpian, interwoven with a number of imperial constitutions ranging from 295 to 378, but mainly from Diocletian. As it knows nothing of the *Codex Theodosianus* it must date from the confines between the fourth and fifth centuries. It looks like a practitioner's commonplace book, and it is possible that it was of earlier date, added to from time to time. There is also the *Collatio legum Romanarum et Mosaicarum*, dealing mainly with criminal law. It is of about the same date and is of no great value for Roman Law, though it has given us passages from Paul's *Sententiae*, not otherwise known. There remains the *Consultatio Veteris jurisconsulti*. It consists of ten legal problems submitted to an unknown lawyer and answered by him by citations from Paul's *Sententiae* and *constitutiones* from the Gregorian, Hermogenian and Theodosian Codes. The nature of the authorities quoted suggests that it dates from the later half of the fifth century[2]. In addition to these more or less continuous and complete works there are a few fragments of which the most important are some Greek *scholia* to Ulpian, *ad Sabinum*, called the *Scholia Sinaitica*.

Apart from private juristic writings we have several barbarian codes which contain much Roman material. As the various parts of the Western Empire were overrun by barbarian chiefs, these established codes of law which were in whole or part designed for their Roman subjects[3].

(*a*) The *Lex Romana Visigothorum*[4], or *Breviarium Alaricianum* established in A.D. 506 by Alaric the second. It was declared to be intended to correct the errors and elucidate the obscurities of the Roman

1 Girard, *Mélanges*, 177 sqq. 2 Krueger, *op. cit.* 347. 3 See as to these Codes, Krueger, *op. cit.* 350 sqq. 4 Ed. Haenel.

lawyers, but it is plain that the men of that age did not understand the profound Roman lawyers, and that what they did was to pick out what they more or less understood. The result has little scientific value, though it has been of the utmost service in re-establishing the text of the Theodosian Code. Its contents are selections from the three codes above mentioned and shortly to be considered, and some later enactments, with *interpretationes* attached to them, a very bad abridgement of Gaius, an abridgement of Paul's *Sententiae*, and a scrap of Papinian. It is doubtful whether the *interpretationes* and abridgements were new or already in existence: the latter seems the most general opinion[1].

(*b*) The *Edictum Theoderici*[2]. This was published a few years later by Theoderic for the East Goths. It uses the same sources, but has much less in it. It is of little use as it does not usually even purport to give the original text, but a brief statement of the gist of it. It differs from the foregoing also in that it was applied to both Romans and Goths.

(*c*) The *Lex Romana Burgundionum*[3]. This is of about the same time and uses the same sources. It is of much the same character, though here and there it follows more closely the wording of the *lex* recited. It acquired in the middle ages the name of the *Papianum*, the result it seems of a curious blunder[4].

Much has been added to our knowledge in recent years, especially as to the Eastern Empire and Egypt, by the discovery and study of numbers of private documents. Even in relation to classical law private documents have been of great use but for the later period they are our chief source. They are mostly on papyrus and in Greek[5]. They cover all kinds of transactions and they have in general two striking characteristics. They testify to an immense infiltration of oriental, late Greek, ideas which had not found their way into earlier law, which indeed Diocletian and his successors are shewn by their enactments to have taken some trouble to keep out[6]. They testify also to a very low standard of legal skill. They are longwinded as every document of that age was, but they are also very unintelligently drawn. They use old Roman forms in transactions with which they have no concern[7], and the same absurdities

1 Conrat, however ("Die Westgothische Paulus," *Abh. der K.A.d.W.* (Amsterdam), Letterkunde, 1907), gives good reason for thinking the *interpretationes* to be the work of the compilers of the *Breviarium*. But as to use of pre-existing *interpretationes*, Krueger, *op. cit.* 353. 2 Riccobono, *Fontes iuris r. antei.* (Baviera) 2. 571 sqq. 3 *Ib.* 2. 600 sqq. 4 The word Papinian stood at the beginning of an extract from him at the end of the *L. R. Visigothorum*. Some MSS. contained the Burgundian Code at the end of that, and a scribe misread the word and thought it was the title of the Burgundian Code. 5 Many collections have been and are being published. A list of the chief will be found at the beginning of Mitteis, *Röm. Privatrecht*. See also *Grundzüge und Chrestomathie der Papyruskunde, Juristischer Teil*, by Mitteis. 6 See, *e.g.*, C. 8. 46. 6. 7 Krueger, *op. cit.* 349, mentions a will, with a stipulation clause.

recur so frequently as to make it clear that the offenders are practitioners and not private persons who do their own law.

XIV. Late Imperial Legislation before Justinian. The Codes. One great piece of work in Roman Law remained to be done. The best lawyers of the fourth and fifth centuries seem to have turned their attention to codification, to setting forth the law in a systematic form. The first steps were not ambitious and, as might be expected, were taken by private persons. The first attempt at anything like a Code was the *Codex Gregorianus*[1]. This was a collection of imperial enactments, arranged in books and titles, following fairly closely the order of Julian's *Digesta*, and, within the title, chronological. It was apparently published about A.D. 300. It is not extant: what is known of it comes from citations in the late literature and the barbarian codes. We have only about seventy constitutions, but these are from only a few of its books and titles, which are numerous. From the fact that Justinian directed his compilers, in making his Code, to compile it from the three pre-existing codes eliminating their prolixity and repetitions[2], it has been inferred that all the constitutions he gives of a date earlier than Constantine, with whom Theodosius begins, are from one or other of the two earlier[3]. But this is unsafe ground, for it does not follow that omissions were to be left uncorrected. And the *leges* are much altered in his Code, so that the original form would still be uncertain.

The *Codex Hermogenianus*[4] is a collection of somewhat similar type, except that it was not divided into books but only into titles, arranged in much the same order. Still less of it is left, preserved in the same way. It appears to be later than the other, but it is said that it cannot have been much later, for some constitutions in Justinian's code are referred to Constantine and Licinius[5]. Licinius was ejected in 323, and in the Theodosian his name is struck out. It is inferred that these came from the Hermogenian, and the failure to make the erasure would indicate that it was put together before 323. This assumes however that no other sources were used by Justinian. There is the further difficulty that this Code is credited with constitutions of about 365[6]. This is explained away as being a mistake: the reference should have been to the Theodosian. But this is a guess and another explanation is that the Hermogenian was re-edited from time to time, and this was in a later issue. This is

1 See *Collectio libror. juris anteiust.* 3. 224 and Riccobono, *Fontes, cit.* 2. 547. There were earlier collections, which were of a less comprehensive character. Papirius Iustus published a collection of the rescripts of M. Aurelius and Verus (Lenel, *Paling.* 1. 947) and Paul published a collection (or two, Lenel, *Paling.* 1. 959) of judicial decisions with notes. Apparently they were of cases in which he had been on the *consilium* at the hearing. 2 *Const.* "*Haec quae necessario,*" pr.; *Const.* "*Summa,*" 1. 3 Krueger, *op. cit.* 317. 4 *Ib.* 316 sqq. 5 C. 3. 1. 8; 7. 16. 41; 7. 22. 3. 6 See *Consultatio,* 9.

confirmed by a text which tells us that Hermogenianus edited his book three times[1]. But Hermogenianus, the same or another, wrote another book which is cited in the Digest, to which this remark may refer[2].

The Hermogenian must have been fairly bulky, since we possess the 120th constitution of the 69th title. This raises the question of its relation to the Gregorian. It is sometimes said to be merely a supplement to this, but there is the difficulty that some constitutions appear in both[3].

These codes or collections were private enterprises, but it is clear that they soon became authoritative and they were so regarded till Justinian's time. They were not superseded by the Theodosian, since that did not go behind Constantine, while the Gregorian went back to Hadrian.

The *Codex Theodosianus*[4] is of much greater importance. Theodosius was perturbed at the low state of legal skill in his empire of the East. He founded or refounded a law school at Constantinople. We have seen that, by the Law of Citations, an attempt was made to systematise the citation of jurists. We have now to note a greater undertaking. In 429[5] he appointed a commission to make a collection of imperial general constitutions from the time of Constantine. It was to be in books and titles, giving the actual words, except that immaterial matter might be omitted, and constitutions which dealt with several matters were to be split up and the parts set in their appropriate places. With a view to education, he directed that all constitutions were to be set out, even though no longer law, to which direction we owe most of our knowledge of the course of change in the later empire. He added, with a view to practice, that another code was to be prepared containing only operative enactments, with additional matter from juristic sources. This work was evidently to have served as a general statement of the whole law, but it was never prepared, though no doubt the plan gave a hint to Justinian. After some years a fresh commission was appointed, mostly of other men, with new instructions, but this was a continuance, not a supersession, for in 438, when the Code was completed and adopted also for the Western Empire by Valentinian III, the proceedings at its reception recite the instructions to the first commission[6]. Our knowledge of it is derived from a considerable number of manuscripts, which give various parts—none is even approximately complete—and the Breviary

1 Krueger, *op. cit.* 321. 2 *Iuris Epitomae*, see Lenel, *Paling.* 1. 265. 3 *E.g.* Coll. 6. 5. 1; 6. 6. 1. 4 Edited by Mommsen, 1905. Of earlier editions that by J. Gothofredus (ed. Ritter, 1736–45) still remains valuable by reason of the commentary. 5 C. Th. 1. 1. 5; 1. 1. 6. 6 *Gesta Senatus de Theodosiano publicando*, Mommsen, *Theodosianus*, 1. 2.

of Alaric[1], which embodied a great part of it. It is still far from complete. Critics tell us that the compilers altered much, and omitted much which has been found in other sources and which under their instructions should have been included, and that in distributing constitutions which dealt with more than one matter they shewed much activity but little skill[2]. The work is arranged in sixteen books with several titles in each, and it appears to follow roughly the order of the classical writers of *Digesta*. Most of the defective part is in the first five or six books, of which we have, it is said, only about a third. It was superseded by Justinian's codification in the East, but appears to have remained authoritative for a considerable time under the barbarians in Western Europe[3].

Theodosius and succeeding Emperors of course continued to legislate, and collections exist of their *Novellae constitutiones*, usually edited with the Theodosian[4]. They come from the East and the West, but the last from the West are of Majorian, the latest being of 460. From the East they end with Anthemius in 468, and the later ones, from Majorian, are known only from their inclusion in manuscripts of the *Lex Romana Visigothorum*. All the manuscripts are from the West[5]. The Eastern Emperors of course continued to legislate, but we know little of their enactments except as they are contained in the Code of Justinian.

XV. The Legislation of Justinian. Soon after his accession in 527 he seems to have framed a plan for going down to posterity as a great legislator. From the fact that Tribonian appears prominently in all parts of the work, and that Justinian's legislative activity lessens and almost stops on the death of Tribonian, it seems probable that he was the inspirer, as he certainly was the chief instrument, of the whole undertaking. Justinian's greatest legal work was his codification, of which the following are the principal steps.

(*a*) The *First Code*. In 528 commissioners were appointed to prepare a code of the imperial enactments. It was to be a consolidation of the existing codes, omitting what was out of date, correcting where this was necessary, and restating in clear language where the old words were obscure. Constitutions were to be divided where they dealt with distinct matters, so that rules might be in their right place, and, conversely, to be combined where this seemed convenient[6]. The code was published in the following year[7], but, for reasons shortly to be stated, it had but a short life.

1 *Ante*, § xiii. 2 Krueger, *op. cit.* 326 sqq. 3 The mss. are all from the West. There is another small group of constitutions of the fourth and (early) fifth centuries, mainly on church law. Mommsen, *Theodosianus*, 1. 907 sqq. 4 See Mommsen's edition, vol. 2. 5 Mommsen, l. xii. 6 *Const.* "*Haec quae necessario.*" 7 *Const.* "*Summa.*"

(*b*) The *Digest* or *Pandects*[1]. This was the well-known codification of the juristic writings. It was begun in 530 and published in 533, an extraordinarily short time for such a work, so short indeed that the view has been maintained that there was in existence already a compilation of somewhat the same sort—a predigest, and that the compilers of the Digest were really only editing this and modifying it in accordance with Justinian's instructions. But though there did no doubt exist comprehensive collections of texts—the so-called Vatican Fragments may be part of one—nothing is known which justifies the view that anything existed which could be considered as a sort of first edition of the Digest which reduced the task of the compilers in the manner suggested[2].

Justinian appointed a committee of sixteen with Tribonian at the head to make the compilation[3]. They were to study and abridge the writings of all those *prudentes* to whom the Emperors at any time had given *auctoritas conscribendarum interpretandarumque legum*. This would appear to confine them to those who had the *ius respondendi*, but he says further that they are not to use books of writers whose works had not been received and *usitatae* by the *auctores*. This widens the field and implies that any, even posthumous, authorisation would suffice, and the words recall the language of the Law of Citations as to those cited and approved by any of the five. This would bring in lawyers of any age, and in fact the Digest contains quotations directly from three republican jurists, Q. M. Scaevola, Alfenus and Aelius Gallus. They were to embody the result in fifty *libri* subdivided into titles, the order of which was to be based on that of the Edict of Julian and Justinian's own Code. In case of conflict they were to eliminate all contradictions and to choose what seemed the best view, not being guided by the number who held any particular view, or giving any particular writer a preference over others. And though certain notes of Ulpian, Paul and Marcellus on Papinian had been barred by legislation, they were not on that account to neglect them. They were to correct and bring the matter up to date where this was necessary. They were not to deal with matters already handled in the Code, except where they called for fuller treatment. For the sake of accuracy there were to be no abbreviations. The work was

1 Edited by Mommsen, 2 vols., with *Prolegomena*. Also stereotype edit. (Krueger); a handy edition is in course of publication in Italy. 2 Notwithstanding Justinian's statement that nothing of the kind had been attempted before ("*Deo auctore*," 2), it has been maintained by H. Peters (*Die Oströmische Digestencommentare und die Entstehung der Digesten*) that there was already in existence a compilation of similar character used for purposes of instruction and that the work of the compilers was in substance merely a revised and somewhat amplified edition of this. But the case set up by Peters has been destroyed by various critics. See Lenel, *Z.S.S.* 34. 373 sqq.; Mitteis, *ib.* 402 sqq. As Mitteis points out, however, it is quite possible that they were much aided by existing compilations for instructional purposes. 3 *Const.* "*Tanta*," 9.

to be the sole authority for the ancient *leges* and the jurisprudential writings, and no one was to raise objections on the ground of differences from the originals, which were superseded. There were to be no commentaries written upon it. The book was to be called *Digesta* or *Pandectae*[1].

The work was completed and published in 533 and confirmed by a *constitutio*[2] which gives an account of the arrangement and of its division into seven parts[3] (chiefly it seems for educational purposes), and restates and emphasises the rule that the codification was to be the sole authority for old law. It explains that there may be accidental repetitions in the codification but that many such are intentional, by reason of the importance of the rule, and adds that any contradictions are only apparent if the text is properly looked at. The prohibition of commentaries is repeated (literal translations into Greek being allowed) and all future copies are to be written in full with no abbreviations.

Space does not admit of details as to the works used. The great mass is from few writers, Ulpian and Paul make up nearly a half and Papinian and Julian are the others most used. Of the thirty-nine writers whose works are quoted only three are from the republic and only about the same number after A.D. 250. The compilers were not successful in keeping out all contradictions and there are many repetitions; but this was inevitable, in a work of such magnitude, carried out with such rapidity. The title is the real unit: the division into books is determined partly by considerations of symmetry and partly by the requirements of education. The order is in the main that of Julian's Edict, but there are divergencies, into the reasons for which it is not necessary to go[4].

In each title the quotations are in separate extracts bearing the name of the author, the title of the book and usually the section or *liber* of the book. To these extracts, and in the case of all but the shortest, to paragraphs within the quotation, numbers have been prefixed by editors, for ease of reference. The order of fragments within the title is at first sight very puzzling. The same topic appears sometimes to be discussed at two or three points in a title with no obvious reason for the separation: occasionally the matter seems utterly disorderly. About a century ago Bluhme published an essay[5], the conclusions of which have been generally accepted, accounting for the arrangement in the following way[6]. The commissioners, to hasten the work of dealing with the great

1 These instructions are contained in *Const.* "*Deo auctore.*" 2 *Const.* "*Tanta,*" Greek parallel text, Δέδωκεν. 3 On the mediaeval division into *Digestum vetus*, *Infortiatum* and *Digestum novum*, see Roby, *Introd.* ccxxxix; Kantorowicz, *Z.S.S.* 31. 40. 4 See Roby, *Introduction*, ch. 3. In one case a single title is spread over three books, 30–32. 5 Bluhme, *Zeits. f. Geschichtl. Rechtswissenschaft*, iv. 257 sqq. 6 Some of the apparent returns to the same topic are explained, as is shewn by Lenel (*E.P.*) in respect of many passages, by the fact that the jurist after commenting on the Edict proceeds to discuss the *formula* of the action based on it.

number of treatises, divided into three committees, probably after the order of titles had been agreed on. The books were divided into three masses, one of which was entrusted to each committee. One committee had Ulpian on Sabinus and the works dealing with the topics on which this was a continuous exposition: this is called the Sabinian mass. Another had those parts of Ulpian on the Edict which dealt with the purely praetorian part of the Edict, as opposed to the civil law matters which Julian incorporated with it, and other books dealing with the same matters: this is the Edictal mass. The other had the works of Papinian and other books dealing with the same matters—the Papinianian mass. There is another small set of books which do not seem to belong to any of the three. It comes frequently at the end of a title and as the Papinianian mass is frequently the last to be inserted, this group is called the Appendix or the Post-Papinianian mass. It usually follows the Papinianian mass even where this is not the last. It is thus supposed that a few books, overlooked, were, on their appearance, handed over to the Papinianian committee as having the smallest mass, and perhaps having finished their work.

The three committees met and incorporated the whole in the prearranged titles, striking out repetitions and contradictions as they had within their own masses. That mass came first in a title which from its bulk or other considerations was the most important in relation to it. The most common order is SEPA, but almost every possible order is found[1]. In some titles only two masses occur[2], in the short titles often only one[3], and in some, where the committee fused two or more intended titles the masses occur more than once[4]. An examination of the books assigned to each mass[5] will shew that subject matter does not fully explain the distribution, which may have been done hastily. When the principle is applied to the different titles it is seen to work correctly, except that short extracts from one mass are occasionally found interspersed in another. This is sometimes in order to complete an account which appeared defective, but, perhaps more often, to get, early in the title, some general definition or the like, which the mass which was to come first does not provide, or to contrive an easy transition from one mass to another[6].

XVI. The Digest is of course our chief authority for the Law of

1 *E.g.* 3. 1–3, EPS; 3. 4, ESP; 4. 3, EPAS; 13. 5, SPEA, etc. 2 See for illustrations Krueger, *Röm. Rechtsq.* 381. 3 1. 2 is fairly long, but it consists only of two fragments, from the Papinianian mass. 4 The composition of each title and the arrangement and distribution of the masses is indicated for each title in the Berlin stereotype edition. 5 See Roby, *Introd.* ch. 4. 6 Bluhme's theory though almost universally accepted was attacked by Schmidt in 1855 and by Hofmann in 1900. But it is generally agreed that in both cases the criticism is ineffective.

Justinian, but it is also our chief authority for much of the earlier law. For the purpose, however, of arriving at the classical law, the work must be used with great caution. The compilers were directed to alter the original texts so as to make them state current law. It follows that, in determining from a text of Julian in the Digest, what was the law of his time, we have several difficulties to contend with. The literature was already some centuries old and no doubt many corruptions and glosses had crept into it. Even the main manuscript which we have of the Digest, though it was written not long after the time of Justinian[1], has no doubt corruptions of its own. These difficulties present themselves with all manuscripts. The definite intentional alterations of the text are a more serious matter. A great deal of legal history has been carefully concealed by the compilers and is to be found, if at all, by reading between the lines of the Digest. In the last fifty years a great deal of study has been devoted to these alterations, which have acquired the name of "interpolations[2]," a word used in a loose sense to cover elisions, misplacements and alterations as well as actual additions[3]. Very striking results have been obtained by this study. The best known is the case of *fiducia*, of which not much was known until Rudorff observed that a text dealing with *pignus* incidentally used a feminine pronoun, *eam* instead of *id*[4]. He inferred that the text spoke originally of *fiducia*, and, consequently, the same would be true of other texts from the same part of the original work. Lenel carried the matter on by ingenious work with other texts[5] with the result that this trifling slip of the compilers was the starting point of a brilliant series of researches into the history of the Roman Law of Pledge[6].

The methods of detection of these interpolations are numerous and fresh devices are constantly being found. The simplest is of course comparison with the original text, but new original texts are not discovered very frequently. Apart from this, the methods may be grouped under two heads: those based on style, grammar and language, and those based on the nature of the argument. Both have their dangers. Sixth century words and grammar suggest alteration, but we do not always know what was possible to writers, many of whom were of foreign extraction. Greek idioms suggest Byzantine work, but many of the great lawyers were Greeks. Florid language suggests Justinian, but even

1 Mommsen, Editio maior, l. xxxx. 2 See for a general account of this matter, H. Appleton, *Des Interpolations et des méthodes propres à les découvrir*. For the present state of the question, Schulz, *Einführung in d. stud. d. Digesten*. 3 They were formerly called *Emblemata* Triboniani. 4 13. 7. 8. 3; h. t. 34. See Lenel, *Z.S.S.* 3 (1882), 104. 5 Lenel, *ib.* 6 The history of innominate contracts, of *dotis dictio*, of the remedies in sale for defect of title, of security in litigation, etc., have been illuminated in the same way.

classical lawyers could[1] be guilty of it. Highly involved sentences with many parentheses and hypotheses are characteristic of Justinian, but Gaius has some specimens[2]. Even obvious "dog-Latin" does not prove material alteration: the scribe may have intended to write what was before him, but slipped into the grammar of his own time. Even intentional alteration does not always mean material change: there are many cases in which comparison has shewn that small alterations in wording were made without any intention to affect the meaning of the text[3]. The same may be said of some of those tests which turn on matter. Where a text writes nonsense, it may be merely a word miswritten which has made the passage absurd. Even the compilers did not intentionally write nonsense. Even where one text plainly contradicts another, interpolation is not certain. Classical disagreements were sometimes retained by oversight[4]. No doubt where a text plainly contradicts itself it is probably altered[5]. When an obviously poor reason is given interpolation is likely, but even here the rule may be classical, the reason a hasty happy thought of the compilers. Even bad reasons may be classical[6]. A sure indication of interpolation is an allusion by a jurist to an institution which did not exist in his day. Thus Paul is made to apply the rule, introduced by Justinian, that a tutor must be 25[7]. Ulpian is made to say that legacies and *fideicommissa* are completely assimilated, a step which was not taken till Justinian[8].

The systematic search for interpolations has been carried on now for more than half a century. In some hands it has given excellent results[9]. In others it has been done with more zeal than discretion. It is easy to throw suspicion on a text, and those who had theories which the texts did not suit were provided with a handy instrument. But when some indications relied on had been shewn to be untrustworthy[10], and some texts held to be interpolated proved on discovery of the original to be essentially genuine[11], a more careful method began to

1 15. 1. 32. pr. See *Z.S.S.* 25, 369. **2** See H. Appleton, *op. cit.* p. 47. **3** See the instances in Roby, *Introd.* lxiii sqq. **4** The disagreements as to possession by a *hereditas* are clearly classical, *post*, § CVII. **5** 13. 6. 22. See on the point itself, Buckland, *Law of Slavery*, p. 126. **6** Paul says that loss of a tooth is not a redhibitory defect under the Edict of the Ediles. The real reason is that it is not a serious defect. But he gives as the reason that, if this were a defect, all babies must be defective as they have no teeth at all. This looks so absurd (for it would be equally true of inability to walk) that it seems impossible that a jurist could have said it. But in fact it seems that Labeo said it in the course of a discussion with Servius which Aulus Gellius has preserved, D. 21. 1. 11; *Noctes Att.* 4. 2. 9, 10. **7** 26. 2. 32. 2; see C. 5. 30. 5. **8** D. 30. 1. *Post*, § CXXV. **9** See for instances, Gradenwitz, *Interpolationen*, and *Z.S.S.* 6 (two articles), and Eisele, *Z.S.S.* 7, 15; 11. 1; and 13. 118, and *Beiträge*, 225 sqq. **10** Service has been rendered by Kalb in a series of works, *Juristenlatein*, *Roms Juristen*, *Jagd nach Interpolationen*, *Wegweiser in die Römische Rechtssprache*. **11** *Z.S.S.* 25. 369.

prevail, and it seemed to be an accepted canon that no text was to be regarded as materially interpolated on linguistic grounds alone. But the undoubted alterations in the Digest may be reckoned, perhaps, by thousands, and there are a vast number more of doubtful cases[1]. Some parts have suffered more than others. Procedure and transfer of property have been drastically handled, but the titles dealing with *bonae fidei* transactions are not so much affected[2].

Thus this enormous book is in effect a palimpsest. Concealed in its propositions are other propositions written by greater men, difficult to find but of supreme interest to the student of legal history when found.

XVII. (*c*) THE INSTITUTES. This work was compiled in the last year of the preparation of the Digest and published almost with it. It was to be, and still is, a first book for students. The compilers, of whom three were chosen for this work, were directed[3] to utilise the old institutional writers, especially Gaius, and they modelled the plan on that of Gaius. The difference in the dividing line between books 3 and 4 is merely a matter of symmetry, but the book has a wider scope than the Institutes of Gaius, since it has titles on *officium judicis* and on criminal law, for which he has no counterpart and has indeed a somewhat different aim[4]. A great part of the matter comes from his Institutes and *Res cottidianae*, but it is clear from internal evidence that the compilers also used the Institutes of Florentinus, Ulpian and Marcian, and they probably used those of Paul[5]. The book was declared to have the force of law[6], an unusual thing for a textbook, and inconvenient in some respects, since it does not always agree with the Digest[7]. It is a dogmatic exposition of the main rules with little historical matter or argument, on the whole a rather mechanical production, much less interesting than Gaius himself.

(*d*) The *Quinquaginta Decisiones*. Imperial legislation of the ordinary kind was still going on, and the Code, as we have it, contains a great

1 The 11th and later editions of the Berlin stereotype edition of the Digest indicate a great number of supposed interpolations with the name of the writer who points them out, but not all of these are universally accepted. (An index is (or was) being prepared in Germany indicating with exact reference all alleged interpolations noted in any published work, without any critical matter.) The 13th edition has an appendix supplementing the indications in the text. In recent years there has been marked renewal of activity in the pursuit of these interpolations, but while some of the results may be accepted as certain there has been a great deal published which, to say the least, is still *sub iudice*. In many cases the material objection is only the author's thesis, and reliance is placed on the uncertain test of form. 2 They provide however one possible important case. It is widely held that the passages dealing with *custodia* are largely interpolated. See *post*, § CXCI. 3 *Const.* "*Imperatoriam*" (Preface to Instit.); *Const.* "*Tanta*," 11. 4 *Post*, § XXI. 5 Whether they used more advanced books, and if so whether they used the originals or the Digest is uncertain. See Ebrard, *Z.S.S.* 38. 327 sqq. 6 *Const.* "*Imperatoriam*," 6. 7 *E.g.* In. 2. 1. 21; D. 41. 1. 7. 2, and Inst. 3. 15. 3; D. 4. 6. 43.

number of Constitutions of Justinian. Many of these are directly aimed at settling old disputes, no doubt in order to simplify the task of the compilers of the Digest. A collection of these was published under the above titles, but the book went out of use as soon as the new Code was in force. As there are many more than fifty enactments of this type, while there are few of which there is direct evidence that they were in this book, much controversy has arisen as to what it did contain, but it is little more than conjecture. It has been suggested[1] that as there are about fifty dated before the Digest was begun in 530, the collection was issued then. The difficulty that there are two from 531 which are known to have been in the book is pointed out but not met.

(*e*) The *Codex Repetitae Praelectionis*[2]. The mass of new legislation had made the first edition of the Code obsolete. Accordingly instructions were issued for a new edition[3], which is that we have. A commission of five of the Digest commissioners with Tribonian at the head were to do the work. The instructions were much like those for the old edition, and it was to be the sole authority for imperial constitutions up to its publication. There was a reservation for future enactments if any should be required[4], and presumably the reservation of validity for certain *privilegia* and regulations for officials, not in the Code, but not in conflict with it, which was contained in the instructions for the earlier Code[5], applied equally to the new. There were to be no repetitions or contradictions, a direction which, as in the case of the Digest, was not completely carried out, and only operative law was to be retained. The book was published in 534, in twelve *libri*, subdivided into titles. The order is roughly, Church Law, Sources, Functions of high Officials, Private Law, Criminal Law and Details of Administrative Law[6]. The Digest and the Code were to be read together and thus what was in one was not to be in the other, a practice which so far as it was carried out was rather inconvenient, since what looks like a complete account in the Digest is often much affected by what is in the Code[7].

(*f*) The *Novellae Constitutiones*[8]. It is evident that on the completion of the codification Justinian thought the system adequate and supposed that new legislation would not be a very important factor. But, in fact, new and important legislation began almost at once, and the new enactments acquired the name of *Novellae Constitutiones*,

1 Krueger, *op. cit.* 369. 2 Edited by P. Krueger, with a smaller edition in the Berlin stereotype edition of the *Corpus Iuris Civilis*. 3 *Const.* "*Cordi.*" 4 *Const.* "*Cordi,*" 4. 5 *Const.* "*Summa,*" 4. 6 Krueger, *Röm. Rechtsq.* 388. 7 Thus the law of theft from a *commodatarius* as stated in the Digest is much altered by an enactment of Justinian in the Code, C. 6. 2. 22. 8 Edited by Schoell and Kroll, see the Berlin stereotype edition of the *Corpus Iuris Civilis*. It gives the original *lex*, the *Authenticum*, and a new Latin translation.

which had been applied to imperial enactments after the publication of the *C. Theodosianus*. They were to have been officially collected from time to time[1], but they never were, and what we know of them is due to private collections. They are for the most part in Greek. The majority are concerned with public matters and have little interest for private law, but some of those which do deal with private law are of the greatest importance. Thus the law of succession on intestacy was not only reformed, but absolutely changed in principle[2]. The rapid flow of novels slackens shortly before the death of Tribonian and there are few after his death in 546[3]. In Justinian's time an epitome of about 120 *Novellae*, ending in 555, was published, the Greek novels mostly in a Latin translation and all the novels abridged. Another translated collection without abridgement appeared late in the sixth century. It is commonly called the *Authenticum*. It contains more *leges*, but goes no later. A fuller collection[4] in the original languages made about the same time contains 165 novels and a few other matters. From these and a few minor collections the modern editions are made up.

XVIII. Justinian's Codes were to be the unvarying law for the whole empire, but he was to find what other legislators have found, that custom would be too strong for him. It is clear that even in the East, for which his legislation was specially designed, it was far from universal in application. The remoter parts of the empire were little affected by it. The Syro-Roman Lawbook[5], which was in circulation before Justinian and contains besides old Roman Law many rules which are not Roman Law at all, continued in use long after his codification[6]. Indeed there is reason to think his legislation fell into some neglect during the seventh century. It was revived by the publication in 740, under Leo the Isaurian, of the Ekloge, a sort of collection from all the Codes, and again about the beginning of the tenth century by the Basilica[7], a Greek paraphrase of the Books of Justinian, to which soon came to be appended a number of *scholia*, consisting mainly of extracts from the commentaries of writers of the sixth and later centuries.

Even the partial success of Justinian's legislation is largely due to the fact that Justinian was himself an oriental, served by orientals, and thus the work was much influenced by local conditions. A recent

1 "*Cordi*," 4 in fin. 2 *Novv.* 118, 127. There are great changes in the law of the *Q. inofficiosi testamenti* (*post*, § CXIV), surety, marriage, procedure, etc. 3 About 135 up to A.D. 540, about 30 after. 4 As to these collections, see Krueger, *op. cit.* 401. Summaries of the *Novellae* (*authenticae communes*) are found, at appropriate points, in old editions of the Code. 5 Edited by Bruns and Sachau. See also Sachau, *Syrische Rechtsbücher*, containing more recently discovered versions. 6 Krueger, *op. cit.* 363. 7 Edited by Heimbach, with supplements by later editors, but it is far from complete. See Krueger, *op. cit.* 415 sq.

work maintains the thesis[1] that Justinian must be regarded not as one who sought to revive the classical jurisprudence, but as one who, governing an oriental State, sought to make the classical law available for an oriental people by a steady and consistent remoulding of it under the guidance of eastern traditions. The introduction of eastern principles, mainly late Greek, is, on this view, the keynote of his work, and this is supported by an analysis of his various reforms. Whether we accept all the demonstrations or not, it must be agreed that to get a real understanding of Justinian's influence on the law we must see him as a Byzantine potentate, and not a Roman.

Justinian was a reformer not only of law, but of legal education. There had been a law school at Constantinople at any rate from the time of Theodosius[2] and there was a famous one at Berytus. These he preserved, but he suppressed the schools at Athens, Alexandria and Caesarea[3]. In the Constitution "*Omnem*" at the beginning of the Digest, he tells us all we know of the existing system of study, which he thought defective in plan and badly carried out, and goes into detail as to his reformed scheme. The old scheme was a four-year course to be completed before the age of 25. The student attended lectures for three years and gave the fourth to private study of Paul's *Responsa*. Freshmen were called *Dupondii*[4], second year men, *Edictales*; third year men, *Papinianistae*, because they mainly studied Papinian, and fourth year men Λύται, which presumably means released from attendance at lectures[5]. He prescribes a five-year course[6]. Freshmen were no longer to be called by the frivolous name of "Twopennies," but *Novi Justiniani*; fifth year men were to be called *Prolytae*, and the other names remained[6]. Freshmen were to be lectured on the Institutes and on the first part of the Digest (Books 1–4, "*Prota*"), second year men on the second part (Books 5–11, *de iudiciis*) or the third (Books 12–19, *de rebus*) and Books 23, 26, 28 and 30. Third year men had the third or the second part, and Books 20–22. In the fourth year there were no lectures, but men studied all the rest up to Book 36. In the fifth year the Code was read. The way in which Justinian kept the needs of education before him is illustrated by the fact that in Book 20, which is the first of those specially

1 Collinet, *Études historiques sur le Droit de Justinien*. He points out that at the time of the compilation Justinian had only a shadowy suzerainty over Italy. It is in virtue of this that he repeatedly names Rome as part of his territory, *e.g.*, in regulating his law schools there is to be one at Rome ("*Omnem*," 7 "*urbes regias*"). No doubt he had already formed the idea of expelling the Goths. There was no western jurist in his councils. 2 *Ante*, § XIV. 3 "*Omnem*," 7; Krueger, *op. cit.* 393. 4 According to H. Pernice (cited, Krueger), the name was first applied to pupils in gladiatorial schools (an allusion to the small pay), then to soldiers, then to law students. See, however, Krueger, *op. cit.* 398. 5 But the form of the word, if this is its meaning, gives trouble to philologists. 6 "*Omnem*," 2–5; Roby, *Introd.* xxvii.

reserved to third year men, nearly all the titles begin with an extract from Papinian, so as to justify the retention of the old name, *Papinianistae*, for these students[1]. Every student had to receive a certificate of diligence and competence from his professor before he could practise[2]. The alternative in the second and third years was probably designed to economise the teaching, so that two years could attend the same lectures. There appear to have been only four professors in each school, and apparently the students were distributed amongst them so that each man studied continuously under the same professor.

XIX. The administrative organisation of the empire does not directly concern us, but some general account of it is necessary to the proper understanding of the legal texts.

We are accustomed to speak of the empire till the time of Diocletian as a Dyarchy, in which the Senate and the Emperor divided the administration. Formally this was so: the Senate had a field nominally reserved to it, *e.g.*, the control of the Senatorian provinces. But the reorganisation under Diocletian was only the formal registration of a change which had in fact long since taken effect, so far as this point is concerned. The Emperor had had, from the beginning, a great power over the Senate[3]: his grip steadily strengthened and it would be more in accord with fact to say that the real monarchy began with Hadrian, when the Emperor's power of legislation was fully recognised, the praetors lost the power of legislation by edict[4], and there remained no republican magistracy with any real power at all. The specially imperial officials were at first mere representatives of the Emperor. Those who governed the imperial provinces, though they had pro-praetorian power were officially *Legati Caesaris*[5]. The great magnates, the *Praefectus Urbi* and *Praetorio*, were themselves mere delegates, as were the subordinate *praefecti, annonae* and *vigilum*. But their functions tended to increase at the expense of those of republican magistrates and in course of time they came to be regarded as great officers of State rather than of the Emperor. The *Praefectus Urbi* and his subordinates ousted the aediles and praetors from their functions in Rome[6], and the *Praefectus Praetorio* gained control of all military forces[7]. The rapid development of *cognitio extraordinaria* brought with it a system of appeals culminating in the Emperor. At first, if he did not hear the case himself, he delegated it to the Urban Praetor, but by the third century it was in the hands of the *Praefectus Urbi*, who also exercised the imperial criminal jurisdiction[8].

1 "*Omnem*," 4. So does Book 22. In the first 19 books only 3 titles begin with an extract from Papinian. 2 See the reff., Krueger, *op. cit.* 394, n. 9. 3 *Ante*, § v. 4 *Ante*, § iv. 5 Mommsen, *Staatsr.* 2. 244; *D.P.R.* 3. 280. 6 Willems, *D.P.R.* 470, 502, etc. 7 *Ib.* 430 sqq. 8 *Ib.* 502.

Appeals to the Emperor from criminal judgments of the provincial magistrates were referred by him to the *Praefectus Praetorio*[1], and similar developments went on steadily in all departments of administration.

The office of *Princeps*[2] was not hereditary. The Emperor nominated his successor, of course frequently from his family. But the successor had, at least nominally, to be approved by the Senate, and conflicts arose, since the Senate might adopt one candidate, the army, growing steadily more aggressive in politics, might set up another, and yet others might claim to have the Emperor's nomination. Diocletian endeavoured to systematise matters, and avoid conflict, by associating with himself another Augustus, Maximian, of equal authority, and with each a subordinate emperor, with the title of Caesar, who was to succeed as Augustus[3]. Laws were issued in the names of the two Augusti, but in administrative matters they governed distinct regions of the empire. The name Caesar had been in use before as an honorific title to a destined successor, but the new *Caesares* were administrative chiefs who acted for the Emperors in many fields. There was no guarantee of permanence in this, and the fourth century gives a story of constantly renewed civil wars in which the nominees of the army had usually the upper hand. In 364 Valentinian became undisputed Augustus. He associated with himself his brother Valens, and handed over to him the administration of the East[4]. But Valens could not hold his own and, after the death of Valentinian, Gratian became in effect Emperor of the whole. In 395 a more permanent division was made. Arcadius became Emperor of the East and Honorius of the West in succession to their father, Theodosius I, who had governed the whole[5]. From that time the distinction was maintained: the two Emperors were colleagues governing distinct sections of one great State. We have already considered the changes in the rules as to the validity in one empire of laws made in the other[6].

The notion of a province underwent a great change. In the earlier empire a *provincia* had meant a remote outlying part of the empire, a dependency, the inhabitants of which, though subjects of Rome, were not in general Roman citizens. The extension of *civitas* under Caracalla[7] made the distinction rather unreal and paved the way for a complete reorganisation of the State. Under Diocletian[8] the whole empire, except the capitals, was divided into four *praefecturae*, two in the West and two in the East, each under a *Praefectus Praetorio*. Each *praefectura* was divided into a small number of *dioceses*, each under a *Vicarius*

1 *Ib.* 2 Mommsen, *Staatsr.* 2. 1132 sqq.; *D.P.R.* 5. 444 sqq. 3 Gibbon (Bury), i. 352, 353. 4 Gibbon (Bury), 3. 10. 5 Mommsen, *Staatsr.* 2. 1145 sqq.; *D.P.R.* 5. 459 sqq. 6 *Ante*, § VI. 7 *Post*, § XXXVII. 8 Karlowa, *R.Rg.* 1. 850, a gradual reform begun before, and completed after, Diocletian.

Praefecti, appointed by the Emperor[1]. Each diocese was divided into a considerable number of provinces governed by an officer, usually called a *Rector*, but differing in rank and title in different cases[2]. The Diocese of Italy had two *Vicarii*, for North and South respectively, the latter being called *Vicarius Urbis Romae*, and having, though the capitals were excluded from the provinces, a certain concurrent jurisdiction in civil and criminal matters with the *Praefectus Urbi*, who was the chief magistrate of Rome[3]. A province was now a small territory, or might be (Italy contained seventeen provinces), and the name province did not now connote any sort of inferiority: it was merely the name of the administrative unit[4].

XX. Custom. *Ius Civile, Gentium, Naturale.* The sources of law which have been considered are those of *ius scriptum*, the means by which new rules were expressly introduced into the system. But many of the older institutions had no legislative basis and originated in custom[5], as indeed did many of the rules which found expression in the XII Tables. But long continued usage was recognised in the republic[6] and throughout the classical age[7] as a kind of tacit consent, equivalent to legislation and thus capable not only of creating new rules and institutions, but of modifying and even repealing express statutes[8]. Constantine indeed provided that long continued usage was of no force against a statute[9], but the Digest preserves the contrary rule[10]. It is probable that Constantine is dealing with purely local usages as against *leges generales*[11].

In historical times, apart from adoption by express legislation, custom commonly achieved recognition by the activity of the jurists[12], in which case it was hardly to be distinguished from the *interpretatio prudentium*, the *disputatio fori*[13], to which as we have seen, the name *ius civile* was applied in the republic. But for the classical lawyers the expression *ius civile* had a wider meaning: it was used sometimes to

1 In one or two eastern dioceses, these officers have special names; see for these and other exceptional cases, Willems, *op. cit.* 602. 2 Two or three ancient and privileged provinces (Asia, Achaia and Africa) continued to be governed by proconsuls in the old way and were thus excluded from the general scheme. Willems, *op. cit.* 605. 3 Mommsen, *Staatsr.* 2. 968, 985; *D.P.R.* 5. 257, 276. 4 But certain rules in which distinctions had been drawn between Italy and the provinces still appear as survivals under Justinian. See, *e.g.* Inst. 1. 25. pr.; D. 47. 18. 1. 2; 47. 22. 1, pr., etc. 5 See, *e.g.*, G. 3. 82; 4. 27; D. 24. 1. 1, etc. 6 Cicero, *de legg.* 2. 10. 23; *de inv.* 2. 22. 67; 2. 54. 162; Appian, *Bell. C.* 1. 54. 7 Ulp. 1. 4.; D. 1. 3. 32 sqq. 8 Appian, *cit.*; Aul. Gell. 2. 24. 3–11; D. 1. 3. 32. 1 in f. 9 C. 8. 52. 2. 10 D. 1. 3. 32. 1 in f. 11 Or, it may be, thinking only of imperial legislation, or possibly of a contention that new legislation was not to apply to provinces in which there was a settled custom conflicting with it; it is certain that the Emperors did not always succeed in uprooting customs. On the conflict see Kipp, *Gesch. der Quell.* §4. 12 *Ante*, § IX. 13 See Jörs, *op. cit.* 80 sqq.

mark off the rest of the law from that made by the magistrates, *ius honorarium*, and sometimes to mark off the essentially Roman part of the law from that available even to peregrines, *ius gentium*, an expression often found associated with another, *ius naturale*[1]. This last notion originated in Greek philosophy: it was a system of moral rules thought of as implanted in man by nature—an intuitionist morality. The notion of *ius gentium* is a more controverted matter. The expression appears first in Cicero, but in a phrase which seems to imply that it is in fact older[2]. How old the thing itself is we do not know. Originally it meant the rules which were applied in dealings with aliens, whether originally imported from alien usage[3] or of internal origin[4], the simpler parts of the Roman Law applied to aliens, we need not consider. But we must say a word or two on the significance of these terms, and especially *ius gentium*, among the classical lawyers. The jurists do not tell a clear story. For Gaius *ius gentium* and *ius naturale* are the same thing: the law which nature has instilled into all nations[5]. But the other jurists who mention the matter, who are later, commonly distinguish, pointing out that slavery is *iuris gentium*, but contrary to *ius naturale*. Ulpian goes further and identifies *ius naturale* with instinct[6], and Justinian adopts the views of Gaius and Ulpian as if they were the same. Accordingly it has been maintained[7] that, for the age of Hadrian and before, there was no difference, but that in the late classical age the two ideas began to be distinguished, and the distinction became a standing part of mediaeval political thought. It is pointed out that it is a mistake to regard the jurists as Stoic philosophers, governed by the notion of life according to nature[8]. But it is to be borne in mind that, though not philosophers, they were educated men, and Greek philosophy played a large part in Roman education, and this view of the course of thought seems a little too simple. It is true that Gaius identifies *ius gentium* and *ius naturale*, or, what is the same thing, *naturalis ratio*[9], but no other jurist of his age or earlier has left us his views on the matter. The current notions on the relation of these two conceptions were doubtless derived from the philosophers, and we can see that Cicero, who expresses their views, uses the term *ius gentium* in several senses. His best-known utterance speaks of it as a branch of the law, a part of the law dis-

1 See on the whole matter, Krueger, *Röm. Rechtsq.* 43 sqq.; Mitteis, *R. Pr.* 1. 62 sqq., and as to influence of local usage, *Reichsr. und Volksr.*, Einleitung. 2 *De off.* 3. 17. 69. 3 A view held with a variety of differences, see Jörs, *Rom. Rechtsw.* 1. 114 sqq. 4 See Clark, *Pract. Jurisp.* ch. xiv, for the principal views and criticism. 5 G. 1. 1. Frag. Dos 1. 1., as in MS., distinguishes them, but it is very corrupt and as ordinarily edited it identifies them. 6 D. 1. 1. 1. 4; cf. Inst. 1. 2. pr. 7 Carlyle, A. J., and R. W., *Hist. of Med. Pol. Thought*, 1. 36 sqq. 8 So, also, Nettleship, *Journ. of Phil.* 13. 169 sqq. 9 G. 1. 1; 2. 65–69; 3. 154; D. 41. 1. 3, 9. 3.

tinguished from the strictly Roman part by *maiores*[1]. Elsewhere he treats it as a code of rules supposed to exist everywhere[2]. Again, he infers from this universality that it is "natural[3]," and elsewhere he speaks of it simply as *iuris naturalis*[4]. Of these various significations Gaius adopts the last, but it is clear that the philosophic view was not the only one, or itself absolutely settled. If we look at the later jurists we find of course many texts in which *ius gentium* is spoken of as a branch of existing law to which various institutions are referred[5]. But we also find the more speculative aspect of it considered[6]. Commonly the later jurists treating *ius gentium* as universal, nevertheless distinguish between it and *ius naturale*, on the ground that slavery is *iuris gentium*, but *contra naturam*[7]. But elsewhere these same jurists seem to identify them[8]. The general conclusion seems to be that *ius gentium* in the only sense in which it is of value in legal discussion means certain rules which, whatever their origin, were a part of the law and had been applied in dealings with peregrines, and that the more speculative conception of it as universal was borrowed from the philosophers, and, being for legal purposes no more than ornament to discussion, was not very exactly formulated. Sometimes the difficulty created by slavery was considered and sometimes it was neglected. It seems to be never mentioned as the basis of distinction except in texts dealing *ex professo* with slaves.

The expression *ius naturale* is also used in more than one sense. Sometimes it is an ideal to which law ought to conform[9], sometimes it is the basis of all law and is thus not to be set aside by the law of the State[10]. The notion is of small importance in legal discussion, for though various institutions are referred to it, they are all equally referable, and referred, to *ius gentium*, and in case of conflict the latter prevailed. But while it is obvious that the *ius gentium* steadily superseded the old *ius civile*, it must not be forgotten that its supposed universality was a great force to this end, and this was its point of contact with *ius naturale*. This name, *ius naturale*, expresses a tendency in the trend of legal thought, a ferment which was operating all over the law. The notion of *obligatio naturalis* was a direct result of the conception of *ius naturale*. But the fact that *ius naturale* was not law is brought out by the gradual

1 *De off.* 3. 17. 69. 2 *Part. or.* 37. 130. 3 *De off.* 3. 5. 23; *de rep.* 3. 22. 33; *Tusc.* 1. 13. 30. 4 *De harusp. R.* 14. 32. 5 *E.g.* 41. 1. 1; 46. 4. 8. 4; 48. 19. 17. 1; 48. 22. 15, etc., etc. 6 Pomponius applies it to the rules for State intercourse, the nearest Roman equivalent to Public International Law, 50. 7. 18. 7 Inst. 1. 2. 2; 1. 3. 2; Flor., D. 1. 5. 4. 1; Tryph. 12. 6. 64; 16. 3. 31. pr.?; Paul, 18. 1. 34. 1; Ulp. 1. 1. 4. pr. His confusion with instinct may be neglected (1. 1. 1. 3), Mitteis, *loc. cit.*, and others, attribute it to Justinian. 8 Paul, 19. 2. 1; 50. 17. 84. 1; Ulp. 1. 1. 6. pr., where "*ei*" is read sometimes "*eis*" which alters the sense. Interpolations are sometimes assumed to avoid the differences, with little evidence. 9 Krueger, *op. cit.* p. 133. 10 Cicero, *de invent.* 2. 22. 65 sqq.; *de leg.* 2. 5. 11 sqq.; G. 1. 158; Inst. 1. 2. 11; D. 4. 5. 8.

and incomplete development of this idea. To the end there was, in general, no *naturalis obligatio* to keep an agreement: it seems to be generally agreed that a pact did not necessarily create a *naturalis obligatio*[1].

It should be added that there is no justification for treating the Edict as originating in the *ius gentium*[2]. Many ideas in the Praetor's Edict no doubt were due to this idea, but many had no direct connexion with it. The Publician action is not *iuris gentium*, for it is confined to things capable of *usucapio* and to persons with *commercium*. The traffic of everyday life and the *disputatio fori* no doubt produced many new ideas, and it may well be that many rules came to be thought of as *iuris gentium*, though they owed their appearance in the edict to other influences. Conversely, many institutions of *ius gentium* had nothing to do with the Edict. *Traditio* and the other *iure gentium* (*naturali*) modes of acquisition were not established by the Edict, nor were *stipulatio* or *acceptilatio*, both of which were *iuris gentium*[3].

The word *aequitas* figures a good deal in the juristic texts[4]. It is shewn by Krueger[5] that it is of little use. He remarks that Cicero employs it in varying and obscure senses. At times it is the basis of all law. At times it is the basis of *ius civile*, at times contrasted with it[6]. As Clark says, it seems to mean no more than fairness[7]. That notion underlies all law[8], but rules sometimes work unfairly and relief is necessary. The classical lawyers applied the term to that part of the law in which the *iudices* had a freer hand, *e.g.* in *bonae fidei iudicia*. It was not a fixed single notion. It was a complex of new ideas by which law was changed as conditions changed. Its affinity with the notion of *ius naturale* tends to an identification. Paul says that *aequitas* is a characteristic of *ius naturale*[8] and the expression *naturalis aequitas* is not uncommon[9].

1 *Post*, § CLXXXIX. 2 See 16. 3. 31. pr. 3 G. 3. 93; D. 46. 4. 8. 4. 4 Clark, *Pract. Jurisp.* 365 sqq.; *Hist. R. L.* 2. 106 sqq. 5 *Op. cit.* p. 135. 6 26. 7. 36. 7 *Locc. citt.* 8 1. 1. 11. 9 Reff. in Krueger, *op. cit.* 138.

CHAPTER II

THE LAW OF PERSONS. LIBERTY AND CITIZENSHIP

XXI. *Jus quod ad personas, res, actiones pertinet*, p. 56; XXII. Threefold classification of the law of persons, 61; Definition of Slavery, 62; XXIII. Position of Slaves in Law, 63; as *res*, *ib.*; as man, 64; XXIV. Enslavement, 67; Capture, *ib.*; Birth, 69; XXV. *Servi poenae*, 70; *Sc. Claudianum*, 71; Sale of young children, *ib.*; *Libertus ingratus*, *ib.*; Fraudulent Sale of Freeman, 72; XXVI. Release from Slavery, 73; Manumission *Censu*, *ib.*; *Vindicta*, 74; XXVII. Manumission by will, *ib.*; Conditions, 75; Fideicommissary Gifts, 77; Informal manumission, 78; XXVIII. *L. Fufia Caninia*, 79; *L. Iunia*, *ib.*; *L. Aelia Sentia*, *ib.*; XXIX. Special restrictions, 81; Later Law of Manumission, 82; XXX. Justinian's Law, 83; XXXI. Freedom independent of manumission, 84; Completion of inchoate manumission, 85; XXXII. *Civitas*, 87; Specially privileged *Cives*, 88; Classes with restricted rights, *ib.*; *Libertini*, *ib.*; XXXIII. *Coloni adscriptitii*, 91; *Infames*, etc., 92; XXXIV. *Latini veteres*, 93; *Colonarii*, *ib.*; *Iuniani*, 94; XXXV. Means of access to citizenship, 95; *Iteratio*, *ib.*; *Anniculi Probatio*, 96; *Erroris causae probatio*, 97; XXXVI. Peregrini, *ib.*; Access to citizenship, 98; XXXVII. Grant of *civitas* under Caracalla, 99; Justinian's Law, 100; Status of children at birth, *ib.*

XXI. The arrangement of the private law adopted by Justinian is expressed in a famous text in the words: "*Omne ius quo utimur vel ad personas pertinet vel ad res vel ad actiones*[1]," words borrowed from the Institutes of Gaius and found again in the Digest, where they are expressly quoted from that work[2]. This state of the texts has naturally led to the view that the classification is due to Gaius. But this inference is not inevitable and there are circumstances which tend to throw doubt on it. The Institutes of Gaius is the only manual of the classical age which has come down to us in such a form as to shew clearly the plan on which it is designed, and in view of the respect in which Gaius was held in Justinian's time the fact that the text is cited from him does not prove that he invented the scheme. There are other elementary books of which a considerable part has come down to us, and there are others of which the general order can be made out from the passages preserved in the Digest. The majority of these have an arrangement similar to that of Gaius and are probably based on the same scheme. Nearly all of them however are as late as Gaius or later, and may therefore have copied him[3], but there is one case of special interest. We have a few fragments of the *Regulae* of Neratius[4], too little indeed to enable us to

1 Inst. 1. 2. 12. 2 G. 1. 8; D. 1. 5. 1. 3 The works which seem to have adopted this order (see Lenel, *Paling.*) are the Institutes of Callistratus, Ulpian and Marcian (so far as they go), the *Regulae* of Scaevola, Ulpian and Paul (but in all these cases with variations, and they do not cover the whole ground) and probably Neratius and to some extent the *Res cotidianae* of Gaius. 4 Lenel, *Paling.* 1. 774.

say with confidence what his order was, but such as to suggest that it was that of Gaius. Neratius must have died at latest when Gaius was young. On the whole the most acceptable view in a very uncertain matter is that Gaius adopted a traditional order[1]. He may indeed have popularised it, though even this is hardly probable, since it is used by contemporary or almost contemporary writers who, so far as is known, never refer to him, though it is possible[2] that his works were used by the great writers of the age of Severus and Caracalla[3].

The more important question remains: what do the terms of the classification mean, or, more exactly, what did they mean to Gaius? They are so general as to be ambiguous, and examination of the various topics discussed under the different heads has created differences of opinion as to the real nature of the distinctions intended. The difficulty of the question is increased by the fact that the loose logic usual with the Roman lawyers in matter of arrangement makes it likely that, whatever the scheme was, part of the resulting disposition of matters will be inconsistent with it. Of the interpretations which the threefold scheme has received there are two of which each has been so widely accepted that it is desirable to state them with some fulness and to give some of the reasons which have been urged in favour of them.

According to one, which may be called the orthodox, and is certainly the most obvious, view, it is the object of the arrangement to divide the law into three branches, the Law of Persons, the Law of *Res*, the Law of Actions. This way of looking at the matter is supported by the occurrence of such expressions as *Ius Personarum*[4] and gives a neat result acceptable to modern readers. But this explanation leaves open the question what is intended to come under each head. No doubt the law of actions is in the main the law of procedure, a description of the steps to be taken in the enforcement of a right, but the law of *res*

1 See Girard, *Textes*, 222. Kniep, *Der Rechtsgelehrter Gaius*, 95, considers the phrase to come from an original dating back to the republic. 2 See Fitting, *Alter und Folge* (1908), 52, 116: see also however Krueger, *Röm. Rechtsquellen* (1912), 211. 3 *Ante*, § XI. Maine (*Early Law and Custom*, 367) thinks there is no reason to suppose that the Romans set much store by this classification: it is confined to institutional books and has but little legal importance. This is no doubt substantially true, though D. 1. 5, 6, 7, and the Rubrics of D. 44. 7 and C. 4. 10 seem to be inspired by it. But this rather adds to its importance from a scientific point of view. It is in such books that scientific arrangements first appear, and the remark is a reflection rather on Tribonian than on Gaius. It is in works for students that we find the most logical arrangements of the English Law, and the modern Codes which have adopted a scientific order derive it from books written by teachers. The real question however is not of its value to the Romans, but of its value to us. Nothing is more helpful to an understanding of a system of law than expositions of t from different points of view. This we have in the Institutes as contrasted with the Digest and Code. 4 *E.g.* G. 1. 9, 48.

and of persons is a more difficult matter. There are many opinions as to what is intended to be discussed in the law of persons. According to some[1], but they are now few, it is the law of the rights and duties of persons in specific or exceptional positions. But, in fact, the rights and duties of such persons are not considered under that head[2], though for convenience modern writers usually treat them there, and they are so dealt with, to some extent, in this book. According to others it is the Family Law[3], but this is open to the same objection and to the opposite objection that matters are discussed by Gaius under this head, such as the ways in which a member of a Latin community can acquire *civitas*, which can hardly be brought under the notion of the family. If we treat it as the law of personal rights as opposed to property rights we have the difficulty, amongst others, that Gaius says not a word about the content of *patria potestas*, except, quite incidentally, as to consent to marriage. Other explanations starting from the same point of view are to be found[4], but they all fail to take account of what seems the most striking characteristic of Book I of Gaius, *i.e.* that it contains scarcely anything about rights and duties, except as concerning changes of *status*.

According to another view, Gaius does not contemplate a division of the law into three branches: his proposition means that every rule of law has three aspects. It may be regarded from the point of view of the persons it affects, or from that of the subject matter concerned, or from that of the remedies[5]. This is the view of the text taken by Theophilus, in the sixth century, who understands the words to mean that every rule of law has three objects[6]. It has been said in support of this view[7] that if Gaius had intended to divide the law into three branches he would have used the word *aut* and not *vel*, but it appears to be the better opinion that the practice of Latin writers in the second century is not such as to justify us in attaching decisive weight to this consideration. It has been objected to this interpretation that it is too abstract[8], but it is not too abstract for Theophilus, and it seems possible to reply that it is the other view which is too abstract for the Romans. The conception of a right as used in modern law is so familiar to us as to seem obvious. But it represents a feat of abstraction which the Romans never thoroughly achieved. Maine goes so far as to say[9]: "On the whole, the Romans must be considered to have constructed their

1 Austin, *Jurisprudence*, 2. 709: "The Law of Unequal Rights," and Poste's *Gaius* (ed. Whittuck), 15. 2 *Post*, p. 54. 3 Savigny, *System*, 1. 400. 4 See the discussion in Moyle, *Inst. Just.* 90. 5 Moyle, *op. cit.* 92; Girard, *Manuel*, 7. 6 Paraphr. ad In. 1. 3. pr. 7 Emerton, *The Threefold Division of Roman Law*. 8 See, *e.g.*, Moyle, *loc. cit.* 9 *Early Law and Custom*, 365, 366.

memorable system without the help of the conception of legal right." Though this is perhaps an overstatement, it seems true that the usually accepted view which makes right and duty the basis of the classification would scarcely have been possible for Gaius and still less for a republican author of the scheme.

It is in favour of the view of Theophilus that Justinian follows our text with the remark that as all the law is made for persons we must therefore know what these are[1]. This kind of language suggests that what is under discussion is persons, not the law of persons, and though we do find the expression *ius personarum*[2] the word *ius* is never used in the passages which mark the transition from one of these three topics to another[3].

It is particularly in connexion with the law of persons that this view is illuminating. The topics which one would expect to find therein are scattered all over the Institutes. Book I tells us little or nothing about the differences of right, duty or capacity which result from differences of *status*[4]. If we desire to learn the effect of a conveyance or acquisition, a contract or a delict, by a slave or *filius* we do not find it in the law of persons, as stated by Gaius, but in different sections of the law of *res* or of actions. What Gaius gives us in Book I is an account of the more important variations in *status* which are legally material: we get a definition of the *status*, and an account of the ways in which it is acquired or lost, and, practically, we get no more. In very few passages does Gaius depart from this standpoint. In discussing *tutela* of women, he adverts to the marked difference which exists between the powers of a woman's *tutor* and those of *tutor pupilli*[5]. This is merely an interjected remark which in a modern book would have been in a footnote. Justinian, by introducing a title on the *auctoritas* of tutors[6], plainly suggested by this remark, has in fact obscured the whole plan of the book. There are similar remarks to distinguish the two classes of Latins and *dediticii*[7], and there is a phrase or two on the position of slaves[8]. That seems to be the whole contribution of Gaius at this point to the law of persons in the modern sense. His subject is not in the least like Austin's Law of Persons or Bentham's Special Codes. It is in fact hardly possible to

1 Inst. 1. 2. 12. 2 G. 1. 9; Inst. 1. 3. pr. 3 "Videamus de rebus," G. 2. 1; Inst. 2. 1. pr.; "superest ut de actionibus loquamur," Inst. 4. 6. pr. 4 The word *status* has no very precise meaning. In regard to persons, the Romans commonly use it much as we do to denote rank or position, but in general only where legal rights are concerned. More precisely used it seems to be equivalent to *caput* (*post*, § XLIX), *i.e.*, the elements which make up a man's position as a *civis*, so that *status mutatio* would mean much the same as *capitis deminutio* (P. 1. 7. 2), but *status mutatio* sometimes means loss of *civitas*, so that here *status* means the elements involved in *civitas* itself (38. 17. 1. 8, *salvo statu*), the original meaning of *caput*. 5 G. 1. 190 sqq. 6 Inst. 1. 21. 7 G. 1. 22–27. 8 G. 1. 53.

mark it off as a branch of the law having as its subject matter any set or sets of rights and duties. The writer is merely giving an account of the principal differences of *status* which the student will meet.

It is to be noted that this characteristic of Book I is that of the whole of the Institutes of Gaius. We are told nothing of the rights and duties involved in ownership or usufruct or in servitudes. So too, in the law of contract all that we get is a word or two as to the nature of the relation, and this not always, and an account of the way in which it is created and how it is dissolved. Not a word is said about the duties of the parties. The treatment of delict looks at first sight different: in the case of theft for instance we get the law of the matter treated in some detail. But in fact the principle is the same. Gaius is considering how the obligation arises and for this purpose it is essential to state the facts which give rise to an *obligatio ex delicto* for theft. An elementary account of the law of sale which says nothing of the duties of the parties is an absurdity, but Gaius is not giving an elementary account of the law. He is stating the principal legal relations, their sources and the modes of determination. As in some points in the law of persons, so noticeably in the law of obligation Justinian takes a different line. He repeatedly discusses the duties created by the relation[1].

Not every difference of *status* which was legally material is considered. We hear little of Vestal Virgins, *decuriones*, *auctorati*, or so forth, though these have many special capacities and incapacities. Gaius gives us no indication of his plan of selection, but it is clear that only those of legal significance come into account, and in an elementary book only those of much importance. Very few classes are in fact considered: we have the slave, the *filiusfamilias*, the person *in manu* or *in mancipio*, the *paterfamilias* with full capacity or under control, the *tutor* and the *curator*. Wife and husband are considered not as part of the subject matter, but incidentally, in explaining the "investitive facts" of the *status* of *filiusfamilias*. So-called *personae fictae* are not considered at all. *Peregrini* are not discussed, perhaps because there was nothing to say[2]. But, in fact, Gaius is concerned only with the everyday *civis*: the important points of whose *status* are *libertas*, *civitas* and *familia*. He is not concerned with *peregrini* as such: all we hear of them is in connexion with access to *civitas*[3]. Slaves and Latins are discussed,

1 See, *e.g.*, Inst. 3. 14. 2 (*commodatum*); 3. 17. 2, etc. (*stipulatio*); 3. 23. 3 (sale); 3. 24. 5 (*locatio*); 3. 25. 9 (*societas*). These contain brief statements of the effects of the relation, and have no counterpart in the Inst. of Gaius. He dealt with these matters in his *Res cottidianae* (see 44. 7. 1; 18. 6. 2, 16; 17. 2. 72, etc.). 2 Moyle, *op. cit.* 88. 3 G. 1. 14, 15. The remarks in 1. 25–27 refer to the freed slaves *in numero dediticiorum*, see 1. 27 in f. We shall shortly have occasion to note that *civitas* itself is not treated distinctly.

partly because of their importance in everyday life, but also because they are sources from which the class of *cives* is constantly being recruited. Manumission is one of the chief investitive facts of citizenship; it is therefore necessary to consider when it does and when it does not confer that *status*. This it is which leads to the result that in discussing those grades of freemen who are not *cives* Gaius appears to confine himself almost entirely to those who are *libertini*. The only topic in connexion with *Latini* in which Gaius shews much interest is that of their means of access to *civitas*, and these he treats at considerable length[1]. Of *dediticii* he notes that they cannot attain *civitas* or Latinity[2]. In support of this view of the scheme of Gaius it may be worth observing that in the *Regulae* of Ulpian, a work the plan of which is unmistakeably based on that adopted by Gaius, there is a title on *Latini* which deals exclusively with the ways in which a Latin can acquire *civitas*[3]. So too in the part of the *Regulae* which corresponds to Book I of Gaius, Ulpian tells us nothing of the position of slaves or of *filiifamilias* or of Latins, and in relation to *tutela* he departs from the plan supposed in the same way, and roughly to the same extent, as Gaius does[4]. As his language and to some extent his matter are different from those of Gaius, the fact that he too abstains from dealing with the law of rights and duties seems not without significance. The few cases in which resulting rights and duties are discussed cannot be explained logically on this view, but they are few and in every case have the air of illustrative matter[5]. Justinian, indeed, departs from this point of view, and repeatedly, but by no means regularly, gives some account of the rights and duties resulting from the condition he is discussing[6].

XXII. It is convenient to base the treatment of the law of persons on the threefold classification of *capitis deminutiones* given by Gaius, *i.e.*, *maxima*, involving loss of liberty, *media* or *minor*, involving loss of *civitas*, and *minima*, involving only loss of family rights[7]. This would naturally result in the treatment of it under the three heads: Liberty, Citizenship and Family, but that is not quite what Gaius does. He treats it from the points of view of liberty and family. This does not mean that the difference between *civis* and peregrine may be neglected in private law: on the contrary it recurs over and over again in his treatment, but

1 G. 1. 28 sqq. 2 We have already noted, p. 54, that here he goes a little further. 3 Ulp. *Reg.* 3. 4 Ulp. *Reg.* Titt. 1–15. 5 The notions of *ius rerum* and *ius actionum* will be considered later, §§ LXVI, CCVI. 6 There has been much study of the institutional scheme. See, *e.g.*, Affolter's *Das röm. Institutionensystem.* Justinian's main classification is borrowed from Gaius but his method of treatment, the matter being drawn from various sources, is different. The method of Gaius is that expressed by Theophilus. That of Justinian tends, very incompletely, to what is above described as the orthodox scheme. 7 G. 1. 159 sqq.

it is considered only incidentally. This is probably due to the treatment of the matter in the older book which was his source, which no doubt ignored the triple division of *deminutiones*, a notion which in all probability was of no great antiquity in the time of Gaius[1]. The unfortunate result is that *civitas* is inadequately treated. It is not surprising that the same arrangement recurs in Justinian's Institutes: he follows Gaius very closely, and indeed in his day the question of *civitas* is not important, as practically every freeman who need be considered was a *civis*[2].

SLAVERY. Roman legal definitions are not usually good. Liberty is defined as the power of doing what one will, except so far as prevented by law or force[3]. Everyone is free under this definition, even slaves. We can if we like, credit Florentinus, whose words these are, with a refined conception of liberty, making it depend on the subject's internal freedom from the restrictions of his lower nature; it is possible that they are derived from a source in philosophy in which they bear this meaning[4]. But, so understood, they are useless as a definition of legal liberty, and it seems more likely that they are in effect an attempt to state what liberty means in law, as unsuccessful as most such attempts.

All men, we are told, were either slaves or free; there was no intermediate position[5]. Slavery is defined by Justinian, after Florentinus, as an institution of *ius gentium* by which one man is subjected to the dominion of another contrary to nature[6], a view made to rest on the propositions that slavery originates in war and that war is contrary to nature[7]. It has been objected to this definition that it is inaccurate, as some slaves (*servi poenae*, *hereditarii*, *sub usufructu manumissi*[8]) had no owners, and that it is scientifically defective since it makes slavery a relative *status*[9]. A definition is therefore substituted which makes it a condition of rightlessness (it is to a great extent dutilessness also[10]), an absolute *status* not depending on relation to others. But Roman definitions however imperfect usually bring out the material point, and their own

1 *Post*, § XLIX. 2 *Post*, § XXXVII. 3 Inst. 1. 3. 1; D. 1. 5. 4. pr. 4 See, *e.g.*, Cicero, *Paradoxa*, 5. 5 G. 1. 9; Inst. 1. 3. pr.; D. 1. 5. 3. *Servus* is a slave. *Mancipium* is a slave regarded as a chattel, D. 21. 1. 51. pr. *Homo* is common. *Famulus* rare in legal texts. *Ancilla* is a female slave, *serva*, rarer. *Puer*, for adults, more used in literary than in legal texts. *Puella* seems always to mean a girl; see as to the terminology, Desserteaux, *Capitis Deminutio*, 1. 372 sqq. *Coloni adscriptitii* (*post*, § XXXIII) are technically free, though practically serfs. 6 G. 1. 52; Inst. 1. 3. 2; D. 1. 5. 4. 1; 12. 6. 64. The only case of conflict between a specific rule of *ius gentium* and *ius naturale*. 7 Justified by the proposition that a captor may kill prisoners, and benefits them by giving them their lives: *servi ut servati!* (1. 5. 4; 50. 16. 239. 1). 8 *Post*, §§ XXV, XXIX, CVII. 9 Accarias, *Précis*, 1. 90; Moyle, *Inst. Just. ad* 1. 3. 2. 10 50. 17. 22. pr. A judgment against a slave is a nullity, 5. 1. 44. 1. Slavery is akin to death, 50. 17. 209. If a man is enslaved his debts cease and do not revive on manumission, 44. 7. 30. As to liabilities on delict, *post*, § CCV.

seems preferable. In the age of Florentinus and later, a slave was not absolutely rightless; he could in some cases appeal to the courts for protection[1], and enemies under arms seem to have been equally rightless though they were not slaves. A graver objection is that the definition looks at the matter from a non-Roman point of view. It is not easy to translate "a rightless man" accurately, and in language which Gaius would have understood. Further the Roman definition does not make slavery a relative *status*. It does not mean that every slave must at every moment be owned, but that a slave is a human being capable of being owned—the one human chattel. Like other chattels he might be at a given moment a *res nullius*. This seems to be correct and vivid[2].

XXIII. Slaves were both things and men or persons. Considered as *res*, they were *res mancipi*[3], of such importance that they figure largely in the texts and were the subject of much special legislation, most of the special rules being due to their special character, as having mental and moral qualities. Like other *res*, they might be productive. There might be earnings of their labour, profits on their transactions, gifts to them, and so forth, which are not exactly *fructus*, but *loco fructuum*. It was settled in classical law that the only true *fructus* a slave could produce, *i.e.* issue, were not legally *fructus*[4], as they were in lower animals[5], a concession to the dignity of humanity, of some practical importance. The usufructuary of an *ancilla* had no right to her child[6], nor was such a child an "accessory[7]." Wrongs could be committed in respect of slaves which could not in respect of other things, *e.g.* insult[8]. Having mental and moral qualities a slave could be damaged in ways not possible with other things[9]. Theft of slaves might be abduction, *plagium*[10]. For most chattels death or destruction is the only way of ceasing to exist, but, for a slave, there was also manumission. When freed he ceased to exist as a slave so completely that no rights in him revived on re-

1 *Post*, § XXIII. 2 Fuller discussion, Buckland, *Slavery*, 1 sqq. The element of truth in the modern definition is that in a freeman capacities are presumed, not in a slave. On the question whether a slave was a person, *post*, § LXIII. 3 *Post*, § LXXXVI. 4 Inst. 2. 1. 37; D. 5. 3. 27. pr. 5 Inst. 2. 1. 37. 6 P. 3. 6. 19; D. 7. 1. 68. 7 Thus the rule that, in a legacy of a thing and its accessories, the gift failed if the principal thing ceased to exist did not apply to a legacy of an *ancilla* and child, 30. 62, 63. The fact that it is not an accessory is important in the law of *usucapio*. If the child was born after possession of the mother had begun, there was dispute whether it was acquired under the same "*causa*," whether good faith was required at the moment of its birth, whether it was a *res furtiva* if the mother was, and so forth, Buckland, *Slavery*, 24 sqq. 8 G. 3. 222; D. 47. 10. 15. 44 sqq. 9 Thus there was an *actio servi corrupti* for harming a slave which covered demoralising him, D. 11. 3, *post*, § CCIII. 10 48. 15. 6. Killing a slave, while it gave an action for damages, like killing a horse (*actio e lege Aquilia*, *post*, § CC), was also the crime of homicide, G. 3. 213; Inst. 4. 3. 11.

enslavement, and, in general, manumission released from any liability in respect of the slave to the same extent as did his death[1].

The special character of the slave appears most clearly in sale. As in other cases the vendor must hand over all acquisitions through the *res* since the contract, which covered earnings, gifts, etc.[2] Slave dealers having an evil reputation, provision was made against dishonesty. Thus so far as liability for defects was concerned, any member of a firm of *venaliciarii*, if his share was not less than any other, could be sued on a contract of any of them[3]. The liabilities themselves were greater. On all sales of live stock the vendor was bound by the Edict of the Aediles to disclose any physical defects, *morbus* or *vitium*, affecting the animal, and was liable even if ignorant of their existence. This applied to slaves[4], and owing to their human character other types of defect were put on the same level[5].

It was always possible on the sale of anything to impose restrictions on its use, but these had in general only contractual force. If the forbidden thing was done, an action might lie against the other party, but the restriction had no force against third parties. In the case of slaves, however, sold to be kept away from Rome, or to be freed after a certain time, or not to be freed, there were means of enforcing the direction even if the slave had passed into other hands[6].

Of the slave as man, we learn that while, *iure naturali*, he was a man, like any other, he was *pro nullo* at civil and praetorian law[7]. But this gives a false picture of the law of the Empire. In the Republic a slave had no protection against his master, supreme in his household, but the Empire brought restrictions. Criminal slaves were to be tried by public courts[8]. A *l. Petronia* forbade masters to punish slaves by making them fight with beasts, except by a magistrate's authority[9]. Claudius provided that if a master abandoned a sick slave the slave should be free and a Latin[10]. Hadrian, besides dealing with specific cases, by *privilegium*,

1 Assuming that the event is not due to the person liable. 2 P. 2. 17. 7. There were perhaps disputes as to damages recovered for theft of the slave after the sale, 18. 4. 21; 47. 2. 14. pr. 3 21. 1. 44. 1. 4 21. 1. 1. 1. 5 *E.g.*, that he was given to running away, or had attempted suicide, or was under a liability for wrongdoing, or was from any cause incapable of manumission. His nationality must be stated as this affected his suitability for certain employments, 21. 1. 31. 21. 6 On sale to be kept away it was usual to agree for a power of seizure, and, apart from other effects, this right existed against third party owners, 18. 7. 7 sq. If to be freed at a certain time, he became free at that time, by an enactment of Marcus Aurelius, even in the hands of a third party, 40. 1. 20. 2. If not to be freed at all, manumission by a later owner was void, 18. 7. 6. pr. 7 28. 1. 20. 7; 28. 8. 1; 50. 17. 32. To the proposition that, *iure naturali*, he is a man like another, may be assigned the gradually evolved rules of personal protection and the partial recognition of servile cognation, *post*, § CXXXII. 8 48. 2. 12. 3. 9 48. 8. 11. 2. Older than the destruction of Pompeii (A.D. 79)—a record of it was found there. 10 40. 8. 2; C. 7. 6. 3.

laid down many restrictions: in particular, he forbade masters to kill slaves without magisterial sanction[1]. These provisions are analogous to modern laws against cruelty to animals, but Pius took a great step forward. He allowed slaves cruelly treated to take sanctuary at a temple or the statue of the Emperor and required the magistrate to investigate the case, and, if he found cruelty proved, to sell the slave on the terms that he was not to return to his old master[2], a rule which gives the slave power to move the law in his own protection. To the close of the classical age it was not homicide in a master to kill a slave by excessive punishment, unless wilfully, though the same text says that the punishment must be reasonable[3]. In 319 Constantine enacted that killing by cruel forms of punishment should be homicide, and apparently went back to the old rule later[4]. There was further legislation and it is clear that under Justinian the master might not exceed reasonable castigation[5].

Although, from burial inscriptions and other evidence, we know that male and female slaves lived habitually in a relation similar to marriage, permanent and monogamous, and that family relations were recognised among them[6], they were incapable of lawful marriage and the law in general ignored these relationships[7]. But they were not quite nullities. Servile relationships were a bar to marriage after freedom[8], and there were many other rules, most of which were merely of a negative or restrictive character[9]. Under Justinian a further logical and important step was taken, by the provision of certain rights of succession on intestacy, after freedom[10].

Slaves were liable for crimes and delicts. In the last case the personal liability meant little so long as they were slaves, but it was reinforced by a liability in the master to surrender the slave to the injured person —*noxae deditio*—unless he was prepared to pay the damages[11].

In commerce slaves were important. In the classical age free hired service was not common: most of the work now done by clerks and ser-

1 Coll. 3; D. 1. 6. 2; 48. 8. 4, 5. 2 G. 1. 53. 3 Coll. 3. 2. 4 C. Th. 9. 12. 1, 2. 5 Inst. 1. 8. 2. 6 Buckland, *Slavery*, 76 and reff. 7 Ulp. 5. 5; P. 2. 19. 6. 8 23. 2. 14. 2. 9 After freedom children could not bring proceedings against their parents, 2. 4. 4. 3. Sales and legacies were to be construed, so far as possible, so as not to involve separation of families, P. 3. 6. 38; D. 33. 7. 12. 7. If brothers were sold the sale could not be in part set aside for defects of one: all or none must be returned, 21. 1. 35, 39. In A.D. 334 it was enacted that in dividing a *hereditas* slaves related were to be kept together, C. Th. 2. 25. 1. Relationship was in effect recognised for the purposes of the law of *parricidium*, 48. 2. 12. 4. See also 28. 8. 11. 10 *Post*, § CXXXII. Slaves shared to some extent in the domestic cults, and there were cults peculiar to them. Wallon, *Histoire de l'Esclavage*, 2. 231 sqq.; Warde Fowler, *Roman Essays*, 56 sqq. It was the duty of the master to give them proper burial, and with his consent they might be members of *Collegia tenuiorum*, essentially burial clubs, 11. 7. 31. 1; 47. 22. 3. 2. 11 *Post*, § CCV; as to crimes, Buckland, *Slavery*, 91.

vants was done by slaves. Though they could have no property, it was customary from early times to entrust them with a fund, called *peculium*, which sometimes became very large, in connexion with which slaves appear, in the empire, almost as independent business men, contracting with their owners and others as if free[1]. As they could neither sue nor be sued, the master intervened if any question of enforcement arose. As a slave's acquisitions were technically his master's[2], the latter could bring any necessary actions, but obligations contracted by a slave did not bind his owner[3], at civil law, and a man would not readily contract with a slave if he had to rely on his *naturalis obligatio*, useless while he was a slave, and only imperfectly operative if he was freed. The praetor therefore facilitated the employment of slaves in trade by giving actions against the master imposing a liability varying with the circumstances, of which the *actio de peculio* was the most important[4]. But capacity to acquire for the master and to bind him within limits does not suffice; to be an effective instrument in commerce the slave must have a power of alienation. He could be authorised to alienate anything. In practice it was usual to give slaves, who traded with their *peculium*, *administratio peculii*, which might vary in extent, but usually meant the right to alienate in the way of business, to sell or pledge, to pay debts, but not to make gifts[5].

Slaves were freely employed in the public service, of the State and the municipalities, those in the State service (*servi publici populi Romani*) enjoying special privileges, and often reaching high positions in the civil service[6]. But they were gradually excluded from one function after another, till under Arcadius it was enacted that *administratio*, which had earlier been essentially servile, should be wholly closed to slaves[7]. The *servus publicus* to whom security was given in some cases, *e.g.*, *adrogatio* of an *impubes*, was replaced in the later empire by a *publica persona* who was free[8]. There were many activities in which slaves had

1 2. 13. 4. 3; 17. 2. 18; h. t. 63. 2. The partnership of a slave might in practice survive a sale of him, h. t. 58. 3. 2 G. 2. 86, 87; Inst. 2. 9. 3; D. 41. 1. 10. 1. Where lesser rights in him exist, the holder of them may acquire to some extent through him, *post*, § XCIX. As to bonitary ownership, *post*, § LXX. 3 The traditional untrustworthiness of slaves (*quot servi, tot hostes*) made this inadmissible. 4 This makes the master liable so far as the *peculium* will go, *post*, § CLXXXIV for this and the other actions. 5 12. 6. 13; 13. 7. 18. 4; 20. 6. 8. 5; 46. 4. 22. Thus the rich Roman could invest his money in trade without engaging in it. It was the only safe way. There were no limited companies, and State contracts which admitted of "sleeping partners" would not cover the ground. There were great risks in appointing free *institores* to manage businesses (*post*, § CLXXXIV) and in sleeping partnerships in private concerns. The *actio de peculio* created a limited liability which could be cut short at any moment by mere expression of intent, subject only to the rights of existing creditors. 6 Buckland, *Slavery*, 320. 7 C. 10. 71. 3; 11. 37. 1. 8 Inst. 1. 11. 3; D. 1. 7. 18. The increasing use of the free agent in private

no share. Not being *cives*, they could not serve in the legions. They could be parties to the formal civil law transfer, *mancipatio*, having a derivative capacity from their owner[1], but they could not be witnesses in it[2]. They could not be parties to any judicial proceeding[3], or to a *cessio in iure*, a transfer which was in form a feigned lawsuit[4]. In general they could not be witnesses in civil suits, but convenience dictated some relaxation of this rule[5]. Where their evidence was admissible it was normally taken by torture, as it was in criminal cases, the torture being allowed only where there was some evidence, but not enough[6]. There was an old rule that they might not give evidence against their master: in classical law this was extended to evidence on his behalf[7].

Justinian describes all slaves as of one condition: *in conditione servorum nulla differentia est*[8]. There were of course wide differences *de facto*[9], but there were also differences in law. *Servi publici populi Romani* had rights of testation of some of their *peculium*[10], and there were other cases. But the cases were few and the differences in law slight.

XXIV. Enslavement. Justinian groups the causes of enslavement under two heads: they are *iure gentium* or *iure civili*[11]. The former, birth and capture, are the more important, and birth is the most important of all[12]. It is however only as to general principle that these are *iure gentium*: in each case there were many specially Roman rules.

Capture in War. Prisoners of foreign war became slaves, the property of the State, commonly sold to private owners. The Roman law applied the same principle to Romans captured by the enemy. During his slavery a captive did not differ from other slaves. But difficult questions arose as to the fate of his acts and rights before enslavement, further complicated by the law of *postliminium*[13], by virtue of which

life is another indication of the same tendency: in the bad times freemen who found it hard to make a living objected to the competition of slaves.

1 G. 2. 87. **2** G. 1. 119. So they could take for their master under a will, but could not make or witness one, *post*, § CIII. **3** Or the formal acts and undertakings connected therewith, 2. 8. 8. 2; 2. 11. 9. **4** *Post*, § LXXXIV. **5** They could be witnesses in a transaction with which they were concerned, if there was no other evidence, P. 5. 16. 1, 2. Many other exceptions, Buckland, *Slavery*, 86. **6** P. 5. 16. 2; D. 48. 18. 1. 1, 9. pr. 18, etc. **7** Cicero, *pro Milone*, 22. 59; P. 1. 12. 3; D. 1. 12. 1. 8, etc., P. 2. 17. 12; C. 9. 41. 6, etc. There was a tendency to extend the exclusion: slaves of near relatives were excluded and a slave could not give evidence against his *bona fide possessor*, 48. 18. 1. 3; h. t. 1. 8; h. t. 10. 2. There were crimes to which the rule did not apply, C. 9. 41. 1; D. 48. 18. 10. 1, etc. **8** Inst. 1. 3. 4. **9** Some had *peculia*, some not. A labourer on a country estate is in a very different position from a banker at Rome. **10** *Post*, § CII. Some slaves could never be freed, *post*, § XXIX. Slaves unowned had no derivative capacities. There were special rules in the case of *captivi*, *post*, § XXIV. **11** Inst. 1. 3. 4. **12** Justinian does not call it *i. gentium*, but see G. 1. 82; D. 1. 5. 5. 1. **13** The rules are such that it is widely held that he was not a slave, but *servi loco*. Mommsen, *Ges. Schrift.* (*Jur.*), 3. 3; Mitteis, *R. Pr.* 1. 128. It is held by Desserteaux (*Capitis Deminutio*, 1. 82, 135 sqq., 2. 79, etc.) that it was *de facto* slavery in classical law, but true slavery

a captive who returned might be more or less restored to his old position[1].

The general rule applied to events during captivity was that their effect was in suspense, differently determined according as the captive returned with *postliminium* or died in captivity. Acquisitions by a son would belong to the captive or the son, according as he returned with *postliminium* or did not[2]. So too all property was lost, subject to revival[3]. But possession or no possession was a question of fact; it did not revive by return, but only by retaking, when it was a new possession[4]. The position of those who had been in his *potestas* was in suspense, but any guardianship he held or was under was ended but might be restored, for the future, by *postliminium*[5]. In classical law his marriage was ended and did not revive, except by consent; under Justinian the marriage continued so long as he was certainly alive, and if this was not certain the wife could not remarry for five years[6].

If he died a captive the suspense was ended and on the view which prevailed he was regarded as having died when captured[7]. Strictly, his will was void, and he could make none while a captive. But under a provision of a *l. Cornelia*, the *fictio legis Corneliae*[8], his will took effect as if he had not been captured, but had died at the moment of capture[9].

Postliminium was thus practically restoration of the *captivus* to his rights on return. For this to arise there must have been nothing discreditable about his capture[10]; he must have returned at the first opportunity[11], and according to some modern writers, this must have been

later. See G. Ep. 2. 3. 5. It is difficult to reconcile these views with the texts. Livy, 22. 60; G. 1. 129; Festus, s.v. *Deminutus*; Inst. 1. 3. 4; D. 49. 15. 19. 2; h. t. 21. 1, etc. Nor is it easy to see why *de facto* slavery should deprive him of his property (see 3. 5. 18. 5; 9. 2. 43. But see also 41. 2. 23. 1) or why *postliminium* was needed. A man *in servitute* did not need *postliminium*. The fact that slavery is *iuris gentium* seems to involve reality of this slavery.

1 G. 1. 129; P. 2. 25. 1; D. 49. 15. 4. **2** 9. 2. 43; 45. 1. 73. 1; 49. 15. 12. 1; h. t. 22. 1. **3** Early protection by a *l. Hostilia*, later by a *curator bonorum* who gives security to a *servus publicus*. Inst. 4. 10. pr.; C. 8. 50. 3; D. 4. 6. 15. pr., etc. **4** If held by someone for him the view finally reached was that of a *res peculiaris* held by son or slave possession was retained, notwithstanding the capture, that *dominium* might be acquired in the meantime by lapse of time, for whose benefit would depend on events; 41. 3. 15. pr.; 49. 15. 22. 3, etc. So in general time is running for or against him, though the machinery of *restitutio in integrum* (*post*, § CCXLIII) makes this rather unreal; 4. 6. 1. 1; h. t. 15. pr. On return, as his *possessio* is a new one there will not be *accessio possessionum* (*post*, § LXXXVII). **5** G. 1. 129, 187; Inst. 1. 12. 5; D. 26. 1. 14. 2; 38. 16. 15. **6** Possible exception where he was patron of his wife, 24. 2. 1. 6; 23. 2. 45. 6; 49. 15. 8; h. t. 12. 4; h. t. 14. 1; Nov. 22. 7. Some of the texts are interpolated and the rule last stated introduced by a Nov. of Justinian is credited in D. 24. 2. 6 (*i.e.* before the enactment) to Julian. The puzzle thus created is explained in many ways. **7** Succession determined as if he had died at capture, G. 1. 129; D. 49. 15. 12. 1. **8** The identity of this *lex*, and the nature of the provision are disputed. Buckland, *Slavery*, 299. **9** Ulp. 23. 5; P. 3. 4a. 8; D. 35. 2. 18. pr.; 49. 15. 22. 1, etc. **10** 49. 15. 17. **11** 49. 15. 12. pr.

during the war[1]. If he was redeemed by payment his ransomer had a lien on him for the money and there was no *postliminium* till this was in some way discharged[2].

Where he was a slave before capture, the rules were different. One who voluntarily went over to the enemy, a *transfuga*, had no *postliminium*, nor had one who returned without intending to stay, but a slave reverted to his owner in both cases[3]. A *civis* had *postliminium* as soon as he reached Roman territory: a slave reverted only when possessed by someone[4].

Birth. The general rule was that the child of an *ancilla* was a slave, even if the father was free, in accordance, says Gaius, with the *ius gentium*, which traced descent from the mother, contrary to the rule in Roman marriage in which it was traced from the father[5]. So, by the *ius gentium*, the child took her status at the time of the birth, and belonged to her owner at that time[6]. To these principles Roman Law recognised two groups of exceptions.

In certain cases the child of a freewoman might be a slave. The *sc. Claudianum* provided that if a freewoman lived with a slave, his owner consenting, issue might, by agreement between the master and the woman, be born his slave. Hadrian abolished this rule[7]. In the fifth century it was enacted that a woman who married her own *libertus* was liable to deportation, and her children were slaves of the Fisc[8]. The rule had disappeared under Justinian. In other, more numerous, cases the child of an *ancilla* might be born free. In classical law, and later, a child was free if the mother was free at any time between the conception and the birth[9]. In several cases in which the mother would normally have been free at the birth but circumstances had barred this, the child was born free, *e.g.* where the mother was conditionally freed, and the child was born after the condition occurred, but owing to her captivity or *condemnatio* she never became free[10], or her holder was under a trust to free her and, though freedom was demanded, delayed wilfully to do

1 Texts hardly bear this out. Reff. in Buckland, *Slavery*, 305. **2** 38. 16. 1. 4; 49. 15. 12. 14. Difficulties as to position in meantime, Buckland, *Slavery*, 312. We know practically nothing of the case of one who returns without *postliminium*. He may of course be a traitor, 48. 19. 38. 1; 49. 15. 12. 17, 19. 4. His rights not being restored, his liabilities cannot be. **3** 41. 1. 51. pr.; 49. 15. 12. 9, 19. 4. **4** 49. 15. 30. In later law he belongs to a ransomer, but can be claimed by old owner on payment, 29. 2. 71. pr.; 49. 15. 12. 7, 8, obscure. Buckland, *Slavery*, 315. **5** G. 1. 56, 82. **6** Ulp. 5. 9, 10; P. 2. 24. 1; D. 13. 7. 18. 2. **7** G. 1. 84; P. 4. 10. 2. Twofold "*inelegantia*": freewoman's child a slave, pact varying *status*, 40. 12. 37. **8** *Nov. Anthemii*, 1. As to the case in G. 1. 85, 86, it is probably not Roman Law at all. See Huschke, *ad loc.* **9** P. 2. 24. 2, 3. Set down to *favor libertatis*, but ultimately applied to cases not concerned with liberty; 1. 5. 7, 26; see 1. 5. 18. Possible exception, G. 1. 91, but rule perhaps not fully developed. **10** 40. 7.

it, and a child was born in the meantime[1], or there had similarly been wilful delay in entering under a will by which the woman was freed[2].

XXV. *Jure Civili* modes of enslavement. Some cases belonging to early law need no more than mention. By the Twelve Tables a thief caught in the act seems to have been enslaved, if a freeman. Those who evaded the *Census* (thus evading, *inter alia*, military service) might be sold by the State, but this disappeared with the *Census*. Similar rules applied to other attempts to evade military service[3]. One who failed to satisfy a judgment might, in early law, be sold into foreign slavery.

Many modes of enslavement were abolished by Justinian[4]: two are important.

Servitus poenae. Those sentenced in certain ways for crime became slaves[5]. Not every capital sentence (*i.e.* sentence involving destruction of *caput*, civil capacity) involved slavery. A *deportatus* lost *civitas*, but was not a slave. No temporary punishment involved slavery, nor did all perpetual punishments[6]. It resulted from condemnation *in metallum*, labour in mines or quarries, and a death sentence made the condemned a *servus poenae* till it was carried out[7].

The convict's marriage was dissolved; his family rights were destroyed[8], and his property was forfeited subject to concessions, frequently varied, in favour of children, and, at one time, some other relatives[9]. Finally the whole was given to the children[10]. A *servus poenae* was no one's property: he did not vest in the State[11]. Thus he had none of the derivative capacities of a slave. A gift to him was a nullity[12]. There could be no manumission, but pardon was possible and would restore freedom, but no more: it did not restore family or property rights[13] and a pardoned slave did not revert to his owner, the ownership being destroyed[14]. But a freeman on pardon did not apparently

1 P. 2. 24. 4; D. 1. 5. 22. 2 40. 5. 55. 1. So too under the *sc. Silanianum* (*post*, § CIX), C. 6. 35. 11, and in delayed manumission for cause approved by *consilium*, 40. 2. 19. Other cases, Buckland, *Slavery*, 400. 3 Mommsen, *Strafr.* 561. 4 *Dediticii* returning to Rome, *post*, § XXXVI; *Liberi expositi*, C. Th. 5. 9. 1, 2; *post*, § XXXI; *Coloni fugitivi*, C. Th. 5. 17. 1, *post*, § XXXIII, etc. 5 48. 19. 2. pr. 6 *E.g.*, *opus publicum*, road-making and the like, 48. 19. 10. pr.; h. t. 17; C. 9. 47. 1. 7 So also certain forms of condemnation to the arena, not involving death, 48. 19. 8. 11, 29, 36. The punishment was more freely inflicted on slaves than on freemen, and, apart from death sentence, could not in general be inflicted on the higher orders at all, 48. 19. 9. 11, etc. 8 48. 19. 2. 9 48. 20. 7. pr.; h. t. 8; C. Th. 9. 42. 2; P. 5. 12. 12; D. 48. 20. 1. pr. Concessions not applicable in case of *maiestas* or magic, C. Th. 9. 42. 2, 6, etc. 10 Nov. 17. 12. Only a fortnight before penal slavery was abolished. A convict woman's children took nothing, the right being primarily based on civil law rights of succession, non-existent in their case, C. 9. 49. 6; D. 48. 20. 7. pr. See also Buckland, *Slavery*, 409. 11 34. 8. 3; 49. 14. 12. 12 29. 2. 25. 3. 13 C. 9. 49. 4; 9. 51. 9, or liabilities, h. t. 4. 14 48. 19. 8. 12. In later classical law he vested in the *fiscus* (40. 5. 24. 5). Earlier law obscure.

become a *libertinus*: he reverted to *ingenuitas*. The pardon might however be accompanied by a restoration of old rights, more or less full, according to the terms of the decree which gave it, such a *restitutio* being necessarily an administrative, not a judicial, act[1]. A man condemned and subsequently found innocent was not pardoned: he was *restitutus*. But this idea was not applicable to one who before condemnation was a slave. Here there was *revocatio* of the sentence, and the old ownership was restored[2]. In 536 Justinian abolished the rule that a convict became a slave[3].

The *sc. Claudianum*. This enactment (A.D. 52) provided, *inter alia*, that if a freewoman cohabited with the slave of another person, after notice that the owner forbade it, she and the issue should be his slaves, a magistrate's decree being necessary[4]. If the woman was a *filiafamilias*, and her father had not consented, the rule did not apply, as it would deprive him of a daughter[5], and if a *libertina*, she became, unless the patron had consented, the slave of her patron[6]. If the man was a *servus fisci*, she became, not a slave, but a *liberta Caesaris*, subject here too to the rights of father and patron[7]. Justinian abolished the rule of the *sc.* retaining a punishment for the slave concerned[8].

There remained in Justinian's law several grounds of enslavement, three of which need mention[9].

Young children sold under pressure of poverty. From the third century onwards[10] sale of new-born children was allowed, with a right of redemption, and in the fourth and fifth centuries this seems to have been, for a time, allowed with older children[11]. As to new-born children it continued under Justinian[12]. On redemption the child was *ingenuus*, but the intermediate *status* was true slavery.

Libertus ingratus. There was much legislation in the empire dealing with this case. The punishment varied with the degree of misconduct[13], but from the time of Claudius enslavement might be imposed in serious cases and Justinian retained this, though it seems to have been rarely inflicted[14]. It needed a decree of the chief magistrate[15], and was allowed

1 If it gave back his property there was legislation to deal with the obvious complications, *e.g.*, P. 4. 8. 22; C. 9. 51. 3, 4, 9. 2 So where he had been made *heres* by his old master before *condemnatio*, this was good, 40. 4. 46. 3 Nov. 22. 8, dealing primarily with alterations in the law of marriage. 4 G. 1. 91, 160; Ulp. 11. 11; P. 2. 21*a*. 1 sqq.; C. Th. 4. 12. 1–5. Rule, varied from time to time, requiring notice three times as evidence of persistence; rules, also, as to who might denounce. The position of children already conceived is not clear. 5 P. 2. 21*a*. 9, 10. 6 *Ib*. 6, 7. 7 C. Th. 4. 12. 3; Fr. de iure Fisci, 12; details and special cases, P. 2. 21*a*. 11–18, Buckland, *Slavery*, 416. 8 Inst. 3. 12. 1; C. 7. 24. 9 Other cases, Buckland, *op. cit.* 419. 10 Not in classical law, P. 5. 1. 1. 11 Vat. Fr. 34; C. Th. 3. 3. 1; 5. 10. 1. 12 C. 4. 43. 2. 13 For lesser cases, fine, whipping, or even loss of citizenship, 37. 14. 7. 1; C. Th. 2. 22. 1. 14 25. 3. 6. 1; 37. 14. 5; C. 6. 7. 2. 15 1. 16. 9. 3; C. 6. 7. 1.

only where the manumission was voluntary, *e.g.* not where it was under a trust[1].

Fraudulent sale of freeman. The general rule was that any free person over 20 who knowingly allowed him, or her, self to be sold as a slave in order to share the price was enslaved, or, as it is put, was forbidden *proclamare in libertatem, i.e.* to bring a claim of liberty[2]. It was a *capitis deminutio maxima.* He could be manumitted and was then a *libertinus.* The child of a woman so dealt with, born during her slavery, was a slave[3]. To be liable he must have received part of the price and the buyer must have been deceived[4]. There was no *restitutio in integrum*, such as, in certain cases, was enjoyed by persons under 25, but Hadrian allowed *proclamatio* in some cases if the whole price was restored. This was a general rule of later law, so that the effect might be undone without manumission[5].

Effect of enslavement. We are told that it was like death[6]. Like death it ended all public and private relations, but it did more, for wills and *donationes mortis causa*, made operative by death, were avoided by slavery[7]. It destroyed cognation, which was not revived by manumission[8]. Property went, not to the *heres*, but to the person who acquired the slave, subject to debts[9], and probably debts to him were due to his owner[10]. Liability *ex delicto*, however, exceptionally, survived. His owner might be sued noxally, and if this was not done, he might him-

1 C. 6. 7. 1. The patron's children might accuse, and in later law any *heres*, though, possibly, between 417 and Justinian, other *heredes* and perhaps children too were barred, C. Th. 4. 10. 2; Nov. Val. 25. 1; C. 6. 7. 3; D. 50. 16. 70. It seems also that in later law children of *liberti* could similarly be accused. C. Th. 4. 10. 3 = C. 6. 7. 4. 2 Inst. 1. 3. 4; D. 1. 5. 5. 1; 40. 13. 3; 40. 14. 2. pr. 3 Inst. 1. 3. 4; 1. 16. 1; D. 1. 5. 21; 40. 12. 40; 40. 13. 3. These rules seem to prove that it was actual slavery, not as is sometimes said a mere procedural rule. 4 40. 12. 7. 2; 40. 13. 1. pr. 5 40. 14. 2. pr. There are difficulties in this institution. No classical text refers to it, and Justinian's texts give a confused account of its origin. Probably it is based on *scc.* It is sometimes said to be edictal, but there seems to be no evidence of this. Marcian calls it *iure civili* (1. 5. 5. 1), but his language is explained away (Karlowa, *R.Rg.* 2. 1116). There was a praetorian action *in factum* giving an action for damages wherever a freeman allowed himself to be sold in fraud (40. 12. 14–22). This seems to be the oldest remedy. The *scc.* strengthen it for specific cases beginning in the Republic. The rule that he must have shared in the price cannot be traced earlier than Hadrian and may be later (40. 14. 2. pr. ?interp.). But sale in order to be qualified for duties appropriate to slaves seems to have been dealt with in classical law in the same way (28. 3. 6. 5). And Paul tells us that gift in dowry or *donatio* or pledge is on the same footing as sale (40. 12. 23. pr.). Thus it is probable that the rule was at one time wider than as we see it under Justinian. Buckland, *Slavery*, 427 sqq. 6 50. 17. 209. 7 G. 2. 147; Inst. 2. 17. 4; D. 24. 1. 32. 6. 8 38. 8. 7. 9 4. 5. 7. 2; 4. 5. 2. pr. The owner is not personally liable, but the property is. 10 *Arg.* from the case of *adrogatio* (*post*, § CXLI). In the case of *servi poenae* there is no owner, but the *Fiscus* takes the property subject to debts and to the concessions already dealt with, 49. 14. 1. 1.

self be sued if he was freed[1]. There could be no noxal action in the case of a *servus poenae* as there was no owner[2].

XXVI. Determination of slavery. There was no temporary slavery. If it was to end otherwise than by death this must be by a juristic act. In the case of *servi poenae* the only such acts were pardon and *revocatio*, but in other cases it might end in many ways. Leaving out of account the cases of *postliminium*, reversion on refund of price, and redemption of a child sold, the slavery of a living man might end by manumission, an act of the owner, voluntary at least in form, or by some act or event wholly or partly independent of his intention. of which groups the first is much the most important.

Manumission. This, release from slavery by the owner, was originally conceived of as the creation of a *civis*[3]. It was not a transfer of ownership, for a man does not own himself. It was not merely release from ownership; that was abandonment, *derelictio*, which did not make the man free[4] and did destroy all rights in the former master, which manumission did not. It was the transfer of a man, by an act under State control, from the class of things which can be owned into the class of persons who are members of the civil body.

At the beginning of the empire the law of manumission was simple. There were three modes of manumission, all actually or in origin subject to State control, and all making the slave a Roman citizen. These were Entry on the Census Roll, *Vindicta*, a fictitious claim of liberty, and Will.

Census. The *Census*, taken normally every fifth year[5], was a list of citizens made for fiscal and military purposes. The preparation of it was conducted before the Censors at Rome, and it was still doubted when the institution fell into decay whether manumission operated at once or only at the final formal act of closing the *Census* (*lustrum condere*), which brought the new lists into operation[6]. The process involved three steps: the slave presented himself for entry like an ordinary *civis*, the master's consent was shewn and the name was entered[7], the Censor probably having the right to refuse the name for unworthiness. The manumitter must have full civil law ownership and there could be no conditions. Although Gaius speaks of it in the present tense[8], there does

1 Inst. 4. 8. 5; D. 9. 4. 24. 2 Noxal actions, giving the alternative of paying the damages or surrendering the wrongdoer might in this case have operated so as to allow the man to pass from severe punishment into private ordinary ownership. 3 Ulp. 1. 6; D. 38. 2. 1. pr. 4 41. 7. 8. 5 Fr. Dos. 17; Mommsen, *Staatsr.* 2. 343; *D.P.R.* 4. 15. 6 Fr. D. 17; Cicero, *de Or.* 1. 40. 183. 7 Cicero, *loc. cit.*; Ulp. 1. 8. 8 G. 1. 17, 44.

not seem to have been a real *Census* for a long time[1]: it is doubtful whether manumission by this mode survived the republic.

Vindicta. Fictitious claim of liberty. This was a formal application of the machinery by which a man who alleged that he was wrongly held in slavery claimed his freedom (*causa liberalis*). It was modelled on the ancient process for recovery of property (*vindicatio*), by the *legis actio per sacramentum*. Some other person claimed on his behalf (*adsertor libertatis*[2]), he being present. The formal words were modelled on those in *sacramentum*[3]. The *adsertor* touched the slave with a rod (*festuca, vindicta*) as he would if the claim was a real one, from which act the process draws its name. The master did the same, but otherwise made no reply[4]. The magistrate formally declared the man free[5]. It was in form a solemn litigious process, and, as such, could be carried out only before a magistrate with the right to preside in a *legis actio*[6]. Its forms were gradually relaxed and in later classical law its litigious character was recognised as a mere pretence[7]. There could not be condition or *dies*, for it was in form a judgment, on which there could be no such restriction[8].

The manumitter must be full civil law owner, and, the process being a *legis actio*, it must be done personally: no representative could act[9]. As in all essentially "formal" acts form was more important than consent. One who had done the act was bound by it, whatever his state of mind, *e.g.* where he did not think he was owner, but in fact was. Most of the "formal" acts were gone by Justinian's time, but the rule remains for this case[10].

XXVII. Will, *Testamento*[11]. This is much the most important case.

1 Mommsen, *op. cit.* 2. 336 sqq.; *D.P.R.* 4. 7 sqq. The last is in A.D. 74, and they had long been irregular. For Ulpian (1. 8) the whole thing was an antiquity. 2 G. 4. 14. 3 *Arg.* G. 2. 24. 4 Silence being the sign of assent, a *mutus* or *surdus* could not free in this way; P. 4. 12. 2. But this is no longer true in later law, 40. 2. 23. Literary texts speak of him as slapping the slave's cheek and turning him round (Isid. 9. 14; see Roby, *R.P.L.* 1. 26). The meaning of these symbolic acts is much disputed, Roby, *loc. cit.*; Karlowa, *R.Rg.* 2. 133. They were probably not legally required but served to make clear the fictitious nature of the transaction. 5 It is essentially a case of *cessio in iure*, *post*, § LXXXIV. 6 P. 2. 25. 4; Ulp. 1. 7; D. 1. 7. 4. 7 It might be done in the street, without lictors, and on days not available for legal process, G. 1. 20; D. 40. 2. 7. 8; h. t. 23. 8 49. 4. 1. 5; 50. 17. 77. There might be tacit conditions in the sense that it might be in suspense, as the owner's right might be. It would operate only if he proved to have been then owner. The question whether the magistrate could refuse is disputed. Wlassak, *Z.S.S.* 28. 107, citing Livy, 41. 9, holds that he could. *Contra*, Girard, *Mél.* 1. 140. 9 *Post*, § CCXXXIX. Texts frequently state an exception: a son, duly authorised, could so free for his father. This is clearly law for Justinian. Mitteis holds that the numerous texts are interpolated, and that it was not so in classical law, *Z.S.S.* 21. 199; 25. 379; *Rom. Pr.* 1. 211. *Contra*, Buckland, *N.R.H.* 27. 737; *Slavery*, App. 5. 10 40. 2. 4. 1. The slave took his *peculium* unless it was reserved, 15. 1. 53. 11 Based on XII Tables, but probably older, as the Tables contain a rule about conditions. Girard, *Textes*, 17; Bruns, 1. 28. Manumission by will does not carry *peculium*, 33. 8. 8. 7.

The Will of early Rome was made before the public assembly, convoked periodically for the purpose, and thus the element of control is traditionally present, here as in the other cases, though, the will of historical times being in an entirely different form, the control had disappeared. The full civil owner could free his slave so that the gift took effect *ipso facto*, by the acceptance of the inheritance by the *heres*, provided that the testator had owned the slave both when the will was made and when it operated[1]. The gift must be in express imperative words, *e.g.*, *liber esto*, *liberum esse iubeo*[2], and *nominatim*, *i.e.* he must be so described or named that his identity was clear[3]. It follows that there could not strictly be an implied gift, but we are told, *in obscura voluntate favendum est libertati*[4]. Two such cases were much discussed, that in which a man made his slave *heres*, with no gift of freedom, to be dealt with later[5], and that in which he simply appointed him *tutor*. Justinian declared this good, the needful gift of freedom being implied. On the obscure texts the better view seems to be that in later classical law it was not directly good or void, but was a *fideicommissum*, a direction to *heres* to free, shortly to be considered[6].

Manumission, like a legacy, might be adeemed, *i.e.* revoked by further provisions of the will, or acts inconsistent with the gift. *Ademptio* might be express[7] or by alienation of the slave or legacy of him, but in these cases if he was again acquired or the legacy was adeemed, the gift revived[8].

It might be conditional or deferred to a future time (*ex die*[9]). *Dies* might be *certus* or *incertus*. The former is a time so fixed that it is clear, when the will operates, when it will be, *e.g.* ten days after my death. The latter is a day sure to come, but uncertain as to date, *e.g.* when *X* dies (*certus an*, *incertus quando*). But there was a rule that, in wills, *dies incertus pro condicione habetur*[10]: it operated as condition, though it did not in contracts. *Condicio*, properly so called, is an event both future and uncertain (*incertus an*, whether *incertus quando* or not). "To be free if I die this year," or "To be free if he was born at Rome," are not conditions. The gifts are good or bad. There is no uncertainty or futurity

1 G. 2. 267; Ulp. 1. 23; D. 40. 4. 35. Harsh result, 28. 5. 50. pr. Such a gift is indestructible when it has taken effect: though the entry of *heres* be set aside the gift of liberty stands; C. 7. 2. 3. 2 G. 2. 267; D. 40. 5. 41. pr. It might not precede the *institutio heredis* in classical law, G. 2. 230; Ulp. 1. 20. Greek equivalents served in later law; C. 7. 2. 14. Rules follow those of legacy with differences, *e.g.*, G. 2. 236, *post*, § CXIX. 3 *L. Fufia Caninia*, G. 2. 239; Ulp. 1. 25; P. 4. 14. 1. 4 50. 17. 179. 5 *Post*, § CVIII. 6 26. 2. 10. 4, 32. 2; C. 6. 27. 5. 1*b*; 7. 4. 10. 7 Ulp. 2. 12; D. 28. 5. 6. 4; 40. 4. 10. 8 40. 4. 58; 40. 5. 50; 34. 4. 27. Complications and difficulties where the conflicting dispositions were in the same document, Buckland, *Slavery*, 468; Desserteaux, *Capitis Deminutio*, 2. p. 126, nn. 2, 3. 9 35. 1. 49; not, in classical law, *post mortem heredis*, Ulp. 1. 20, *post*, § CXIX. 10 Ulp. 24. 31; D. 35. 1. 75.

about them when the will operates[1]. An impossible condition, one "contrary to the nature of things," *e.g.*, if he touch the sky with his finger, was struck out, the gift being construed as absolute, and the same is no doubt true of illegal and immoral conditions[2]. Impossibility merely to the person concerned was not so treated, and would bar the gift[3].

Negative conditions, *e.g.* "if he does not do so and so," were not treated as in legacy. There the gift was effective at once, with some restrictions, but security was taken for return if the condition was broken[4]. But a manumission which has taken effect cannot be undone. The method adopted, since the gift would be a farce, unless some relief was given, was to allow the testator to impose a condition of taking an oath, remitted in other cases[5], not to do the forbidden thing—a poor security, as there was no way of compelling obedience to the oath.

Till the condition was satisfied the slave was still a slave (*statuliber*[6]), and the child of a *statulibera* was thus a slave[7]. But no act of the *heres* could destroy the prospect of liberty, and thus though the *statuliber* could be commercially dealt with in ordinary ways any rights in him created by the *heres* were destroyed when the condition was satisfied[8]. There were other respects in which *statuliberi* were better off than ordinary slaves. They could be sold, but not under harsh conditions which made their position worse[9]. They might not ordinarily be tortured as witnesses[10]. Where slaves and freemen were differently punished they had, in later law, the right to be treated as freemen[11]. On satisfaction of the condition the gift took effect[12]. If the condition was to do an act to or for the *heres* and before performance the *heres* sold him, it must be done to or for the acquirer, unless it was plainly a personal service[13]. Supervening impossibility was more favourably treated than in legacy. A gift of liberty "when X is 20" was good, though X died younger[14], as

1 If testator did not so die, if donee was not so born, the gift was void. This is certain at the death, though in some cases it might not be known. When it is known he is shewn to have been free (or not free at all) from the operation of the will; 40. 4. 7; 40. 5. 18. Gifts "*pridie mortis heredis*," "*post mortem heredis*," were treated as in legacy, G. 2. 233, *post*, § CXIX. 2 Inst. 2. 14. 10; 3. 19. 11; G. 3. 98. Rule the same in *institutio heredis*, *post*, § CXIX. 3 All this deals only with initial impossibility. Supervening impossibility (*casus*) is dealt with differently, below and *post*, § CIV. 4 *Cautio Muciana*, *post*, § CXIX. 5 40. 4. 12. pr. In some cases the gift was treated as derisory and void, 40. 4. 61. pr.; 40. 5. 4. 1. In cases other than manumission a *condicio iurisiurandi* was released by the praetor, security being required, at least in later classical law, that the thing should be done, or not done. *Post*, § CIV. 6 Ulp. 2. 1–6. 7 40. 5. 45. 2; 40. 7. 16. 8 Ulp. 2. 3; D. 20. 1. 13. 1; 30. 81. 9; 40. 7. 6. 3. Fraud was easy, and there is much law as to sales of this kind, Buckland, *Slavery*, 288. 9 40. 7. 25, 33. 10 48. 18. 8. 1, 9. 3. 11 48. 18. 14; 48. 19. 9. 16. 12 If it is that he shall promise to do an act, the promise frees him, though a slave's promise cannot be enforced after he is free, 40. 7. 13. 3, 24, 41. 1. 13 Payment of money must be made to alienee, 40. 7. 6. 5; Ulp. 2. 4; condition to teach the *heres* to read must be satisfied in his person, 40. 7. 6. 7. 14 40. 4. 16 etc.

was a gift on the condition of rendering a service to *X*, who died before it could be done[1]. This is *favore libertatis*; a legacy would fail[2]. In the present case the rule of later law seems to have been that the condition was satisfied where it was to be done by the donee, if it was not his fault that it was not done. Thus if he was prevented by anyone from fulfilling the condition, it was satisfied[3]. But these relaxations applied only if the condition was one to be fulfilled by him: if any other condition failed, the gift failed[4].

Fideicommissary gifts. Under Augustus certain stringent rules of the law of wills were relieved against by the institution of *fideicommissa*, trusts imposed on a beneficiary under the will, not subject to all the restrictive rules[5]. Of these, *fideicommissa* of liberty were a common case; directions to a beneficiary under a will or codicil to free a slave, his own, or one coming to him under the will, or one to be bought and freed[6]. No particular form was needed; it might be implied, and in many cases a gift not imperative enough to constitute a direct gift was construed as a direction to the *heres* to free, an interpretation more readily adopted under Justinian than earlier[7]. A direction to the *heres* to free a man *si volueris* was void, but very little more was needed to make it mean "if he deserves it," which was a conditional *fideicommissum*[8]. The gift failed if the will or codicil failed[9].

The gift having been accepted, the trust must be carried out, even though the amount was less than the value of the slave, except that, if the trust was to buy and free a slave, no more than the gift need be spent in buying him[10]. If the owner refused to sell, the trust was void

1 40. 7. 20. 3. **2** 40. 7. 19, 20. 3. **3** 40. 5. 55; 40. 7. 3. pr.; Ulp. 2. 5. 6. In legacy this is so only if the prevention is by one interested in failure of the condition, 28. 7. 3. 11; 30. 92. 1. **4** 40. 7. 4. 7. A slave made *heres* might not refuse. Rules were applied where there were conditions, to secure that the gift should be valid and that he should not get the liberty and then refuse the *hereditas*. Both under the same condition gave no difficulty. If only the liberty was conditional, this was, strictly, bad —not free till *heres*, or *heres* till free. Condition read into both, 28. 5. 3. 1. Same in converse case, lest he be free by entry of another *heres* and then refuse the *hereditas*. There were modifications, *favore libertatis*, if the condition failed or if they were under different conditions, 40. 4. 14; 40. 7. 2. 3; 28. 5. 21. 22. Buckland. *Slavery*, 511. **5** *Post*, § CXXIV. **6** Ulp. 2. 9; 25. 18; G. 2. 263. **7** Ulp. 2. 7; D. 26. 2. 10. 4; 40. 5. 24. 7. But where there was a doubt whether a gift was direct or fideicommissary, there was a leaning to direct construction, 40. 4. 9. pr., 15, 19, 56. **8** 40. 5. 46. 3. **9** 40. 5. 24. 11; C. 7. 2. 12. But see Buckland, *Slavery*, 609, for reliefs against collusion, etc. In classical law liberty could be given to an unborn person by will, but only by *fideicommissum* (P. 4. 14. 1) and some jurists doubted (C. 7. 4. 14). If the slave is regarded as the donee, it should be void, for in Paul's time *fideicommissa* to *incertae personae* and *postumi alieni* were void (G. 2. 238 sqq.). If he is the subject-matter, no difficulty. Future things could be given. Justinian allows it even direct, so that the child will be born free (C. 7. 4. 14). **10** 40. 5. 24. 12–16.

in the time of Gaius, but in later law it was still valid if the owner afterwards changed his mind[1].

Till the trust was carried out, the slave was still a slave. Thus, subject to what has been said[2], the child of an *ancilla* in this position was a slave not affected by the trust in any way[3]. But the subject of the trust was treated like one conditionally freed—he was a quasi *statuliber*[4]. The manumission not being voluntary, it might not be made subject to a promise of services, and the manumitter had less rights than an ordinary patron[5], though he was actually patron, the object being often that the man should be the freedman of the person directed to free, and not, as he would be under a direct gift[6], the freedman of the maker of the gift (*libertus orcinus*).

These formal modes were the only modes of manumission in the republic, and they were available only to the full civil law owner. But cases occurred of less formal manumission and of manumission by one whose ownership, though effective, was not civil law ownership (*qui habet in bonis*[7], bonitary owner). In these cases, though the manumission was in strictness void, the praetor intervened to protect the man concerned[8], but only where in his judgment it was a proper case for protection[9], and only where the master was of full age and competence and acted quite freely[10].

Not every informal declaration was accepted: we are told of only two cases: *per epistolam*, a letter of enfranchisement, and *inter amicos*, declaration before witnesses[11]. In the later empire we hear of a mode *in convivio*, declaration before guests at a feast[12], but this seems to be only a variant of the last. It was immaterial that the ownership was only bonitary, and conversely a bonitary owner could produce no better effect even if he freed by will[13]; he could not do it at all by *vindicta*.

One so freed was still a slave: his *peculium* was his master's and so were his acquisitions[14]. A child of an *ancilla* so freed was an ordinary slave for all purposes[15]. The only effect was that if the master sought to make slaves, so freed, work for him, the Praetor intervened[16]. The act was not revocable and no doubt it bound successors in title. The persons

1 G. 2. 265; Ulp. 2. 11; Inst. 2. 24. 2; C. 7. 4. 6; perhaps as early as A.D. 220. If the *fc.* was only one of liberty he need not take the gift, as he must in some other cases (36. 1. 54. 1; *post*, § CXXIV). If it was his own slave he need not, though there was a *fc.* of the *hereditas*, *contra* if the slave were the testator's. 36. 1. 23. 1. 2 *Ante*, p. 69. 3 35. 2. 24. 1; 40. 5. 45. 2. 4 40. 5. 15, 24. 21, 30. 16. 5 38. 1. 13. 1. 6 G. 2. 266, 267; Ulp. 2. 8. 7 G. 1. 54; *post*, § LXX. 8 G. 3. 56; Ulp. 1. 16. 9 Fr. D. 8. 10 Fr. D. 7. It must be clear that a real gift of *libertas* was meant, not merely to let the man do as he liked, to be *in libertate* (Wlassak, *Z.S.S.* 26. 367). 11 G. 1. 44. *Amici* is a common term for witnesses, Wlassak, *loc. cit.* 12 G. Ep. 1. 1. 2. 13 G. 1. 16, 167; Fr. Dos. 9; Ulp. 1. 16, 22. 8. 14 Fr. Dos. 4, 5. 15 *Ib., arg.* 16 G. 3. 56; Fr. D. 5.

affected were said *in libertate auxilio* (or *tuitione*) *praetoris esse*, *in libertate morari*, etc.[1]

XXVIII. The law was profoundly modified by Statutes of the early empire which must now be considered.

Lex Fufia Caninia, B.C. 2. Slaves were now very numerous and manumissions so frequent that the large number of *libertini* were a menace to the stability of society. This statute imposed a limit on manumissions by will, always the commonest case, as it cost nothing and provided a procession of grateful *liberti* for the funeral cortège. It enacted that an owner of not more than two slaves might so free all, of from 2 to 10 half, of from 10 to 30 one-third, of from 30 to 100 one-fourth, of from 100 to 500 one-fifth, and never more than 100[2]. An increase in the number of slaves was not to involve a diminution in the number who could be freed[3]. The slaves must be named or clearly described[4]. If more than the lawful number were freed only the earliest named were free[5]. A gift to "all my slaves" was void[6]. The law did not, as stated, refer in terms to fideicommissary gifts, but it must have applied to them, otherwise it would not have been worth while to resort to evasions.

Lex Iunia (*Norbana*). This statute put an end to the equivocal position of those *in libertate tuitione praetoris*. It provided that they should be really free, but not *cives*, and invented for them the *status* of *Latini Iuniani*, *i.e.* they were to have the same *status* as existing *Latini*, subject to serious restrictions[7]. The nature of this *status* and these restrictions will be considered later[8]. The date of the statute is uncertain[9].

Lex Aelia Sentia, A.D. 4. This was a comprehensive enactment, con-

1 G. 3. 56; Fr. D. 5. Other exceptional forms were (*a*) manumission *sacrorum causa* (Festus, s.vv. *Manumitti*, *Puri*), discussed Mommsen, *Staatsr.* 3. 421; *D.P.R.* 6. 2. 2; Wlassak, *Z.S.S.* 28. 22. It may be only a case of manumission *vindicta*; (*b*) giving a slave in adoption (Aul. Gell. 5. 19. 13, 14, *post*, § XLV), also may be only a case of *vindicta*, in effect. As to adoption of slave by master, *post*, § XLV. 2 G. 1. 42, 43; Ulp. 1. 24; P. 4. 14. 4. The total included *fugitivi*, P. 4. 14. 3. 3 G. 1. 45; Ulp. 1. 24. Thus one with 12 could free 5, one with 32 could free 10. 4 Ulp. 1. 25; P. 4. 14. 1. The *sc. Orfitianum* makes clear description suffice. 5 G. Ep. 1. 2. 2. There were other provisions against fraud on the law, *e.g.*, if they were set in a circle so that it could not be said which were first, all were void, G. 1. 46, who speaks of *scc.* on the matter. A *sc.* provided that manumissions *inter vivos*, but on the point of death, might be treated as frauds on the *lex*. 6 G. Ep. 1. 2. 2. 7 G. 1. 16, 22, 23; 3. 56; Ulp. 1. 10, 16. 8 *Post*, § XXXIV. 9 There is confusion as to what was in this *lex* and what in the *l. Aelia Sentia* (G. 1. 29; Ulp. 3. 3). The name *Iunia Norbana* fits only A.D. 19, but only Justinian calls it *Norbana*. It deals with those freed under 30 as well as the informally freed, but they were *cives* till the *l. Aelia* (*arg.*, G. 1. 56). These points would make the *l. Iunia* the later. But Gaius makes the *l. Aelia* refer to Junian Latins which would make the *l. Iunia* the earlier.

taining, *inter alia*, the following important provisions affecting manumissions.

1. The manumitter must be 20, otherwise the manumission was wholly void[1]. Attempts to evade the rule, *e.g.* by transferring the man to one over 20 to be freed, were stopped by a *sc.* which seems to have nullified transactions tending to such a result, and thus to have been applicable to any new devices as they appeared[2]. There was however an important limitation. If the manumission were approved by a body called the *Consilium* (which sat periodically for such cases), and was afterwards completed *vindicta*, the rule did not apply and the man became a *civis*[3]. If it were completed informally he became a *Latinus*[4]. To obtain this approval it was necessary to shew *causa*[5]. There was no hard and fast rule as to what was a sufficient *causa*: it might be merit or some service rendered, or something to be done in the future which he could not do as a slave[6]. It must be a *honesta causa*, and if it was with a view to marriage there were special restrictions and rules[7].

2. The slave must be over 30, or he did not become a *civis*, with the same exception for manumission *vindicta*, on cause approved by the *Consilium*[8]. Where no *causa* was shewn the result is uncertain, owing to the state of the texts. If it was informal or by will (in which last case there is no question of *causa*), he seems to have become *in libertate tuitione praetoris*, or, after the *l. Iunia*, a Latin[9]. No classical text mentions Latinity as resulting from manumission *vindicta*, and a corrupt text suggests that it was simply void, but it may be that as it could in any case, on such facts, give no more than Latinity, there was no purpose in the form, and the case therefore did not occur[10] in practice.

3. Manumission in fraud of creditors or patron of the manumitter was void[11]. Of the case of fraud on the patron we know little and it is not mentioned by Justinian[12]. Fraud on creditors was committed if the manumission was with intent to injure them, *i.e.* with knowledge that it would do so, and did in fact harm them, when, in short, the owner was insolvent or the manumission would make him so[13]. If it was on death,

1 G. 1. 38. 40; Ulp. 1. 13; C. 2. 30. 3. pr. 2 40. 9. 7. 1; 18. 7. 4; C. 7. 11. 4. Rule did not apply where he was bound to free from any cause, 40. 1. 20. pr., etc. 3 G. 1. 38; Fr. D. 13. At Rome the *consilium* was five senators and five *equites*, elsewhere, twenty *recuperatores cives*, who met on the last day of the *Conventus*, the judicial assize. 4 G. 1. 41; Fr. D. 13, or *in libertate praetoris tuitione*, according to the view taken of the date of *l. Iunia*. 5 Whether he was to be freed formally or informally. 6 G. 1. 19, 39; D. 40. 2. 9. pr., 15. 1. 7 40. 2. 13, 16. pr. "To be *heres* if he frees *X*" gave a good *causa*, 40. 2. 15. pr. 8 G. 1. 18; Fr. D. 17; Ulp. 1. 12. 9 *Ib.* and G. 1. 17. 10 Ulp. 1. 12. 11 G. 1. 37; Ulp. 1. 15; Inst. 1. 6. pr. 12 Presumably where a dying *libertinus* freed his slaves, who, if he was a Latin, would go to his patron, and if he was a *civis*, would do so if he had no children, *post*, § CXXXIV. 13 G. 1. 47; Fr. D. 16; D. 40. 9. 16. 2. Possibly intent not material in early classical law, but it certainly was later, Inst. 1. 6. 3; D. 40. 9. 10.

as no doubt it usually would be, and the *heres* was solvent, the creditors would not suffer, for, till very late[1], he was fully liable on the ancestor's debts. Some jurists thought, logically, that this saved the gift, but the view prevailed that it was immaterial[2], possibly because any other view rendered refusal and intestacy likely, and this was avoided as far as possible. But there are difficulties about this[3].

The rule applied where the manumitter was a *peregrinus*, though the other provisions did not[4], and whether it was done *inter vivos* or by will, directly or by *fideicommissum*, but in this last case *eventus* sufficed —intent was not material[5]. But it did not apply where the manumitter was bound to free, either under a trust or otherwise[6].

Where the gift was bad it was void *ab initio*, not revoked: there was no revocation of a manumission[7]. Some time might elapse before the point was clear, and for this time the man's position was in suspense: he was a quasi *statuliber*[8]. It was not void unless steps were taken, and there were provisions, to be stated later, protecting apparent liberty after a certain lapse of time[9].

4. Certain degraded slaves, on manumission, did not become *cives* or Latins, but were put *in numero dediticiorum*. They were those who had been punished by branding or chains or imprisonment by their masters, or condemned to fight with beasts or tortured and convicted of crime[10]. Their disabilities were severe[11]: *inter alia*, they could never become citizens. The form of the manumission was immaterial[12].

None of these four restrictions applied if the manumission was by will, and the testator was insolvent, and instituted and freed a single slave so as to have a *necessarius heres*, in order to avoid the stigma of intestacy and posthumous insolvency[13]. This did not apply if any other *heres* entered under the will, and it had no bearing on other restrictions on manumission[14].

XXIX. Such restrictions were numerous and some of them need mention.

1 *Post*, § CX. **2** 40. 4. 57; C. 7. 2. 5. **3** The *heres* could not attack it, 40. 12. 31; C. 7. 8. 5; C. 7. 16. 7, and if he was solvent the creditors had no interest. Perhaps he refused to enter unless the creditors undertook to proceed. Where the liberty was conditional on payment of money which a third party provided so that the estate suffered no loss, this did not save it (40. 9. 18. 1) but a gift "if my debts are paid" was held valid (40. 4. 57). **4** G. 1. 47. **5** 40. 5. 4. 19; C. 7. 11. 7. **6** Fr. d. i. fisci, 19; D. 28. 5. 56; 40. 1. 10; C. 7. 11. 5. **7** G. 1. 37; Fr. D. 16; Ulp. 1. 15. **8** 40. 7. 1. 1. **9** *Post*, § XXXI. **10** G. 1. 13. 15; Ulp. 1. 5; 1. 11; special cases and details, P. 4. 12. 3–8. Not where tortured but not convicted, P. 4. 12. 3. **11** *Post*, § XXXVI. **12** Ulp. 1. 11. If *vindicta*, possibly a nullity. If informally, it would give the odd result that if the *l. Iunia* is later than the *l. Aelia Sentia* he would be technically better off than an honest man, for he would be free, but the other would be technically a slave. **13** G. 1. 21; Ulp. 1. 14; D. 40. 4. 27; Inst. 1. 6. 1. **14** 28. 5. 84. pr.

(*a*) A slave specially pledged could not be freed unless the creditor consented, though the owner was solvent[1]. But there is evidence that in late classical law such a manumission was regarded, if *inter vivos*, as informal manumission, conditional on release of the pledge, so that if the debt was paid, the slave became a Latin[2]. If it was by will, it was void as a direct gift, but came to be construed as a fideicommissary gift on the same condition[3].

(*b*) A slave owned by two or more could not be freed by one, till Justinian[4].

(*c*) A slave in whom someone held a life interest (usufruct) could be freed by the owner's will, the gift being construed as conditional on the expiry of the usufruct[5]. But there could be no condition on manumission *vindicta*, and the texts leave the classical law uncertain[6]. Justinian confirmed the old rule that if both owner and usufructuary agreed the man was free, and made manumission by the owner alone give freedom, without releasing the man from his duty of service to the usufructuary[7].

There were a number of other restrictions[8].

Slaves of corporate bodies and public authorities were freed in special ways: those of a municipality by *decretum* of the local senate[9]. We do not know the form for those of other corporate bodies[10]. *Servi populi Romani* seem to have been freed by declaration of the magistrate, authorised by the Senate, or later, the Emperor[11].

When the State became Christian, a new mode of manumission was introduced. So soon as the church was recognised, it became a common practice for masters to free slaves before the congregation, a form of manumission *inter amicos*, giving Latinity. Constantine regulated this, requiring a writing signed by the master, and providing, a little later,

1 40. 1. 3; 40. 8. 6; C. 7. 8. 4. The rule has nothing to do with the *l. Aelia Sentia*. **2** Fr. D. 16; D. 40. 9. 26. **3** 40. 5. 24. 10. **4** *Post*, § XC. **5** 28. 5. 9. 20. **6** Void, or suspended till the usufruct ended? (Fr. D. 11; Ulp. 1. 19). The last unlikely, though it may have been so in informal manumission. But we know that such a manumission, *vindicta*, made the slave a *servus sine domino*, *ib.* **7** C. 7. 15. 1. He allowed manumission by fructuary, strictly a nullity, to protect him from seizure by owner till usufruct would have ended. **8** Case of sale with prohibition of manumission (*ante*, § XXIII). Prohibition to sell is prohibition to free, C. 4. 51. 7; legacy of slave, slave freed by *heres*, Buckland, *Slavery*, 581; manumission under threats or popular clamour, or, under M. Aurelius, at public games, Fr. D. 7; D. 40. 9. 9. pr., 17. pr.; *Deditícius* enslaved for living in prohibited area, *post*, § XXXVI; bonitary owner, *ante*, § XXVII; Latin or peregrine cannot give slave a better *status* than his own, Fr. D. 12; *sc. Silanianum*, under Augustus, on suspicion that a man had been killed by his slaves, will not to be opened, and thus no manumission operative, till slaves who might have been concerned examined by torture, to ascertain who was guilty and who, being able to render help, had failed to do so. Penalties for breach of the rule, P. 3. 5. 1–12; D. 29. 5. For other restrictions on manumission, Buckland, *Slavery*, 591 sqq. **9** C. 7. 9. **10** 40. 3. 1. **11** *C.I.L.* 6. 2340; as to these and *servi Caesaris* and *Fiscales*, see Buckland, *Slavery*, 590 and reff., and *post*, § LXIV.

that it should give *civitas*. The rule that the slave must be 30 does not seem to have applied, an accidental result of the mode of development, as Latinity never required this. The method survives in Justinian's law but is not prominent[1].

XXX. The law of manumission was simplified by Justinian. Much of it was made obsolete by other changes, *e.g.* abolition of the difference between bonitary and civil ownership[2], and of the inferior grades, Latins and *dediticii*[3]. As to manumission itself he repealed the *sc. Claudianum*[4] and the *l. Fufia Caninia*[5], and legislated sweepingly on the forms.

Manumission *vindicta* remained, in the relaxed form it had taken in the later classical law, as did the mode *in ecclesiis*. Will remained much the most important form. Place in the will was immaterial[6], and it might be *post mortem heredis*[7]. Implied gifts were allowed, and it was clear that appointment of one whom the testator knew to be his slave, as *heres* or *tutor*, implied a gift of liberty[8], but, in all cases of implication, the intent must be clear[9]. Fideicommissary and direct gifts of liberty might be made to unborn persons and they would be born free[10]. There was much legislation both settling doubts in the law and on the informal modes[11]. Those that were valid were to be *legitimi modus* having the same effect as manumission *vindicta*. The modes *per epistolam* and *inter amicos* now required writing and five witnesses. Some other informal modes were recognised[12].

The main rules of manumission under Justinian are the following:

1. All manumission if valid makes the slave a *civis*, whatever is intended[13].

2. The master must be 20, unless (*a*) it is *vindicta* for cause approved by the *consilium*, or (*b*) the slave was received, under a trust to free, from one competent to free, or (*c*) it is by will, when it is allowed under the Institutes at 14, to provide a *necessarius heres*, as in earlier law, otherwise at 17[14]. Later it is allowed at 14, in any case, the earliest age for testation[15].

1 C. Th. 4. 7. 1; C. 1. 13. 1, 2. In the same enactments are provisions allowing priests to free without witnesses in any form they like. **2** *Post*, § LXX. **3** *Post*, § XXXVI. Thus repealing the rule of the *l. Aelia Sentia* requiring the slave to be 30 and also its provisions as to criminal slaves. **4** Inst. 3. 12. 1; C. 7. 24. 1. **5** Inst. 1. 7; C. 7. 3. **6** Inst. 2. 20. 34. **7** Inst. 2. 20. 35. **8** 26. 2. 32. 2; Inst. 1. 6. 2. **9** Soldier's will more favourably construed, 40. 4. 49. **10** C. 7. 4. 14. **11** C. 7. 6. **12** *Ib.* Giving to the slave, or destroying, evidences of slavery, before five witnesses; recording the slave as a son on *acta* of court, which seems to have given Latinity in post-classical times; giving an *ancilla* in marriage to a freeman with a *dos*; order of testator or *heres* to wear the *pileus*, cap of liberty, in the funeral procession. The enactment also provided that in many cases in which Latinity had resulted from facts other than manumission, *civitas* should result. **13** C. 7. 6. 6. **14** Inst. 1. 6. 7. **15** Nov. 119. 2.

3. It must be *nominatim*: description is enough but the donee must be certainly identifiable[1]. It may be to an unborn person: *qui ex ea ancilla nascetur*[2].

4. The slave need not consent, except in fideicommissary gifts where the intent was only a benefit to him: *beneficium invito non datur*[3].

5. It must be by the owner. One whose ownership is determinable on some event may free: the gift is good, though he may be liable to someone for it[4]. It cannot be done by representative, except that a *filiusfamilias* duly authorised can free on the father's behalf by *vindicta*. This is clear for Justinian's law, whatever the law was before[5].

6. If in fraud of creditors it is void. Justinian does not deal with fraud on the patron: the abolition of Latinity had removed the chief case of this[6].

7. It must be in perpetuity and is irrevocable[7]. Thus even a manumission *inter vivos* induced by fraud is good[8]. Freedom given under a trust or to satisfy a condition afterwards shewn to be a *falsum*, or not binding, is good[9].

8. It may be conditional or *ex die* (except *vindicta*)[10].

XXXI. The cases of liberty without manumission break into two groups:

(A) Independent of voluntary manumission. Freedom was given as a reward, *e.g.* for giving information against certain criminals[11]; or, in the Byzantine empire, on becoming a monk[12]. It might also be given as a penalty on the master. A slave abandoned for sickness became a Latin in classical law, a *civis* under Justinian[13]. A woman prostituted in violation of a contract of sale was free[14]. In both these groups of cases there is some obscurity as to the way in which liberty was conferred. In some cases the master was compelled to free, in others the public authority declared the man free, in others he became free by the event.

1 40. 4. 24. 2 "Whichever the *heres* shall choose" is enough, C. 7. 4. 16. pr.; C. 7. 4. 14. 3 40. 5. 32. 1; 50. 17. 69. 4 36. 1. 26. 2. 5 *Ante*, § XXVI. Messengers (*nuntii*) might be employed of course in informal manumission. 6 The suggestion that he deals with it under revocation of acts done in fraud of patron is inconsistent with the next rule, and the title on these contains no ref. to manumission, D. 38. 5. 7 40. 4. 33, 34. 8 4. 3. 7. pr. 9 40. 4. 47. So too where a minor entered and liberties took effect and he was *restitutus in integrum*, C. 7. 2. 3. Of course the omnipotent Emperor could set aside even a manumission, 4. 4. 10. There were provisions for compensation in some of these cases. 10 *Ante*, § XXVI; 40. 7. 1. 11 47. 10. 5. 11; C. 7. 13. One given to the Emperor's household was free and *ingenuus* whether the donor so intended or not, C. 12. 5. 4. 12 C. 1. 3. 37; Nov. 5. 2. As he is free, but reverts to slavery if he leaves the monastery, there is a breach with principle. Nov. 12. 3. 17 lays down the same rule on his becoming a priest *non contradicente domino*. 13 40. 8. 2. 14 40. 8. 6. Numerous later cases, *e.g.* heresy and judaic proselytising (C. Th. 16. 9. 4, etc.), fraudulently marrying an *ancilla* to a freeman, C. 7. 6. 1. 9; finally, any abandonment of a slave, Nov. 22. 12.

Besides *postliminium*, pardon, and sale of new-born children[1], there were some exceptional cases. Under Justinian, a slave noxally surrendered for a wrong was freed, *auxilio praetoris*, when his service had recouped the injured person[2]. Constantine allowed one who reared an exposed child to bring him up as slave or free whatever he may have been by birth. Under Justinian the child was always free and *ingenuus* whatever he was by birth[3].

No pact or acknowledgment or lapse of time in apparent slavery made a freeman a slave[4]. No pact or acknowledgment made a slave a freeman[5]. Lapse of time was in later law on a different footing: apparent liberty begun in good faith was confirmed by a lapse of time which Justinian fixed at 20 years[6]. A *heres* could not attack his ancestor's manumission on technical or formal grounds, but this did not bar third parties. Here too a certain lapse of time, perhaps five years from manumission, protected the *manumissus*[7]. And the *status* of a man who died apparently free could not be attacked after five years from his death, by those claiming property or that his children were slaves[8].

(B) Inchoate manumission, which has failed to take effect.

1. Abortive gift of liberty. Where an *institutio heredis* failed from causes other than invalidity of the will and injustice was done, relief was given in some cases, *e.g.* the *heres*, also entitled on intestacy, took in that way so as to defeat the gifts in the will[9].

2. Fideicommissary liberty overdue. By the operation of three *Scc.*[10] it was provided that where the fiduciary had failed to carry out the trust, the praetor would declare the man free as from the time when he should have been freed. If the fiduciary was in fault and the slave belonged to the *hereditas* he lost his patronal rights[11], the freedman being the *libertus* of the deceased (*orcinus*).

3. *Bonorum addictio libertatium conservandarum causa.* M. Aurelius

1 *Ante*, § xxv. 2 Inst. 4. 8. 3. 3 C. Th. 5. 9. 1, 2; C. 8. 51. 3. 4 40. 12. 37; C. 7. 14. 15; C. 7. 16. 5. 1; C. 7. 22. 3. 5 40. 12. 37; C. 7. 14. 8. 6 C. 7. 22. 2; perhaps 16 before, C. Th. 4. 8. 7. 7 Buckland, *Slavery*, 650. 8 40. 15. Litigation on a man's liberty decided in his favour did not bar others from disputing his *status* (40. 12. 42). The same would appear to be true on decision the other way. As to allusion, in literary texts to a rule that such cases should be tried twice or even thrice, see Buckland, *Slavery*, 668 sqq. 9 29. 4. 6. 10; 40. 4. 23. pr. Or is bribed not to enter, C. 7. 4. 1. 1; or the will is upset by collusion, etc., 49. 1. 14. 1. A *heres* directed to choose and free one of the children of an *ancilla* wilfully refuses, Justinian makes them all free, C. 7. 4. 16. Many other cases. 10 *sc. Rubrianum*, A.D. 103, *sc. Dasumianum* a little later, *sc. Iuncianum*, A.D. 137. 11 40. 5. 26. 7 sqq., 28. 4. 36. pr., 51. 4, 8, 10; 31. 84. Much discussion, where slave has been alienated, on the questions who is liable and what are the patronal rights, and also where several are bound to free. Buckland, *Slavery*, 613. In Nov. 1. 1, Justinian framed a new system. Beneficiaries under the will might claim what was given to the defaulter, in a certain order, giving security that they would carry out the gift.

provided that if no *heres* entered and the estate was likely to be sold by creditors, so that gifts of liberty would fail, the estate might be assigned to one of the slaves freed, who gave security for payment of debts, and gifts of liberty would operate as if the *heres* had accepted[1]. This was soon extended to cases of liberty given by codicil without a will[2], and to application by an *extraneus*[3]. The slaves need not consent. The addictee became liable and entitled like a praetorian successor[4]. A gift in fraud of creditors was good, as they did not suffer[5]. Justinian allowed assignment even to a slave not freed, who thus got freedom; he allowed it also within a year after the goods were sold, and, if the creditors agreed, on security for less than full payment, and so that only some of the gifts should operate[6].

4. Inheritances passing to the Fisc. Where this occurred liberties took effect as if a *heres* had entered, so that gifts in fraud of creditors failed[7].

5. Transfer *ut manumittatur*. M. Aurelius (and Commodus?) provided that one sold or given to be freed at once or later and not so freed, should be free, *ipso facto* without decree, on the failure[8]. The case of gift may be an early extension: here there was a right of withdrawal, before it was effective[9].

6. *Servus suis nummis emptus*. M. Aurelius and Verus provided that a slave *suis nummis emptus*, which, as a slave has none, means with money not provided by the buyer, could claim immediate manumission. The case was dealt with like an overdue *fideicommissum*[10]. The purpose must have been declared at the outset[11], and the money might have come from the slave's *peculium*, if the master consented[12].

7. The slave whose master has taken money to free him. Here the ownership was an existing one, not as in the last two cases, created *ad hoc*. It was enforcing a bargain between slave and master. The texts

1 Inst. 3. 11. 1. **2** 40. 5. 2. **3** 40. 4. 50. **4** 40. 5. 4. 21. **5** 40. 5. 4. 19. **6** Inst. 3. 11. 7; C. 7. 2. 15. **7** 40. 5. 4. 19; h. t. 51. pr. There are many such cases. Controversy as to gifts in fraud of creditors, Buckland, *Slavery*, 626. **8** 18. 7. 10; 38. 1. 13. pr.; 40. 8. 1, 9; C. 4. 57. 1, 2, 6. The purpose might be to make the actual manumitter patron or to avoid the difficulty that the owner, as he was physically incapable (*mutus, surdus*), could himself have freed only informally, so that the man would not be a *civis*. P. 4. 12. 2. See Lotmar, *Marc Aurels Erlass über die Freilassungsauflage*. **9** Such gifts were sometimes by *mancipatio cum fiducia* (*post*, § CLI), which gave a right of revocation before completion. If the gift were revoked before the freedom took effect the constitution would not apply and the man could be recovered. Though this is a characteristic due to *fiducia*, it was generalised in later law, and there was a *condictio ex poenitentia*, whether it had been done with express *fiducia* or not; Buckland, *Slavery*, 633. **10** 5. 1. 67; 40. 1. 4. pr., 5. pr., *i.e.* by decree. **11** 40. 1. 4. 2, 4, 6. **12** C. 4. 49. 7. There may be a *ius poenitendi* before the actual transfer (12. 4. 5. 2) and even after (40. 1. 4. 2) but it is not clear that the text covers this type of case, where the slave initiates the business.

disagree on the effect. Some make it operate *ipso facto* as in case 5, others require a decree, as in cases 2 and 6[1]. The rule appears to come from Greek law[2], and to be post-classical. The agreement might be that he was to be a Latin[3]. There was a *ius poenitentiae* in the payer, till the man was free, which seems to be due to Justinian[4].

The chief points to notice as to the effect of supervening freedom on previous transactions are the following: Liabilities for crime or delict remained; *noxa caput sequitur*[5]. Rights arising from such things remained with the master, a slave could have no rights[6]. But a slave who had committed a wrong against his master could not be sued after freedom any more than he could before[7].

Inheritances left to a slave would go to him personally if he was free before they were accepted[8]. In the region of contract there might be *naturalis obligatio* between a man and his slave, but the latter had no rights after manumission, except that if he took his *peculium* the claim would be reckoned in it[9], and conversely it was only against the *peculium* that the master had a right[10]. On contracts with *extranei*, the right remained with the master[11], and though the contract might impose a *naturalis obligatio* on the slave, he could not be sued after he was free[12]. But here too if he took his *peculium* he was liable to an action, *de peculio*, for one year[13], as the master would have been, had he kept it[14].

XXXII. Civitas. From this point of view the main classification is into *Cives*, *Latini* and *Peregrini*, a classification more convenient than exact since Latins are a class of privileged Peregrines. But their privileges are so marked as to bring them closer to *Cives* than to *Peregrini*[15].

Cives. Of *cives* in general little need be said, but there were on the

1 40. 1. 19; 40. 12. 38. 1; C. 4. 6. 9; C. 4. 57. 4; C. 7. 16. 8. **2** Dareste, *Recueil des inscriptions juridiques grecques*, 2. 252 sqq., 273 sqq. **3** Girard, *Textes*, 849. **4** 12. 4. 3. 2, 3. **5** G. 4. 77; P. 2. 31. 8; D. 9. 4. 24. In minor wrongs command by *dominus* was a defence after manumission, 9. 4. 2. 1; 25. 2. 21. 1. **6** An action lay in some circumstances for an insult to a slave. Even this remained with the master, 47. 10. 30. pr.; 47. 2. 46. pr.; 9. 2. 15. 1. **7** 47. 2. 17. 1; C. 3. 41. 1. **8** G. 2. 189; Ulp. 22. 12, 13. As to legacies, *post*, § cxx. **9** 33. 8. 6. 4. **10** Of retention merely; Buckland, *Slavery*, 690. **11** 44. 7. 56, even conditional, 45. 1. 75. **12** P. 2. 13. 9; C. 4. 14. 2. **13** *Post*, § clxxxiv. It was disputed. **14** 15. 2. 1. 7. **15** The existence in the same community of persons of similar race and speech with widely different civil rights caused great difficulties (see the story in *Vita Alexandri*, 27. 1) and mistakes, resulting in great prominence of rules remedying evils due to them. Thus sale of a freeman as a slave is a valid contract, *quia difficile dignosci potest liber homo a servo* (18. 1. 5) though of course it cannot be carried out. See also rules as to fraudulent sale of freeman (*ante*, § xxv), *erroris causae probatio* (*post*, § xxxv), attestation by slave supposed free (*post*, § ciii), *institutio* in same conditions (*post*, § cviii), acquisition through *liber homo bona fide serviens* (*post*, § xcix), position of child of *ancilla* supposed to be free (G. 1. 85), persons *de statu suo incerti* (*post*, § cii), etc. A slave could not be arbiter but if one thought free was so appointed and gave his decision, this was good (C. 7. 45. 2). A fugitive slave got himself appointed praetor: his official acts were valid (1. 14. 3).

one hand specially privileged classes, and, on the other, classes whose rights were more or less restricted. The only privileged classes that need mention are:

1. *Ordo Senatorius.* This was a sort of nobility founded by Augustus, based on descent from a Senator[1], a title which itself gradually became more a rank than an office. Membership of the *ordo* passed to agnatic descendants, but only to the grandchildren of an actual senator, not *in perpetuum.* The privileges belong mainly to public law: the only important special rules of private law were that these *clarissimi* could not take the lucrative government contracts[2] and that a marriage between one of this class and a *libertinus* (*a*) was void[3].

2. *Ordo Equester*[4]. This descends from the equestrian centuries in the scheme of Servius Tullius, but in the empire it had altered its character. It was an aristocracy of wealth, not in the sense that all the rich belonged to it, for membership was conferred by the Emperor, but in the sense that wealth was an essential, though birth and character played a part. The position was held for life, subject to removal or promotion to the Senate, but was not inherited[5]. Members of this *ordo* formed the chief element in the *album iudicum*[6]. They held the chief financial administrative posts, and provided most of the officers in the army. They tended to increase in wealth, as the business of contracting with the State was mainly in their hands, but their various privileges, apart from the first mentioned, had small importance in private law.

Classes with specially restricted rights are more important. Leaving out of account the distinctions of the republic, and omitting for the present *addicti* under a judgment[7], and persons *in mancipio*[8], who will call for consideration in other connexions, there were four classes who appeared in the empire.

1. Freedmen, *Cives Liberti, Libertini Cives*[9]. Many of the disabilities of *libertini* belong to public law and need not be considered[10], but some relate to private law. A *libertinus* could not marry a person of the *ordo senatorius*[11]: he was barred from taking State contracts, at any

1 Mommsen, *Staatsr.* 3. 458 sqq.; *D.P.R.* 6. 2. 47 sqq. 2 Mommsen, *op. cit.* 2. 509; *D.P.R.* 6. 2. 109. 3 23. 2. 44. pr. 4 Mommsen, *op. cit.* 3. 476; *D.P.R.* 6. 2. 68. 5 Mommsen, *op. cit.* 500; *D.P.R.* 6. 2. 98. 6 *Post*, § CCXVII. 7 *Post*, §§ CCXI, CCXIX. 8 *Post*, § XLVIII. As to *auctorati*, see Pauly-Wissowa, s.v. *auctoratus.* 9 The word *libertinus* denotes the freedman in relation to the rest of the community, the word *libertus* his relation to his patron. See G. 1. 110, 111. A *libertinus* freed by T. is the *libertus* of T. The name *libertinus* is applied to all grades of freedmen, the name *libertus*, apparently, in the time of Gaius, only to *cives.* Cp. G. 1. 12, with G. Ep. 1. 1. pr. G. 3. 56, *liberti latini hominis*, is under suspicion, see, *e.g.*, Krueger und Stud. ad h. 1. 10 *E.g.* inability to hold Roman magistracies or vote in the *comitia*, under the Empire. See Mommsen, *op. cit.* 3. 440; *D.P.R.* 6. 2. 25. 11 See n. 3. In the Republic he could not marry any free-born person.

rate until, in the second century, he became admissible to equestrian rank[1]. But more important practically than these points were the rules affecting his relation with his *patronus*. The main rules in this matter are the following:

The patron had a right of succession—*iura in bonis*: its extent will be considered later[2]. This right, established by the XII Tables, carried with it the right of guardianship over the *libertus impubes* or *liberta—tutela legitima*[3]. It was protected by rules annulling alienations which in intent and effect were frauds on the patron's right[4]. It was regarded as in some sort compensation for loss of services, rendered by the *libertus*, for it was laid down that if the *heres* instituted by the will of the freedman undertook to continue these, and the patron accepted this, he could not afterwards attack the will[5].

The patron was entitled to *obsequium*. This is not easily defined, but the duty of respectful conduct which it implies is expressed in a number of specific rules. *Obsequium* was due even though the liberty was the result of a bargain[6], and, to some extent, to parents and children of the patron[7]. The *libertus* might not, as it seems, bring any action involving discredit against the patron or these relatives, or, without leave of a magistrate, any action at all[8]. He could not be accuser, or give evidence, in a criminal case against the patron[9]. Gifts by the patron were revocable without proof of ingratitude[10] and gifts to the patron were not limited in amount by the *l. Cincia*[11]. A woman freed for the purpose of marriage could not refuse it[12]. Apart from any special obligation to *operae* and *munera* undertaken, a *libertus* was bound to support his patron in need, according to his means[13]. The obligations were not however all one way. The *libertus* must not be treated as a slave[14]. In classical law the patron could not give evidence against him in criminal matters, and in later

1 Mommsen, *op. cit.* 3. 518; *D.P.R.* 6. 2. 118 sq. Most of these rules were applied in the republic *de facto*, though not in law, to the child of a *libertus*—it took two generations to wipe out the stain of slavery. There is in fact evidence that at one time the name *libertinus* had been applied only to the children of *liberti*, Suetonius, *Claudius*, 24; Isidorus, 9. 4. 47. See Bruns, 2. 83. **2** *Post*, § CXXXIV. **3** *Post*, § LII. **4** Enforced by the *actio Calvisiana* where the *libertus* had died intestate (38. 5. 3. 3) and the *actio Fabiana* where he had made a will (P. 3. 3; D. 38. 5, *passim*), thus only after death (*post*, § CCIII). **5** 37. 14. 20; 38. 2. 1. 2; 38. 2. 37. **6** 37. 15. 3. **7** 37. 15. 5. 6. As to machinery for dealing with ingratitude, *ante*, § XXV. **8** G. 4. 46; C. 6. 6. 1; D. 37. 15. 2; h. t. 6; h. t. 7. **9** Coll. 4. 4. 2; 9. 2. 2; 9. 3. 3; D. 48. 2. 8; C. Th. 9. 6. 4 (=C. 4. 20. 12). Or in some cases children or parents or patron of the patron. **10** Vat. Fr. 272. **11** Vat. Fr. 308, 309. **12** *Post*, § XLI. **13** P. 2. 32. 1; C. 6. 3. 1. *Libertus* punishable for seeking to marry *patrona* or patron's wife or daughter (P. 2. 19. 9), must accept *tutela* of patron's child in circumstances which excuse him from others (P. 2. 29. 1; Vat. Fr. 152, 224). A woman's power to change *tutor* did not apply to *patronus* except temporarily, in case of urgency (G. 1. 174). **14** C. 6. 6. 6.

law he could not be compelled to do so[1]. He must provide for him in need[2], and there were other protections[3].

If the manumission was voluntary and gratuitous in other respects it was allowed, and usual, for the patron to require services, *operae*, and gifts, *munera*[4]. *Munera* seem to have been gifts on special occasions of no great importance, as it was forbidden to exact money *onerandae libertatis causa*[5], though it was permitted to agree for money in lieu of promised services, the choice being with the *libertus*[6]. *Operae* were more serious. They might not be excessive and must be suitable to the age, *status* and training of the *libertus*[7]. Sickness excused without compensation[8]. The right to *operae* of a *liberta* was lost by marriage or concubinage with her and by her marriage, with the patron's consent[9], and by her reaching the age of 50 or a rank which made the services unreasonable[10]. In the case of a *libertus* the right was lost by his having two children (but not by mere marriage[11], or, it seems, dignity) and by redemption for money, which ended the patron's rights altogether[12]. An *opera* is a day's work, conceived of as a definite unit of value, a *dandum*, not a *faciendum*[13].

Other facts might destroy the right to *bona*, *i.e.* in effect, to the patron's rights generally. Such were: reclaiming him as a slave[14]; exacting an oath not to marry or have children[15]; having freed a woman under a *fideicommissum*, excusing himself from *tutela* of her[16]; and breaches of various duties above enumerated and others[17]. The rights were destroyed by *capitis deminutio maxima* or *media* on either side, but of course the condemnation of the patron did not destroy the independent right of his children to the *bona*[18]. *Adrogatio* of the patron merely trans-

1 Coll. 9. 3. 3; P. 5. 15. 3; D. 22. 5. 4. **2** 37. 14. 5. 1. **3** Patron cannot prevent *libertus* from trading even in competition, but Justinian allows the patron to stop this in case of actual damage; 37. 14. 2; h. t. 18; 37. 15. 11; 38. 1. 45. *Libertus* cannot be compelled to live with patron, C. 6. 3. 12. **4** 38. 1. 7. 4; C. 6. 3. 3; h. t. 5. **5** 38. 1. 32; h. t. 36; h. t. 39. **6** 37. 14. 6. 1; 38. 1. 39. **7** 38. 1. 2; h. t. 16. 1; h. t. 50. **8** 38. 1. 15. pr. **9** 38. 1. 13. 4; h. t. 30. 1; h. t. 46; C. 6. 3. 9. Marriage of *liberta* did not destroy the right of a *patrona*, 38. 1. 48. 2. **10** 38. 1. 34, 35. **11** C. 6. 3. 7. 1 (*lege Iulia*); 38. 1. 13. 3. **12** 38. 2. 37, expressing the fact that succession is a replacement of right to services. The right to support in need remained, P. 2. 32. **13** Thélohan, *Ét. Girard*, 1. 355 sqq.; *post*, §§ XCVI, CLX. *Operae* other than personal services were assignable, 38. 1. 9. 1; h. t. 23. pr. (interp. see Desserteaux, *Capitis Deminutio*, 2. 290, and his reff.). Services the render of which had already been claimed, *operae indictae*, were debts to the patron and so the claim passed to his *heres*. Whether future services were due to *liberi* or *heredes* depended on the terms of the undertaking, 38. 1. 5; h. t. 22. 1. **14** 38. 2. 9. **15** 37. 14. 6. **16** 37. 14. 3. **17** Failure to support in need (*l. Aelia Sentia*, 38. 2. 33), exacting money *libertatis onerandae causa* (38. 1. 32), wrongly bringing or supporting a capital charge against him, with some exceptions. If rightly the goods are *publicata* (37. 14. 9–11; 38. 2. 14. 5; h. t. 3. 9, etc.). In some of these cases the same effect is produced if a child of the patron does the act, 38. 1. 48. **18** *Post*, § CXXXIV

ferred the rights: that of the *libertus*, not usually allowed, did not affect the patron's rights[1].

Not all patrons had these rights. We have seen in what case the right to *operae* arose. In some of the cases in which a slave was freed for misconduct of the master the latter was patron in name without the patronal rights[2]. One who freed under a trust had *iura in bona* and *tutela*, and could not be sued, but the other rules of *obsequium* did not apply[3]. We have seen that for default in carrying out the trust he might lose the *libertus* altogether[4]. The transferee, *ut manumittatur*, seems to have been in the position of one who freed under a trust[5]. In the case of a slave *suis nummis emptus*, the manumitter could not be sued[6], but the other rules of *obsequium* did not apply, and though he succeeded on intestacy like any other patron, he could not attack the freedman's will[7]. A *libertinus* could not, of course, ever come to have been born free, *ingenuus*, but he could be put in the same legal position. Augustus gave a certain freedman the rights of *ingenuitas*, by allowing a collusive claim that he was *ingenuus*, known to be merely a fiction, in order to introduce him to the equestrian class[8], and soon there were direct gifts of the *ius anuli aurei*, the mark of this class[9]. From the second century this right marked only an *ingenuus*, and from Commodus onwards, grants of it to freedmen were common[10]. Such a grant made the man an *ingenuus* for general legal purposes but did not affect the patron's rights[11]. A little later a further step was taken. By decree of the Emperor a freedman might get *restitutio natalium*[12], which made him an *ingenuus* for all purposes and thus the consent of patron and his children was usually required, as their rights were destroyed[13]. In a late novel, Justinian gave to all *libertini*, existing or future, the *ius regenerationis* and *anuli aurei*. This left the patron's rights unaffected, but he provided that these were destroyed if the patron at any time expressly waived them[14]. The practical result was that the general disabilities of a *libertinus* disappeared.

XXXIII. 2. *Coloni Adscriptitii*, *Adscripti Glebae*[15]. This is a class of serfs who appeared in the empire, not certainly traceable before Constantine, but probably older. They were evidently a very large class in the Byzantine empire, and were the subject of much legislation[16]. They

1 *Post*, § XLV. But as to the effect of *cap. dem.* of patron on *iusiurandum operarum*, *post*, § CLX. 2 See C. 7. 6. 1. 4. 3 2. 4. 9; 27. 1. 24; 38. 1. 7. 4; Vat. Fr. 225. 4 *Ante*, § XXXI. 5 2. 4. 10. pr.; 37. 15. 3; 38. 2. 3. 3; C. 6. 3. 2, etc. 6 2. 4. 10. pr. 7 C. 6. 4. 1. 8 Suetonius, *Augustus*, 74. 9 Mommsen, *Staatsr.* 2. 893; *D.P.R.* 5. 172. 10 *Ib.*; Vat. Fr. 226. 11 Commodus seems to have required the patron's consent, 40. 10. 3. 12 Marcian tells us that the *natalia* restored are not of course their own but those originally the common right of all men, 40. 11. 2. 13 P. 4. 14a. 14 Nov. 78. 15 Heitland, *Agricola*, chh. 50, 51; Seeck, Pauly-Wissowa, s.v. *colonatus*; Girard, *Man.* 134. 16 See for an account of the legislation affecting them,

were the rustic cultivating class. The *colonus* was free and a citizen[1]. He could marry and engage in ordinary transactions[2] and he did not owe servile *obsequium*[3]. But he could not leave the land or sell it, or his other property. If he deserted he could be reclaimed and those who detained him were liable[4]. His lord could not remove him from the land or sell it away from him or raise his rent, which was paid in kind[5]. The position was hereditary[6]. There was no enfranchisement from this *status*, and though in 419 it was provided that 30 years apparent liberty from it should release from it, this had disappeared under Justinian[7]. But the *colonus* could be released by an agreement under which he was to hold the land free of the burdens[8], and under Justinian was released by becoming a bishop[9]. The *status* arose by birth, by voluntary acceptance, *e.g.* in distress[10], by lapse of time[11], and by *denunciatio*, *i.e.* sturdy vagrants were assigned to landowners who denounced them[12]. *Coloni* could bring no actions against their lord except as to his title or on an increase of rent[13]. Most of these rules belong to the fifth century when the institution was becoming more important in the growing distress, and as part of the tendency to secure the due functioning of matters important to the State by making many *status* hereditary, thus holding the people to the work and *status* to which they had been born[14].

3. *Infames*[15]. These appear in Justinian's law[16] as a sharply defined group who, by reason of numerous forms of wrongful or unseemly conduct, are subjected to serious disabilities. Shameful trades, condemnation in certain actions and criminal charges, dismissal in disgrace from the army, and misconduct in family relations are the chief cases[17]. The rule is essentially praetorian[18], but, on the one hand, some of the praetor's cases have disappeared from the list in the Digest[19], and, on the other hand, the praetor does not speak of *infamia*, but only of prohibition to appear as advocate for any one (*postulare*[20]) or to represent or be repre-

Gothofredus ad C. Th. 5. 9. The *papyri* are giving much information and raising new problems. There is evidence of gradual extension and local variations.

1 C. 11. 50. 2; 11. 52. 1. **2** C. 11. 48. 8. 2; h. t. 24. **3** C. 11. 50. 2; 11. 55. 1. As to their power of alienation, Cuq, *Manuel*, 90. **4** C. Th. 5. 17. 1–3; 5. 19. 1, 2; C. 11. 48. 6, 12; 11. 50. 2. **5** C. 11. 48. 2, 5, 7, 15. A similar class called *Inquilini*, of whom little is known, appear to be somewhat earlier. They are said to have been barbarians settled on Roman territory, 30. 112. pr.; C. 11. 48. 12, 13. **6** C. 11. 48. 13, 16. **7** 20 years, if a woman, C. Th. 5. 18. 1; C. 11. 48. 22. **8** C. 11. 48. 21. **9** Nov. 123. 4. Not by any other privilege, C. 11. 48. 11; can hold no *militia*, h. t. 18. **10** C. Th. 5. 6. 3; Salvianus, *de gubernatione dei*, 5. 8. **11** C. 11. 48. 19, 20. **12** C. Th. 14. 18. 1. **13** C. 11. 48. 20; 11. 50. 1, 2. **14** In that age there are many such hereditary positions. **15** Greenidge, *Infamia in Roman Law*. **16** Chief texts, Vat. Fr. 320–324; D. 3. 1. 1. 5–8; 3. 2. *passim*; C. 2. 11. **17** Greenidge gives a list of about 40 sources of *infamia*. **18** It originated with the *Censor*, but this aspect of it disappears with the *census*. **19** *E.g.*, *auctorati*, Coll. 9. 2. 2, persons condemned in the *actio fiduciae* (obsolete, *post*, § CLI. **20** Lenel, *E. P.* 76 sqq.; D. 3. 1. 1. 5.

sented by anyone in litigation (*cognitores dare*, *dari*[1]). This last rule, which applied also to the less formally appointed representatives, *procuratores*, was no longer expressly stated under Justinian[2], but that of *postulatio* remained[3]. Certain *condemnati* could not *postulare* for anyone[4]. *Infames* in general could act only for connected persons and could not appoint persons to act for them[5]. They could not *accusare* in criminal cases[6]. They could not hold offices or dignities[7]. They were not necessarily *intestabiles*, though the provision which made them *infames* might also provide this[8]. But in fact we are better informed as to the cases of *infamia* than as to its effects. Most of the disabilities created by *infamia* had no possible bearing on women, and in fact the original censorian conception of *infamia* did not apply to them. They appear, however, in the law of the empire: probably in their case the chief result was that they could not appoint representatives[9].

4. *Intestabiles*[10]. Certain persons might not be witnesses, a rule referring not only to giving evidence in litigation[11], but to acting as witnesses in formal transactions, *e.g.*, *mancipatio* and will[12]. Gaius tells us that some jurists excluded them from having witnesses[13], a rule which bars them from conveying property in civil form and from making wills, and is applied to this last case by Ulpian[14]. But in addition to these persons who are declared *intestabiles*, generally, there are others who are excluded by specific statutes from giving evidence in cases with which it deals[15].

XXXIV. Free subjects other than *Cives* are *Latini* or *Peregrini*, and each of these groups has subdivisions.

(*a*) *Latini Veteres* (*nomen Latinum*). These, *i.e.* the Italian communities of Latin race, had been endowed with *civitas* long before the empire and do not therefore directly concern us[16]. But the name of Latin had been applied to

(*b*) *Latini Colonarii*. These were communities on which, at or after their incorporation into the State, an inferior *status* modelled on that of the old Latins had been conferred, in some cases on the old inhabitants of the region, in others on emigrants sent out from Rome to occupy the territory or town[17]. Such colonies continued to be founded[18] till the middle of the second century, but, owing to the progressive extensions of *civitas*,

1 G. 4. 82; Lenel, *op. cit.* 88. One who could not *postulare* could not be *cognitor*, P. 1. 2. 1. 2 Inst. 4. 13. 11; *post*, § CCXXXIX. 3 3. 3. 1. 5. 4 h. t. 1. 6. 5 h. t. 1. 8. 6 Coll. 4. 4. 7 48. 7. 1. pr.; or to act as *iudices*, Greenidge, 155. 8 28. 1. 18. 9 See Greenidge, *op. cit.* ch. VII. 10 This notion is as old as the XII Tables, 8. 22. 11 Coll. 9. 2; D. 22. 5. 20. 12 22. 5. 15; 28. 1. 18. 1. 13 28. 1. 26. 14 28. 1. 18. 1. 15 See Greenidge, *op. cit.* 166. 16 The name *Latini* was applied also to the inhabitants of the earliest colonies, before the name *Latini Colonarii* was invented. See Girard, *Manuel*, 111. 17 Mommsen, *Röm. Staatsr.* 3. 620 sqq.; *D.P.R.* 6. 2. 241 sqq. 18 By the Senate or the Emperor, G. 1. 95; *Vita Hadriani*, 21.

the later ones were in the remoter parts of the empire, and the class disappeared under Caracalla[1]. Latin colonies were of two main types, those with *minus* and those with *maius Latium*, the difference being that in the first, the superior officials acquired Roman *civitas* for them and their children, while, in the other, *decuriones*, *i.e.* members of the local *curia* or town council, shared the same privilege[2]. The general position of such Latins was as follows[3]. They might not serve in the Roman legions. They could not hold a Roman magistracy (*ius honorum*) and, apart from special provisions[4], a marriage between a Latin and a Roman had not the effects of a Roman marriage (*ius connubii*). But in the ordinary relations of private law, they were on a level with Romans (*ius commercii*)[5].

(*c*) *Latini Iuniani*. These are the inferior class of manumitted slaves already considered[6]. Just as, by an "economy of juristic conceptions," the *nomen Latinum* was extended to communities which had nothing to do with Latium, so was it here extended to a class which had no local or racial significance at all. Their position was that of colonary Latins, except so far as it was restricted by the patron's rights, or by express legislation, or by the fact that they were not members of any Latin community. These limitations were serious. There was no question of their acquiring *civitas* by holding office in their community for they were not usually members of a Latin community[7]. They owed *obsequium* to their patron, with the resulting liabilities already considered[8]. But they were said to become slaves at their death: their property reverted to their patron, as *peculium*, not as inheritance, and their children had no claim[9]. They had no capacity for civil marriage[10]. They had *ius commercii*, with the important exception that by express enactment of the *l. Iunia*, they could not make a will or take an inheritance or legacy under one, or be made *tutores* by will[11]. As this resulted from express enactment and was not an inherent disability, they could act, like other Latins, as witnesses in wills and other formal acts[12]. Having *commercium* they had access to the law courts[13]. After an enactment of

1 *Post*, § XXXVII. 2 G. 1. 96. 3 Each had its own statute (*e.g.*, *l. Salpensana*, Bruns, 1. 142; Girard, *Textes*, 108), and these were not uniform but the differences seem to have been mainly in details of local administration. 4 G. 1. 56; Ulp. 5. 4. 5 Ulp. 19. 4, 5. It was possible for a Latin to give his child in adoption to a Roman (Livy, 41. 8) and by a survival of the notions of the old Latin league it was open to Latins resident at Rome to vote, at any rate in the Tribes (Livy, 25. 3; Mommsen, *op. cit.* 3. 643; *D.P.R.* 6. 2. 297). But there is no evidence of this in the Empire and that for the late Republic is not good. 6 *Ante*, § XXVIII. 7 They might be, if freed by a member of the community. 8 *Ante*, § XXXII. 9 Inst. 3. 7. 4; *post*, § CXXXIV. 10 Ulp. 5. 9. Special provisions of *l. Aelia Sentia*, *post*, § XLI. 11 G. 1. 23, 24; 2. 110, 275; Ulp. 11. 16. They could take *fideicommissa*. 12 Technically, they had *testamenti factio*, but not *ius capiendi*. Ulp. 20. 8; 22. 3. 13 Ulp. 5. 4; 19. 4.

Caracalla shortly to be considered[1] the name *iuniani* went out of use, as there were no longer any colonary Latins. At the same time there was a gradual development of new ways of becoming a Latin. Some of them were merely new modes of informal or imperfect manumission[2], but some clearly were not, *e.g.* Latinity given by law to a slave who detected certain criminals[3]. Many of the cases are very late and it is impossible to say how far the beneficiaries were subject to patronal rights and the other disabilities of junian Latins. The same is true of the children of junian Latins, but for reasons now to be stated the class affected would not be numerous.

XXXV. Access to citizenship was made very easy by the legislation of the empire[4]. Gaius and Ulpian enumerate many ways, open apparently to all Latins, but, in the case of junian Latins, not affecting the patron's rights. The case of office in a Latin colony has been mentioned[5]. Claudius gave *civitas* to Latins who built a ship of a certain size and carried grain to Rome for six years[6]. A *lex Visellia* (apparently 25 A.D.) gave it to those who served in the *Vigiles* for six years[7]. Nero gave it to any Latin who, being of a certain wealth, should build a house in Rome at the cost of half his patrimony[8], Trajan to any Latin who should work a mill of a certain capacity at Rome for three years[9]. A senatusconsult gave it to *Latinae* who had three children, even *volgo concepti*[10]. It was of course frequently given by special decree of the Emperor, and though in general the patron's rights were unaffected there is reason to think that in this last case, if the patron consented, the man became a *civis libertus* for all purposes[11].

There is another group of cases of more importance in which the Latin became a *civis* for all purposes.

Iteratio[12]. A slave who on manumission became a Latin could become a *civis* by a repetition of the manumission without the defect, and by a senatusconsult this would affect his children also[13]. The cases recorded seem to be: the man informally freed, or freed under 30, or by a bonitary owner[14]. We are told that he became the *libertus* of the one who iterated.

1 *Post*, § XXXVII. 2 *E.g.*, pledged slave freed, 40. 5. 24. 10; Fr. Dos. 16; *ancilla* married to freeman with *dos*, C. 7. 6. 9. 3 C. Th. 9. 24. 1. Numerous cases, Buckland, *Slavery*, 548 sqq. 4 G. 1. 28. 5 *Ante*, § XXXIV. 6 G. 1. 32; Ulp. 3. 6. 7 Shortened by *sc.* to three, G. 1. 32; Ulp. 3. 5. 8 G. 1. 33. 9 G. 1. 34; Ulp. 3. 1. 10 Ulp. 3. 1. If of marriage with Latin, another rule applied, *post*, p. 96. If of marriage with peregrine, to apply this rule would put them in a better position than *Latini*. It was not desirable to encourage marriage between *cives* and *Latinae*, who were usually *libertinae*. 11 See *ante*, § XXXII. 12 As to some problems connected with *iteratio* and not considered here, involving the fundamental conception of manumission, see Buckland, *Slavery*, Appendix 4. 13 G. 1. 35, 167; Fr. D. 14; Ulp. 3. 4; Vat. Fr. 221. It is not clear that the children would be in his *potestas*, but this is probable. The whole rule is to exclude the doubt whether as he was not now a slave any act of manumission might not be a nullity. 14 Pliny, *Ep.* 7. 16.

Where this was the original manumitter or his successor in title there was no difficulty. But if the bonitary owner freed and the quiritary owner iterated, we learn that the *bona*, *i.e.* right of succession, remained with the late bonitary owner[1], no doubt because the quiritary owner could not acquire anything through him while he was a slave or Latin. And by a rescript of M. Aurelius rights to *munera* and *operae* remained with the bonitary owner[2]. It might have been thought that *tutela*, which went with right of succession, would also have been with the bonitary owner, but the quiritary owner became *tutor*[3]. It may be assumed that the ordinary rules of *obsequium* applied to both. It is thus only in a very restricted sense that the *libertus* was the *libertus* of the former quiritary owner[4].

Anniculi Probatio. By the *l. Aelia Sentia*[5] or the *l. Iunia*[6] it was provided that a *Latinus iunianus* who had been freed under 30 could, on marrying a *Latina colonaria* or *iunia* or a *civis*, before seven witnesses, (aware of the purpose of the marriage,) and having a child one year old, go before a magistrate and prove these facts. He would thus acquire *civitas* for himself, his wife and child, and *patria potestas* over the child, unless indeed the wife was a *civis* already, in which case the child would be a *civis* on general principle[7]. If the man died before making the proof the mother could do it to get *civitas* for herself and child. A defective text of Gaius seems to say that, if both were dead, then, if the child were a *civis*, through his mother, he himself could proceed, so as to become *heres* to the father[8]. The limitation to those under 30 is not very reasonable, and a *sc. Pusio-Pegasianum* of 72 A.D. gave the same right to all junian Latins[9].

The position thus obtained was better than that gained by acquiring *civitas* by the methods of the first group, but it applied in terms only to Latins, and Trajan held that one who, having obtained *civitas* in some way, had ceased to be a Latin could not afterwards utilise *anniculi probatio*, so that his *bona* must go to his patron and his children would have no claim. Hadrian however[10], observing the unfairness of this, allowed those who had gained *civitas* with this inferior result to proceed

1 G. 1. 167. The rights are no doubt those he had in the goods, as those of a Latin. 2 Vat. Fr. 221. 3 *Ib.*; G. 167; Ulp. 11. 19. The point is that the civil law right of succession is not divested, though emptied of content by the praetorian right, *post*, § CXXXV. 4 Where he acquires *civitas* by one of the first group of methods, he becomes the *libertus* of his former quiritary owner, but the *bona* are still with the bonitary owner, G. 1. 35. 5 G. 1. 29. 6 Ulp. 3. 3. The restriction to those under 30 indicates the *l. Aelia Sentia*, these being the *Latini* specially created by that *lex*. To give them this special privilege does not add to the class of *cives* those who would not have been such in earlier law. 7 *Post*, § XXXVII, and under a *sc.* of Hadrian which seems to have dealt comprehensively with questions of *status* on birth, not always making new law. Ulp. 3. 3. See G. 1. 30, 77, etc. 8 G. 1. 32; Coll. 16. 3. 7, 15. 9 G. 1. 31. 10 G. 3. 72, 73.

nevertheless afterwards under the rules of *anniculi probatio*, as if they were still Latins.

Erroris Causae Probatio. This is one of the cases, so prominent in Roman Law, of provisions to deal with the results of error in *status*. Gaius, in a mutilated set of texts[1], deals with cases in which, a marriage having been contracted under mistake of *status*, so that the *status* of issue was not what was expected, the effects of the error, if it was not grossly negligent, might be set aside by decree so soon as there was issue. Ulpian deals more shortly with the matter. The cases, all of which rest on senatusconsult, appear to fall into three groups.

(*a*) One party intended to satisfy the rules of *anniculi probatio*, but, owing to mistake of *status*, did not, *e.g.* a Roman woman married a peregrine thinking him a Latin, or a *latina* married a peregrine under a similar error. As soon as a child was a year old, *erroris causa* could be shewn and proceedings taken under the *lex*[2].

(*b*) There was no reference to *anniculi probatio*, but the marriage was not a civil marriage because one party, supposed to be a *civis*, was not, and had not *conubium*. Here it was enough that a child was born[3].

(*c*) One who had *conubium*, mistaking his own *status*, married one who had not. The age of the child was immaterial[4].

The general result was to give *civitas* to the parties not *cives*, and *potestas* to the father[5]. The primary matter in view being *civitas*, the rules were not applied except where the effect was to give someone *civitas*, and the benefits of the rule were not extended to any party to the marriage who, being a *dediticius*, was incapable of *civitas*[6].

Both parties need not have been in error, but only the one who was could avail himself of the rules[7]. The man could always do so, if in error, but the woman only if she was the superior, *i.e.* a *civis* or *latina* who had married a peregrine[8]. But a peregrine who shewed cause under these rules did not get *potestas* over existing issue except by special decree, though he did if the wife shewed cause[9].

XXXVI. Of the third class, *peregrini*, there were two types.

Peregrini (*socii*). With the earlier meaning of this name we are not concerned; in classical law it may be said to denote the denizens of those outlying parts of the empire which had never been incorporated as Roman, or endowed with Latin rights—the provinces. Apart from municipalities and the like which here and there received civil or Latin

1 G. 1. 67–75; see also, G. 1. 87, 2. 142; Ulp. 7. 4. 2 G. 1. 68–70, 73; 3. 5; Ulp. 7. 4; Coll. 16. 2. 5. 3 G. 1. 67, 68; Ulp. 7. 4. 4 G. 1. 71. 5 G. 1. 67. Sex of child immaterial, G. 1. 72. 6 G. 1. 68. 7 No text mentions the other case. 8 G. 1. 74. 9 G. 1. 93; 1. 68.

rights, and thus constituted civil enclaves[1], the provinces were governed by their own private law, little altered by Roman authority. What we have to consider is therefore the relations between these peregrines and Romans in civil life. They had in general no *ius honorum, suffragii, conubii* or *commercii*[2]. The exclusion from *commercium* does not mean exclusion from commerce, but only from the specially Roman part of the law. They could not have civil *dominium* or transfer property by civil law methods, such as *mancipatio* or *cessio in iure*[3]. The land, unless it had received, by *privilegium*, the *ius italicum*, was not regarded as owned; the *dominium* was in the *populus* or the Emperor[4], and it paid a tribute; methods being of course devised by which transfers, creation of servitudes, and litigation affecting the land were carried out effectively[5]. Moreover the *ius gentium* was open to them, and this, in the empire, was the most important part of the law. Thus they could transfer property by *traditio*, and since *stipulatio* was treated as *iuris gentium*[6], it may be said that the law of contract was in practice as free to peregrines as to *cives*[7]. And though, in principle, civil procedure was closed to them, "fictitious" actions were devised by which in the principal cases of dispute between them and *cives*, the matter might come before the courts with a formal pretence that they were *cives*[8]. There were moreover special tribunals (*recuperatoria iudicia*) for cases, at Rome, in which peregrines were concerned, controlled by the *praetor peregrinus*[9], but these grew less important as the above machinery developed[10].

Except so far as they might benefit by the rules of *erroris causae probatio*, there was no standing rule by which peregrines could attain

1 Mommsen, *Staatsr.* 3. 645 sqq.; *D.P.R.* 6. 2. 269 sqq. 2 G. 1. 25, 56, 92, etc. By *privilegium*, some had *conubium* (G. 1. 56, 57, 76, etc.) and *commercium*, with access to Roman courts (Ulp. 19. 4). Thus some could proceed by *legis actio* (Girard, *Org. Jud.* 1. 104, 213 sqq.). 3 G. 1. 119. 4 G. 2. 7. The *populus* as a property owner disappears soon after Gaius. 5 *Post*, §§ LXIX, XCIV. 6 G. 3. 93, not in the form "*Spondes-ne, spondeo.*" 7 Except perhaps for the decaying contract *literis*, G. 3. 132–134. 8 G. 4. 37. 9 Girard, *Org. Jud.* 1. 211 sqq. 10 This machinery would apply to some extent to those who had suffered *deportatio*, a punishment introduced by Augustus, and gradually superseding exile (*aquae et ignis interdictio*). It could be inflicted only by the Emperor or *Praefectus Urbi* (1. 12. 1. 3; 48. 19. 2; 48. 22. 6. 1), must be perpetual (48. 22. 17. 2) and involved residence in a fixed place (Theop. ad Inst. 1. 12. 1). *Deportati* lost their citizenship without acquiring another—they were "ἀπόλιδες," and thus did not become citizens of the place to which they were sent, or share the special law of that place. But they had the power of ordinary dealings involved in the *ius gentium* (48. 19. 17. 1; 48. 22. 15). Their goods were usually forfeited (P. 5. 23. 11, 13, etc.), but if they retained some (not otherwise, 4. 5. 7. 3) they could be sued, *pro parte*, on their old debts, but only by *utiles actiones* as they had suffered *capitis deminutio* (48. 22. 14. 3). They could not manumit slaves and they could neither take under a will nor make one; the *Fiscus* succeeded to them (48. 22. 2. 15, 16); they had in no case any rights against former debtors to them. Mommsen (*Staatsr.* 3. 140; *D.P.R.* 6. 1. 156) considers them to be *dediticii*.

civitas. But, apart from grants to communities, or in mass, the emperors often gave it as a reward after service in the irregular and auxiliary forces, and as a qualification for service in the legions, which was confined to *cives*[1]. But where a peregrine obtained *civitas* for himself and his wife and children, he did not get *patria potestas* over children already born, unless he expressly petitioned and it was shewn to be for the benefit of the children[2].

Dediticii. These were primarily members of nations which had submitted to Rome, but had, as yet, no constitution conferred on them, and those who by reason of treachery or other discreditable dealings were permanently placed in the position[3]. There is however little trace of these in the empire, and the name is applied mainly to those freed slaves who, by reason of their personal degradation, were placed by the *l. Aelia* "*in numero dediticiorum*[4]." They were free but could never become *cives*[5]. If they attempted to live within 100 miles of Rome, they were sold into slavery, with their goods, to one who undertook to keep them beyond that limit. If he freed them they became the property of the State[6]. They had the ordinary *iure gentium* powers, but could not make wills even by peregrine law, as they were not members of any community[7].

XXXVII. The law was profoundly affected by an enactment of Caracalla[8]. We are told by several writers, in almost identical language, that in 212 he gave *civitas* to all (*omnes*, πάντας) in the Roman world[9]. It is stated to have been for fiscal reasons[10]. The taxes on manumissions and successions were doubled and as the latter fell only on *cives*, there was profit in increasing the class. A mutilated Greek copy, recently discovered[11], suggests other more creditable motives; to end a fruitful source of disputes, and to encourage the cult of the Roman gods. It also tells us that the decree expressly excluded *dediticii*. It has long been known that there were large numbers without *civitas* after this enactment, and it has been suggested that it did not apply to Junian Latins, but the express exclusion of *dediticii* seems clearly to negative this. It is a gift to specific classes of existing persons, not the abolition of a *status*; Junian Latins would continue to recur, by defective manumissions, and there were many ways of becoming Latins. So too *deportatio*, involving loss of *civitas*, still continued, and it is clear that even under Justinian, barbarian inhabitants of the confines of the

1 Girard, *Manuel*, 118. 2 G. 1. 93, 94; 2. 135 a. 3 G. 1. 14. 4 *Ante*, § XXVIII. 5 A rule applied in *erroris causae probatio*, *ante*, § XXXV; or Latins, G. 1. 15. 6 G. 1. 27, *l. Aelia Sentia*. Not "*servi publici*." 7 G. 3. 75; Ulp. 20. 14. 8 See Bry, *Études Girard*, 1. 1 sqq. 9 Dio Cassius, 77. 9; D. 1. 5. 17; *Vita Severi*, 1 and others cited, Bry, p. 5. 10 Dio Cassius, *cit.* 11 Printed by Bry, p. 3; Pap. Giessen, 40.

empire, some originating there, some immigrant, and some settled by compulsion, were not treated as *cives*[1]. No doubt the excluded *dediticii* covered all these, but it is generally thought that they covered many more. On the conquest of Palestine, the Jews were made *dediticii*, and it is possible, though not probable, that they were such throughout the empire. But there is evidence for a wider class of *dediticii*. It is clear that in Egypt, after Caracalla, only those were *cives* who were free of a certain tribute and only those were free of this who belonged to organised municipalities. Thus it seems that the rural inhabitants came under Caracalla's conception of *dediticii*. This may have been so all over the empire, but though there were *dediticii* elsewhere, other than freedmen, there seems no trace of this particular distinction, and, Egypt being a special appanage of the Emperor, governed on special lines, this rule may be peculiar to it. Though municipal organisation was very widespread under Caracalla, the urban population was less than the rural, so that the majority would still not be *cives*, which is difficult to reconcile with the emphatic language of the texts and of the decree itself[2].

Under Justinian a more decisive step was taken. In a comprehensive enactment[3], noting that Latins were now few (which indicates that some of the rules of the *l. Aelia* were disused[4]) he reviewed the different sources of Latinity which still existed, and either nullified them or made them give *civitas*. Noting that *dediticii* had become *vanum nomen* he abolished the class for the future[5]. He made no enactment abolishing the class of *peregrini*, nor was this needed. The gift of Caracalla had made all the inhabitants (subject to what has been said) and their descendants, *cives*, and this seems in later times to have been understood as a gift to the community, covering even immigrants. In the result the only peregrines left were foreigners and the *deportati* and barbarians, already mentioned, who were in effect still *dediticii*, though not so called[6].

The topic of *civitas* may be left with a short statement of the rules as to the inheritance of civic *status*. The chief were these:

1. The general rule of *ius gentium* was that a child took the *status* of its mother[7], but, for Romans, the exceptions ate away most of the rule[8].

2. A child born in Roman civil marriage took the *status* of its

1 See Girard, *Manuel*, 119. 2 See Girard, *Manuel*, 119, n. 1. 3 C. 7. 6. 1. 4 Perhaps never operated in the East. 5 C. 7. 5. 1. Not confined to those who were *dediticii* by their manumission. If obsolete, the class had not long been so. The fifth century Epitome of Gaius still speaks of them. And the "Homologoi" of this age in the Eastern Empire have been shewn to be *dediticii*, Wilcken, *Grundzüge der Papyruskunde*, 1. 59. There were doubtless sources other than the *l. Aelia Sentia*. 6 Justinian avoids the word *peregrinus*. Compare C. Th. 4. 6. 3 with its reproduction in C. 5. 27. 1. pr. 7 G. 1. 78, 82; Ulp. 5. 8, 9. 8 G. 1. 83.

father[1]. In general this would be *civitas*, for civil marriage was usually confined to *cives*, but there were privileged peregrines who had *conubium*, and if a Roman woman married such a person, the issue would be peregrines[2].

3. A *l. Minicia* provided that the issue of a marriage between a *civis* and a *peregrinus* or *peregrina* was always a peregrine, a rule operating where, as was usual, there was no *conubium* between them, and the father was a peregrine; in the other case the result followed from rules already stated[3].

4. Marriage under the *l. Aelia Sentia*, though regulated by statute, was not civil marriage, as some thought[4]. Hadrian settled the matter by senatusconsult; any child was born a *civis* if the mother was one[5].

5. Apart from a possible doubt in the case of Junian Latins, as an artificial creation, Latins were in strictness peregrines. Thus it might be said that in marriage between a Latin and a peregrine, either way, issue would be peregrine by the *l. Minicia*. Hadrian declared that the general rule of *ius gentium* applied, and the child took the *status* of the mother[6].

6. The *iure gentium* rule applied where the mother was a slave[7], and we have noted the exceptional cases in which the child of an *ancilla* was free[8].

7. Those conceived *legitime*, which means in civil marriage (*ex iustis nuptiis*), took their status from conception; others from the time of birth[9]. This in practice meant that where they took the father's *status*, except *e lege Minicia*, they took his *status* at the time of conception. We have already noted that in later classical law this rule was modified in the case of slave mothers by the principle that the issue was entitled to the best *status* the mother had had at any time during the pregnancy[10]. It is not unlikely that the same principle came to be applied in other cases, for Paul tells us twice in the Digest that a child in the womb was regarded as already born, so far as this was to his benefit[11].

1 G. 1. 56, 76; Ulp. 5. 8. **2** G. 1. 77. **3** G. 1. 77, 78; Ulp. 5. 8. **4** G. 1. 80. **5** *Ib.* **6** G. 1. 30. **7** *Ante*, § XXIV. **8** *Ib.* **9** G. 1. 89; see Ulp. 5. 10. **10** *Ante*, § XXIV. **11** Gaius in 1. 90, 91 discusses the case of a woman *civis* who during pregnancy loses citizenship or liberty, and gives as a probable opinion the rule that if the conception was in *iustae nuptiae* the child is a *civis*, but otherwise takes the inferior *status*. In 92 he considers the case of a *peregrina* who gets *civitas* during pregnancy. If the child was *volgo conceptus* he says it is a *civis* (which is general principle): if of a peregrine marriage it is a *civis* if the father also got *civitas*. This he attributes to the *sc* of Hadrian.

CHAPTER III

THE LAW OF PERSONS (*cont.*). THE LAW OF THE FAMILY

XXXVIII. The Family, persons *sui* and *alieni iuris*, p. 102; *filiifamilias*, nature and effects of *patria potestas*, 103; XXXIX. Birth *ex iustis nuptiis*, 105; Effects of Roman marriage, 106; XL. *Dos*, 107; *Dos* at end of marriage, 109; *Donatio ante (propter) nuptias*, 111; XLI. Requirements of Roman marriage, 112; Form, *ib.*; Consent, 113; Age, 114; *Conubium*, 115; XLII. End of marriage, 117; Divorce, *ib.*; XLIII. *Manus*, 118; Divorce from *manus*, 121; XLIV. *Adoptio* of person *alieni iuris*, 122; Effect, *ib.*; XLV. *Adrogatio* of person *sui iuris*, 124; Effect, 125; Special restrictions, 126; Adoption by will, 128; Adoption of slaves, *ib.*; XLVI. Legitimation, etc. *ib.*; XLVII. Ending of *patria potestas*, 131; *Emancipatio*, 132; XLVIII. Civil Bondage, 134; Contracts by persons *alieni iuris*, 135; XLIX. *Capitis deminutio*, 136; L. Effects of *capitis deminutio*, 139.

XXXVIII. The Law of Family Relations is the most important branch of the law of *status*. The word *Familia* has many meanings[1], but in its strict sense it denotes a group consisting of a *paterfamilias* and those under his control, *i.e.* his children, adoptive or natural, who have not passed out of the family by emancipation or the like, remoter issue through males, in the same case, the wife, if the marriage was one with *manus*, in which case she was *loco filiae*, civil bondsmen and slaves. If, as was usual from the beginning of the empire, and universal in later law, the marriage was not with *manus*, the wife was not a member of the *familia*, but remained in that to which she had belonged. Conversely, a daughter did not leave the family by marriage without *manus*, but her children were never in the family. If her marriage was a fully valid civil marriage they belonged to her husband's family[2]. If it was not, *e.g.* if she had married a *peregrinus* not capable of civil marriage, or if she was not married at all, any child would be *sui iuris*, *i.e.* not in any family but his own[3]. Every *civis* who was not under a *paterfamilias* was himself a *paterfamilias*, whatever his age, and conversely, the parental control was not ended by maturity of the son, but lasted, unless artificially determined, till the death of the father. And where the *paterfamilias* was the grandfather, his death would cause the grandson to lapse into the *potestas* of the father, if he was still in the family[4]. A *paterfamilias* was *sui iuris*—a subordinate member of a family was *alieni iuris*[5]. A woman could be *sui iuris* but could not have *patria*

1 Heumann-Seckel, s.v. 2 G. 1. 55. 3 G. 1. 64; Ulp. 4. 1, 2. In the former case he was a *peregrinus*, *ante*, § XXXVII. 4 G. 1. 127; D. 50. 16. 195. 2. 5 G. 1. 48, 124–127.

potestas, and thus was said to be *caput et finis familiae suae*[1]. The control of a woman married *in manu* to a *filiusfamilias* was in the *paterfamilias*, to whom she was *loco neptis*[2]. It was possible in classical law (though the institution was in decay) to sell a son into a position, in another family, analogous to slavery, and those so sold were said to be *in mancipio, in mancipii causa*[3]. We have therefore to consider three classes of *cives alieni iuris*, those in *potestas*, *manus*, and civil bondage.

FILIIFAMILIAS and FILIAEFAMILIAS. In early law no question of this relation arose unless the father accepted the child—*ius tollendi, suscipiendi*, but this crude form of arbitrary judgment on legitimacy, difficult to reconcile with the rights accorded to *postumi*, seems to have been in practice obsolete in the empire and, in law, was ended by a praetorian procedure certainly earlier than Julian, which made fathers compellable to recognise their children[4]. Exposure and sale are not on this footing; they both imply a right to dispose of the child.

The *patria potestas* was essentially Roman: both in its content, so great that it could be called *patria maiestas*[5], and in its lifelong duration, it had an intensity unknown to the paternal power in any of the systems with which Rome came into contact. In early Rome the State interfered little within the family; the *paterfamilias*, as domestic judge, normally with a *concilium*, exercised supreme power and any restraint was indirect, through the *Censor*[6]. But in the empire, the powers, though still great, were constantly diminishing. The chief elements of the *potestas* were:

1. Power of life and death and minor violence[7]. The exposure of infants was not definitely forbidden in classical law and there was a little later legislation as to the rights of one who rescued the *expositus*. It was forbidden in A.D. 374, but it still continued[8]. Classical law regarded the killing of a son except under a formal domestic judgment as criminal. Ulpian held it so in any case: the son should be handed over to the courts[9]. Constantine made it parricide to kill a son[10]. In later law the right of the father was limited to reasonable castigation[11].

2. Power of Sale. The power to sell into real slavery, *trans Tiberim*,

1 50. 16. 195. 5; Ulp. (4. 1) calls such a woman *materfamilias*, and some texts in the Digest use this language (*e.g.*, 1. 6. 4, Ulp.; 24. 3. 34, Afr.). The more usual meaning is *uxor iusta*, primarily, wife *in manu*. Aul. Gell. 18. 6. 4 sqq., who makes *matrona* mean any wife and gives other views; Boethius, in *Top.* 3. 14; Nonius, 442. 2 Coll. 16. 2. 3. 3 G. 1. 49, *post.* § XLVIII. 4 See Declareuil, *Mél. Girard*, 1. 326, 333. It may be doubted if in private life it lasted as he suggests into the second century: arbitrary acts in imperial households prove little. 5 Livy, 8. 7. 6 See Cuq, *Inst. Jurid.* 1. 154. 7 Coll. 4. 8. 8 C. 8. 51. 2. Justinian legislated on the matter, C. 8. 51. 3. 9 48. 8. 2. Hadrian had punished by deportation a father who had killed his son who had wronged him, 48. 9. 5. 10 C. 9. 17. 1. 11 C. 9. 15. 1 = C. Th. 9. 13. 1. In the Empire there was no such right over the wife *in manu*.

was obsolete long before the empire, and the power to sell into civil bondage, except that it survived for formal sales in emancipation and adoption[1], and for noxal surrender for wrongs[2], was no longer a reality in the time of Gaius. In that age some parents did indeed sell children into slavery, but Paul denied the validity of such sale or even of pledge[3], and, later, the emperors repeatedly laid down a prohibition[4]. But by the time of Constantine the case of new-born children was a permitted exception, and enactments regulating such sales and even sales of older children are frequent in later times[5]. There was in all cases a right of redemption, and, for new-born children the rule still existed under Justinian[6].

3. Right to veto marriage and control divorce[7].

4. Right of action for the recovery of the child from anyone detaining him[8].

5. Right to all acquisitions, either property rights or obligations, resulting from transactions by the *filiusfamilias*[9]. But the rule that all such acquisitions vested in the *paterfamilias* was greatly cut down in the empire, the limitations having begun under Augustus[10].

6. Right to hand the child over instead of paying the penalty for a wrong done by him, originally a right to ransom him from the consequences of his wrongdoing[11]. As to females it was obsolete long before the empire: as to males it was abolished by Justinian. It probably never applied to wife in *manu*[12].

7. Power to appoint guardians (*tutores*) to young children, by will[13].

8. Power to appoint a *heres* to take the property if the child, surviving the father, died too young to make a will for himself—pupillary substitution[14].

9. Wrongs to the son, or to property in his hands, were wrongs to the father[15]. In the empire, when the son began to have separate proprietary interests, he had the same remedies in respect of these as a *paterfamilias*[16], and, apart from this, he became capable of himself appearing as party to litigation, to an extent and with an effect too controverted to be considered here[17].

1 *Post*, §§ XLIV, XLVII. 2 *Post*, § CCV. He might transfer the son to a Latin colony, G. 1. 131. 3 P. 5. 1. 1. A creditor taking such a pledge was deported. 4 *E.g.*, C. 7. 6. 1; h. t. 37. 5 *E.g.* C. Th. 3. 3. 1. 6 C. 4. 42. 2. 7 *Post*, §§ XLI sqq. 8 G. 3. 199; D. 6. 1. 1. 2; 43. 30; C. 8. 8. In early law his right was probably not distinguishable from ownership. 9 G. 2. 86; 3. 163. The right on transactions *inter vivos* vests in the *paterfamilias* at once. Thus if a *filius* takes a promise for payment after he is emancipated, the right nevertheless vests in the *pater*, 45. 3. 40. So too on a conditional promise, though the condition is not satisfied till after the emancipation, 45. 1. 78; 50. 17. 144. 1. As to the special rules affecting *dos*, *post*, § XL. 10 *Post*, § XCIX. 11 *Post*, § CCV. 12 G. 4. 75 sqq.; Inst. 4. 8. 13 *Post*, § LI. 14 *Post*, § CV. 15 9. 2. 7, etc. 16 49. 17. 4. 1, *post*, § XCIX. 17 Girard, *Manuel*, 145.

The restrictions on the power of the father were accompanied by recognition of rights of the son against the father[1]. In relation to the funds independent of the father he seems to have been dealt with much as a *libertus* was with regard to the patron. And conversely, while the praetorian liabilities on his contracts were substantially the same as on those of a slave, they did not arise on dealings in connexion with those funds[2].

XXXIX. We have now to consider how *patria potestas* was acquired. *Anniculi probatio*, *erroris causa probatio*, and imperial decree accompanying gifts of *civitas* have already been considered[3]. There remain the more important cases of Birth *ex iustis nuptiis*, the normal case, Adoption, and, in later law, Legitimation.

Birth *ex iustis nuptiis*. *Iustae nuptiae* meant valid marriage between two persons who had *conubium*, the capacity of Roman marriage[4]. If this was not present, but there was no such obstacle as prevented marriage altogether, it was a case of *nuptiae*, but of *nuptiae non iustae*, *matrimonium non iustum*, sometimes called *matrimonium iuris gentium*, valid *iure gentium*, but producing no specifically civil effects. There could be no *manus*; the children were not in *potestas*[5]. They were related to each other and to their parents' relatives cognatically, not by the Roman tie of Agnation[6]. This agnatic tie between two persons existed only if they traced connexion by civil descents, from a common male ancestor, through males, unbroken by *capitis minutio*; the connexion being sometimes artificial, *e.g.* created by *adoptio*[7]. Brothers and sisters by a civil marriage were agnates. The brother's child was an agnate of the sister, but her child was not, either of her or her brother or the paternal

1 *Inter alia*, a right to *alimenta* in later classical law, D. 25. 3; C. 5. 25. 4. 2 49. 17. 18. 5. 3 *Ante*, §§ XXXV, XXXVI. 4 Ulp. 5. 2; G. 1. 56, etc. 5 G. 1. 55, 65, 66. 6 Inst. 1. 15. 1. Those born out of wedlock are *volgo concepti* or *spurii* (fanciful derivations, "σπορά̀δην," "sine patre," G. 1. 64) and have for most purposes no certain father (Ulp. 4. 2). Those of a forbidden marriage, and, for classical law, those of concubines, are on the same footing, Ulp. 5. 7, *post*, § XLVI. They are not related to the father. They do not excuse him from *tutelae* (27. 1. 2. 3; Vat. Fr. 194, where *iniusti* means born of *nuptiae non iustae*). They do not count for the *praemia patrum* (*post*, § CXI). But, where traceable, the relationship is reckoned for the purpose of prohibited degrees (23. 2. 14. 2), and the child, like a legitimate child, cannot initiate proceedings against the father (2. 4. 6). The child is a cognate of the mother (Inst. 3. 5. 4). He takes her *status* at birth, and is her child for the purpose of succession both ways (P. 4. 10. 1; Inst. 3. 4. 3; D. 38. 17. 2. 1; *post*, § CXXXI), so that he counts towards the *ius liberorum* (*post*, § LX). He may not initiate proceedings against her (2. 4. 4. 3). In classical law no rights of such children arise if born in slavery (P. 4. 10. 2). As to servile *cognatio*, *post*, § CXXXII. 7 Or, as the principle may be stated, those who would sacrifice to the same set of ancestors, or who would be in the same *potestas* if the common ancestor were alive. Moriaud, *La simple famille paternelle*, finds difficulty in this way of stating the matter, for the case of those who enter an agnatic group after the death of the *paterfamilias*, *e.g.*, *postumi*, and states three principles which he considers necessary to cover all the cases.

relatives. If a member of the family passed out of it by adoption or any step involving *capitis deminutio*[1], the tie was destroyed, though the adoption would have conferred similar rights in the new family. *Cognatio* was any blood relationship, and agnates, even by adoption so long as the artificial tie existed, ranked as cognates also[2].

It must be noted that there is no question of choice between alternative modes of marriage; if the parties had *conubium* it was *iustae nuptiae* or no marriage at all. It was only where either (or both) had no *conubium* that *nuptiae non iustae* could occur[3], so that the difference was not so much between the marriages as between the parties[4].

The chief effects of civil law marriage may be shortly stated. The children were *liberi iusti*[5], in the *potestas* of the *paterfamilias*, and agnates of his agnates. Apart from *manus*[6], unusual in the early empire and obsolete in the later, the wife did not enter the *familia*. But the husband's home was hers, and they owed each other protection and respect[7]. Apart from *manus* she was not concerned with the cult of the *manes*, but apparently was with those of the *lares* and *penates*[8]. The wife did not necessarily take her husband's name, though in the empire she sometimes did[9]. She shared the honorific titles of her husband[10]. Their properties remained distinct, and gifts between them were void[11].

It will be seen that apart from issue, the effects of marriage were few, in law, a result of the Roman conception of *liberum matrimonium*. Thus it is discussed, by, *e.g.* Gaius, not as a separate institution but as a step in the most important way of acquiring *patria potestas*. Whether parties to a union were married or not was important if there were issue,

1 *Post*, § XLIX. **2** G. 1. 61; D. 38. 10. 10. 4. **3** A marriage between two *cives* of classes forbidden to intermarry was a nullity, not *nuptiae non iustae*. **4** Many rules bring out this aspect of the matter. Marriage between two persons who have not *conubium* becomes *ipso facto* civil marriage if they acquire the capacity of civil marriage while their marriage is still subsisting (G. 1. 95). A *deportatus* loses *civitas* and with it his capacity for civil marriage, but his marriage is not ended though it loses its civil character and effects for the future (24. 1. 13. 1; 24. 3. 56; 48. 20. 5. 1; C. 5. 16. 24. 2; C. 5. 17. 1). One case goes further. Where two slaves "married" and one was allowed by the master to give to the other a sum of money as a *dos*, out of the *peculium*, this was no marriage, as slaves were incapable of any marriage. But the intent was clear, and when the *dominus* freed them both, *inter vivos*, not taking away the *peculium*, the union automatically became *iustae nuptiae*, and the fund a *dos* (23. 3. 39). So, where two slaves were "married" and fideicommissary liberty was given to them, and its completion wrongly delayed, a child born meantime was, as we have seen, *ingenuus* (*ante*, § XXIV), and Ulpian says that he is a *suus heres* to his father (38. 16. 1. 1). Marriage indeed consists in common life with the intent of being married, having the necessary qualifications. Whether the relation is or is not marriage and, in the former case, of what type it is, depends on the qualification of the parties. **5** G. 1. 77; Vat. Fr. 168. **6** *Post*, § XLIII. **7** Inst. 1. 9. 1; D. 23. 2. 1; 24. 3. 14. 1; 47. 10. 2. No action involving *infamia* lay between them, 25. 2. 1, 2. **8** See Wissowa, *Religion und Cultus der Römer*, §§ 26, 27. **9** Marquardt, *Privatleben der Römer*, 18. **10** Vat. Fr. 104, D. 1. 9. 8. **11** *Post*, § XL.

and thus full rules appear as to the essentials of a valid marriage. Other rules shew that the possibility of issue was its main legal interest. Thus relief against error of *status* was given only if there was issue[1]—if there was not, no relief was necessary; the parties could end the relation at any time. The main titles on marriage in the Digest and Code say very little about its effects[2]. The definition given by Modestinus[3]: "*nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*," is, literally understood, so far from exact, that it is plain the legal aspect is not the one primarily in view, though no doubt it contains a reminiscence of the old *manus* system. Its freedom from legal regulation is evidenced by many texts[4] and collateral rules[5].

XL. The independence of property, consistent as it was with the notion of *liberum matrimonium*, would lead to inconvenience in relation to the maintenance of the household. This was lessened by the institution of *dos*, a contribution by or on behalf of the wife. *Dos*, though very ancient, was much increased in importance when *manus* decayed. It was technically the husband's property but his dealings with it were restricted by law, and it had usually to be accounted for at the end of the marriage. Hence we are told that "*quamvis in bonis mariti dos sit, tamen mulieris est*[6]."

Dos was not legally necessary to a marriage, but, in the absence of legal requirements of form, the existence of *dos* was the best evidence that marriage was intended and not mere concubinage. Thus fathers at times insisted on giving a *dos*[7], while on the other hand there was legislation, the history of which is debated, under which fathers were required to give *dos*[8]. But *dos* might come from various sources. If pro-

1 *Ante*, § xxxv. 2 D. 23. 2; C. 5. 4. 3 23. 2. 1. 4 45. 1. 134; C. 8. 38. 2; C. 5. 4. 14. 5 Marriage is not primarily a legal relation. The question whether two persons are married or not is often material in law, as is the question whether a person is over 14. But if the *vir* did not support his wife, or she failed in *reverentia*, it is not easy to see in the time of Gaius any direct means of enforcing these duties. Divorce is not the remedy: this was free whether there was misconduct or not, and, in any case, annulment alone is no remedy for breach of contract. Forfeitures of *dos* (*post*, § XL) formed an indirect check, and, if the wife was *alieni iuris*, the authority of the *paterfamilias* was a real resource. The need of appeal to these shews how far we are from contract. If we treat it as conveyance it is difficult to see what civil rights against third parties either has lost or gained, apart from *manus*. There was no civil remedy for adultery. There was no *actio utilis e lege Aquilia* to the *vir* for bodily harm to the wife. There was an *actio iniuriarum* for insult to her, but that is because it was necessarily an insult to the husband. The only serious exception to this absence of remedy is a rule, apparently of later law, that if her father or any other person detained her, the *vir* had an interdict for her production, so that she could return if she wished (43. 30. 2; C. 5. 4. 11; C. 5. 17. 5. 1). Remote analogies can be made out, but marriage has few useful affinities with the *ius rerum*. 6 23. 3. 75. 7 See the reff. in Costa, *Storia del dir. Rom. priv.* 14. 8 In 23. 2. 19 such a rule is attributed to the *l. Iulia*, and to Severus and Caracalla. Other texts refer

vided by the father or other paternal ancestor, or by an *extraneus* by way of gift to the father, it was called *profectitia*[1], if by the wife herself, if *sui iuris*, or from any other source, it was *adventitia*[2], and if, when given by an *extraneus* (and perhaps in other cases), there was an express agreement for its return, it was *receptitia*, and went back wholly to the donor at the end of the marriage[3].

The provision of *dos*, which might be after the marriage[4], did not necessarily take the form of an immediate transfer of property; it might be a promise to pay or a transfer of a claim against a third party. The husband had all administrative powers over the *dos*, and the right to use the fruits[5]. As owner, he could alienate property of the *dos*, except that the *l. Iulia de adulteriis* prevented him from alienating Italic land in the *dos* without the wife's consent, or from hypothecating it even with her consent, the latter rule being, perhaps, a juristic extension[6]. Justinian extended the rule to all land, and made the wife's consent ineffective in both cases[7]. The prohibition extended to the releasing of any praedial servitudes attaching to a *fundus dotalis*[8]. But though, apart from this restriction his transactions were valid, they might be a breach of his obligations. He was bound to administer the *dos* like a *bonus paterfamilias*[9] and careless disposals of property would have to be paid for, like other negligent damage, when the *dos* came to be returned. Thus he could free a dotal slave, but if the wife did not consent he might have to account for his value[10].

These rules are subject to two important modifications. They might be varied by agreement—*pacta dotalia*, which were very frequent, and usually dealt with return, but sometimes with the duties during the marriage: for instance they might vary the rules as to the incidence of risks[11]. Again, they were altered if the *dos* was *aestimata*, *i.e.* taken by the husband at a valuation. Here there was no question of liability for

to such a duty (37. 6. 6; C. 5. 12. 14). Other *leges* deal with special cases (C. 1. 5. 19. 3; 1. 5. 12. 20). But 23. 2. 19 and some other texts shew signs of interpolation, and the general rule may be due to Justinian. See Castelli, *Obbligo di dotare*. See also, however, Moriaud, *Mél. Girard*, 2. 291 sqq. In any case it is an obligation, not an essential of marriage. P. 2. 21 b. 1; C. 5. 17. 11. pr.; Nov. 22. 3; Nov. 74. 4.

1 Ulp. 6. 3; D. 23. 3. 5. pr. **2** Ulp. 6. 3. **3** Ulp. 6. 5. **4** P. 2. 21 b. 1. **5** P. 2. 22. 1. **6** G. 2. 63; P. 2. 21 b. 2; Inst. 2. 8. pr.; D. 23. 5. 4; C. 5. 13. 1. 15 (Accarías, *précis*, 1. 825). **7** Inst. 2. 8. pr. The alienation is not void *ab initio*: it is set aside if at end of marriage the wife has a claim to the *dos* (23. 5. 3. 1) so that the wife can ratify it (24. 3. 50). **8** 23. 5. 6, or creating servitudes on it, 23. 5. 5. It did not prevent such a transfer of property *per universitatem* as would result from adrogation of the *vir* (23. 5. 1. 1), in which case it retained its inalienability, or bar any person who acquired rights by the operation of rules of law, *e.g.*, *damnum infectum* (23. 5. 1. pr.; *post*, § CCXLV). **9** Perhaps in later law needing to shew only the care he did in his own affairs, *post* § CXC. **10** 24. 3. 24. 4; h. t. 62–64. **11** 23. 4. 6; in classical law formal *stipulatio* needed, P. 2. 22. 2; but, in later law, *actio pr. verbis* on pact, C. 5. 13. 1. 13; 5. 14. 7.

negligence; the husband must account for the value at the end of the marriage, no matter what had happened in the meantime. It was as if he had bought it, and the risks were entirely on him, though in ordinary cases they would be on the wife[1]. The *aestimatio* released the *vir* from the restrictions of the *l. Iulia*, unless the terms were that the wife might choose between the *dos* and its value as agreed[2]. On the other hand, the *aestimatio* would not affect later independent additions to the *dos*[3].

The ultimate destiny of the *dos* depended on the way in which the marriage ended, and on the nature of the *dos*, and the classical law differed from that of Justinian[4]. *Dos receptitia* may be neglected, for this went to the donor in any event. If the marriage ended by the husband's death, the wife took the *dos*. If by divorce the rule was the same except that if this was caused by the wife or her father, without justification, the husband kept one-sixth for each child up to three. There were other deductions in respect of expenses connected with *dos*, of *res donatae*, of *res amotae* and of misconduct, *mores*, while, if the husband had misbehaved, the periods within which the *dos* must be returned were shortened. These deductions, enforceable in the action for recovery of *dos*, *actio rei uxoriae*[5], were probably regulated and defined by the *l. Iulia de maritandis ordinibus*, but they were certainly to some extent recognised before[6]. There were however alternative remedies in some cases, *actio rerum amotarum*[7] where property had been made away with, *actio de moribus*[8], in case of the wife's misconduct, and, it seems a *condictio* for *res donatae* and *impensae necessariae*[9]. Justinian suppressed the *retentiones* in A.D. 530[10], leaving the alternative remedies, but a little

1 20. 4. 9. 3; C. 5. 12. 5, 10. **2** 23. 5. 11. **3** *Dos* might be made or increased after marriage, P. 2. 21 b. 1. **4** Ulp. 6. 6 sqq. **5** Ulp. 6. 6. The remedy for recovery was modified by Justinian, *post*, p. 110 and § CCXXIX. **6** See, *e.g.*, Val. Max. 8. 2. 3; Aul. Gell. 10. 23. 4; Cicero, *Top.* 4. **7** *Post*, § CLXXXVII. **8** Of this action little is known. It was not cumulative with criminal proceedings for adultery (C. Th. 9. 20. 1). It was not available to or against the *heres* (C. Th. 3. 13. 1; D. 24. 3. 15. 1). It was not a *praeiudicium*, for security might be required (G. 4. 102). It is commonly held to have been of praetorian origin, and to have been limited to the *dos*. The evidence seems to be that other actions affecting property relations of *vir et uxor* were praetorian and that it is most commonly stated in connexion with *dos*. But there seems no more reason for this than there would be for supposing the same limit for *actio rerum amotarum*, which also corresponds to a *retentio*, and Justinian in the abolishing enactment is dealing with *feminae indotatae* (C. 5. 17. 11). There could be no pact against liability under this head (23. 4. 5. pr.). The passage is struck out by the corrector of the Florentine MS. It was really obsolete, but the abolishing enactment is dated only a few weeks before that confirming the Digest. Literary texts which appear to deal with this action are (see also n. 6): Plut. *Marius*, 38; Pliny, *H. N.* 14. 13 (90). See Esmein, *Mél.* 78 sqq.; 150 sqq.; *N.R.H.* 1893, 149 sqq.; Czyhlarz, *Dotalrecht*, 337 sqq. **9** On the rule: *impensae necessariae dotem ipso iure minuunt*, Schulz, *Z.S.S.* 34, 57. **10** C. 5. 13. 1. 5. This abolished any claim in respect of children, and, on the abolition, three years after, of the *actio de moribus*, any claim on *mores*.

later he abolished the *actio de moribus*[1]. On the other hand he gave an action for recovery of *impensae utiles*[2]. There were further provisions where the wife was *alieni iuris* to secure that the father should not receive the *dos* without her consent, the fund being considered their common property[3]. Where the marriage ended by the death of the wife, *dos profectitia* went to the donor if alive, if he was not, the husband took it in classical law, as he did *dos adventitia*, on the wife's death[4]. And where *dos profectitia* returned to the donor the husband kept a fifth for each child[5]. Under Justinian the wife's heirs replaced the husband, who thus, apart from agreement, took nothing in any *dos* of his deceased wife[6].

As the *dos* was the property of the husband it did not revert *ipso facto* on the end of the marriage; there was an obligation to restore. If there was an express agreement for return, *dos receptitia*, there was an action *ex stipulatu*; in other cases an *actio rei uxoriae*. The agreement could be enforced at once, but in the other case there were delays. Apart from the reduction of time already mentioned where the husband was in fault, he must, in classical law, restore *res fungibiles* (money and the like) in three annual instalments, other things at once[7]. Security could be taken for the return, and the limitation in amount under the *l. Cornelia* did not apply here[8]. But this was later forbidden, apparently on the not very satisfactory ground that one who could be trusted with a daughter could be trusted with money, and Justinian maintained the prohibition[9]. Under Justinian the system was remodelled. The *actio rei uxoriae* was abolished and an implied agreement substituted[10], so that the *actio ex stipulatu*, somewhat modified in its results[11], was the general remedy. Further, land had to be returned at once and moveables within a year[12].

In the case of insolvency the wife claiming her *dos* had a priority over other unsecured creditors, though not over those who had taken a valid security[13]. Justinian went further, and gave her a tacit hypothec

1 C. 5. 17. 11. 2b. **2** See Schulz, *cit.* 71. **3** 24. 3. 2. 1. This and following *leges* bring out the exceptional character of the claim to restoration of *dos*. Apart from express promise of restoration, the wife's right to recover it was not lost by *capitis deminutio*. If, when the marriage ended, she was *alieni iuris*, the claim did not vest simply in the *pater-familias*, as would other rights acquired through a *filiafamilias*. It passed to her if she was emancipated or otherwise became *sui iuris*, and if she was still in the family, neither she nor the *pater* could properly receive or recover it without the consent of the other. If this was in fact done, the other still had the action for recovery, which would however be barred if the situation was subsequently in any way regularised. See 4. 5. 9; 24. 3. 2–4, 22, 33. 6, 42; C. 5. 18. 2, etc. **4** Ulp. 6. 5. **5** Ulp. 6. 4. **6** C. 5. 13. 1. 6, 13. This is a change of principle: the above rules shew that return of *dos* could be claimed only by the giver, not by his or her representatives. **7** Ulp. 6. 8. **8** G. 3. 125, *post*, § CLVI. **9** C. Th. 3. 15. 1; C. 5. 14. 8; C. 5. 20. **10** C. 5. 13. 1; Inst. 4. 6. 29. **11** *Post*, § CCXXIX. **12** C. 5. 13. 1. 76 a. **13** C. 8. 17. 12. 1.

over such of the *dos* as was still in the hands of the husband or his successors[1], a privileged hypothec, taking priority over others of earlier date[2]. But he also gave her the alternative of a real action, a *vindicatio* of the property, a remedy which implies that it is her own and is thus inconsistent with her hypothec[3], and also constitutes an *ipso iure* reversion of the ownership, contrary to classical principle[4].

In the Byzantine Empire a new institution appeared called *Donatio ante nuptias*. It was a sort of converse of *dos*, given by the husband to the wife, whose property it was, but administered by the husband. It had its origin in ordinary gifts by the man to his betrothed, much influenced by oriental notions[5], but it assumed the character of a special institution. Its history and the conceptions underlying it are the subject of controversy. The main legislation affecting it seems to be the following: There was a little legislation in the Western Empire which differentiated such gifts from ordinary completed *donationes*, which became absolutely the property of the donee[6], but as Mitteis shews, this did not create a real new institution; that appeared in the East. Theodosius provided that *donatio ante nuptias* should go to the survivor and on divorce to the divorced party[7]. Leo enacted that on causeless divorce the divorcer lost all right in *dos* or *donatio*, and in case of death the husband surviving took all the *donatio* and half the *dos*, the wife surviving, all the *dos* and half the *donatio*, a rule which makes *donatio* a sort of counterpart of *dos*[8]. He also provided that if there were agreements giving either a greater share, they must apply equally in proportion on both sides[9]. Justin allowed increase of such gifts after marriage if *dos* had been increased, and even creation where there had been none, if there had been such increase in *dos*[10]. Justinian allowed creation of it in any case after marriage and therefore changed the name to *donatio propter nuptias*[11]. He applied most of the rules of *dos* to it with the parts interchanged. In particular he laid it down that it was to be of the same amount as the *dos*, and that the special agreements to vary the legal rules as to its disposal after the marriage must apply to both[12].

These funds, *dos* and *donatio propter nuptias*, were the chief exceptions to a rule that gifts between husband and wife were void. It was a customary rule based by jurists on the considerations which led to a some-

1 C. 5. 13. 1. 1b. 2 C. 8. 17. 12. 5, 6. 3 He gives a laborious explanation of the anomaly which however only carries on the involved conception of the ownership which had been current in classical law. C. 5. 12. 30. 1. 4 *Post*, § LXVIII. If it was land alienated in violation of the *l. Iulia*, the alienation being void, the action would be available there too. Before Justinian she had in such case a *vindicatio* but only on cession of the action (31. 77. 5). See Girard, *Manuel*, 977. 5 See Mitteis, *Reichsr. und Volksr.* 256 sqq. and Collinet, *Études Hist.* 1. 145 sqq. 6 C. Th. 8. 12. 1; C. 5. 3. 1–5, 15, 16. 7 *Syro-Roman Law-book*, 265. 8 *Ibid.* 9 C. 5. 14. 9. 10 C. 5. 3. 19. 11 C. 5. 3. 20. 12 Further legislation in Nov. 97.

what analogous rule in English law, "lest they be kissed or cursed out of their money[1]." Other exceptions were gifts not to operate till the marriage ended[2], reasonable gifts on festal occasions[3], and gifts not involving profit to the receiver, *e.g.* gift of a slave *ut manumittatur*[4]. Forbidden gifts were simply void[5], but might be confirmed by will[6], and in the third century it was provided that they were good if the donor died without having changed his mind[7].

XLI. The requirements of a valid Roman marriage, which was of course monogamous, may be stated as follows[8].

Form. The only form required by law was the placing of the wife in the control of the husband[9], essentially a *traditio*, which, like *traditio* of property, could be effected in many ways. The normal method of this *deductio in domum* was for the husband to receive the wife at his domicile, but it might be in his absence with his consent[10]. There might indeed be no change of domicile; he might go to live at her house or they might have been occupying the same house. But there could be no marriage in the absence of the wife[11]. Though this was all the law required, elaborate ceremonial was usual[12], in which the nature of marriage as "*consortium omnis vitae, divini et humani iuris communicatio*" was expressed. There would be a bridal procession, epithalamia, feasting, and when the bride reached the house she was lifted over the threshold and offered fire and water, the symbols of life, she uttering the declaration "*ubi tu Gaius ego Gaia*[13]." All this, like the presence of *dos*, shewed that marriage and not concubinage was intended. Just as *traditio* did not transfer ownership unless there was evidence of intent that it should, so

1 24. 1. 1, 2, 3. pr. **2** 24. 1. 9. 2; h. t. 10, 13, 61, 62; P. 2. 23. **3** Ulp. 7. 1; D. 24. 1. 31. 8, 40, 42. **4** 24. 1. 5. 16, 7. 8, 22. **5** 24. 1. 3. 10, 36. **6** 32. 33. 1. **7** 24. 1. 32. pr.–4. **8** Marriage was usually preceded by contract of betrothal, *Sponsalia* (D. 23. 1), which might be made in absence or by ratification without special form, but needed the same personal consents as marriage and so could not be made by *tutor* (*post*, § LVI). As capacity to contract was needed the parties must not be insane or *infantes* (23. 1. 2; h. t. 8). It was originally made by formal *sponsio*. Those who could not intermarry could not be betrothed, but, possibly, in classical law a betrothal in view of expiry of a temporary obstruction was allowed (23. 1. 15, 16 seem to be interpolated). It could always be renounced by notice by the parties or the *paterfamilias*, and if the intended husband failed to complete the marriage for two years, without good reason, the other party was discharged (23. 1. 17; C. 5. 1. 1, 2). It gave rise to no action for breach of promise, but it was important, for several reasons, to have rules as to what constituted valid *sponsalia*. Thus relationship by marriage might be a bar to marriage and this was to some extent applied to those only betrothed. And the bar to alienation of dotal land applied while the parties were yet only betrothed (23. 5. 4). To be betrothed to two persons at the same time involved infamy (3. 2. 1). In late law it was usual to give *arra* on one side or both, and there was a good deal of legislation involving forfeiture, sometimes of a multiple, for causeless renunciation (C. 5. 1. 5; C. 5. 3. 15; C. Th. 3. 6. 1). As to the history of this legislation, see Riccobono, *Arra sponsalicia, secondo la C.J.* 5. 1. 5. **9** 23. 2. 5; C. 5. 4. 9. **10** 23. 2. 5; P. 2. 19. 8. **11** *Ibid.* **12** Marquardt, *Privatleben*, 42 sqq. **13** Probably appropriate to *manus*.

here there was no marriage without evidence of intent to marry, *affectio maritalis*[1]. But this was presumed, *prima facie*, if the parties were of equal rank, and, under Justinian, in all cases[2], though circumstances might rebut the presumption, apart from proof, *e.g.* if the woman was of notoriously bad character[3].

Consent. The consent of the parties was needed, though for those in *potestas* it was probably not required in early law. There was one exception. If a man freed an *ancilla*, specially for the purpose of marriage (but not otherwise), and the manumission was in all respects voluntary, she could not refuse[4]. The parties must be capable of consent, and thus a lunatic could not marry[5]. Neither fraud nor error, however fundamental, of themselves vitiated the marriage, in view of the ease of divorce[6].

Other consents might be needed. The issue of the marriage would be in *potestas* of the father's *paterfamilias*. This would be adding to his family, and thus his consent was needed[7], as also would be that of the father if the *vir* was a grandson whose father was in the same *potestas*[8]. The consent of the wife's *paterfamilias* was also needed[9], not for that reason, but as part of his *patria potestas*, so that the consent of any intervening link was not required. But the rule was subject to many limitations. The *l. Iulia* is said to have laid down a rule forbidding causeless refusal[10], and this is the basis of a rule of Severus and Caracalla, requiring the father to take steps to secure a suitable marriage for his child, on appeal to the chief magistrate[11]. Though in terms this deals with general prohibition, or refusal to seek a marriage, it seems to imply that he could be compelled to assent to any suitable marriage if he had no other to propose. In some cases the consent could be dispensed with. The child of a *captivus* could marry, but Justinian limited this to the case in which the captivity had lasted three years[12]. If the father was absent and it was not known whether he was alive or where, if alive, he was, the child could marry; here too Justinian required a delay of three years[13]. Where the father was insane there were disputes of which

1 24. 1. 3. 1; h. t. 32. 13. **2** 23. 2. 24; 39. 5. 31. pr.; C. 5. 4. 22. **3** C. 5. 4. 23. 7; D. 23. 2. 24. **4** 23. 2. 29; h. t. 29. **5** P. 2. 19. 7; D. 23. 2. 16. 2. No words or ceremonial being needed deaf, dumb or blind folk could marry. **6** See the rules as to *erroris causae probatio, ante* § XXXV. **7** Inst. 1. 10. pr.; P. 2. 19. 2; D. 23. 2. 2; C. 5. 4. 12. **8** 23. 2. 9, 16. 1. **9** 23. 2. 16. In this case it was enough that he did not forbid. C. 5. 4. 25; D. 23. 1. 7. 1. The same may be true in the other case, but C. 5. 4. 5 does not quite say so. **10** 23. 2. 19. The text is corrupt and probably interpolated. Castelli, *Obbligo di dotare*, 7 sqq.; Moriaud, *Mél. Girard*, 2. 291, who thinks the *l.* applied only to females, and that Just. made it general by altering *filias vel neptes* into *liberos*. **11** 23. 2. 19. See however Castelli, *loc. cit.* **12** 23. 2. 9. 1, 11; 49. 15. 12. 3. **13** 23. 2. 11. The requirement attributed to Julian that the marriage must be such as the *pater* would have approved is no doubt due to Justinian.

Justinian gives an account[1]. There was no difficulty in the case of daughters; the principle that here non-prohibition sufficed gives a sophistical justification of a rational rule. But for sons the leave of the Emperor was needed till M. Aurelius allowed it generally to children of *mente capti*[2]. Whether this covered *furiosi*, capable of lucid intervals, was doubted, till Justinian enacted that it should, and provided machinery enabling the *curator* and relatives, with approval of the magistrates, to arrange for *dos* and *donatio*[3].

It may be added that where consent was needed and was given only after cohabitation had begun, this was not ratification; the marriage dated only from the consent[4].

Age. The male must be 14, the female 12[5], this being the normal age at which the necessary physical faculties are developed. Thus one who could not have the physical capacity, *e.g.* a *castratus*, could not marry[6], and, at least in classical law, those whose development was retarded could not marry till it was complete[7]. Those who lived together before attaining the necessary age were not married till they reached it, still living together as man and wife[8].

Conubium. Capacity of civil marriage[9]. A convenient modern terminology distinguishes between absolute and relative *conubium*. Absolute *conubium* is the capacity to contract civil marriage. This was possessed in general only by *cives* and those *Latini* and *peregrini* to whom, as members of a community, or personally, it had been granted[10]. But *veterani* who had received *civitas* were sometimes, but not always, allowed by their diploma of *civitas* to contract civil marriage with any woman they first chose after their discharge[11], so that they could marry with their own tribe without loss of rights, and give to the woman chosen a limited *conubium*. But, unless it was expressly so provided in the diploma, this did not confer *civitas* on her. The children would be *cives* and in *potestas* as issue of a civil marriage whose father was a *civis*[12].

Relative *Conubium*. Those capable of civil marriage might not be

1 Inst. 1. 10. pr. 2 C. 5. 4. 25. 3 *Ibid.* 4 1. 5. 11; Vat. Fr. 102. Other special cases. A *liberta* who had been married to her patron could never marry another person without his leave (23. 2. 45, 51; C. 5. 5. 1). The tutor and relatives of a girl *sui iuris* had some control over her marriage, and in 199 it was provided that if they could not agree on a choice, it should go to the *praeses* (C. 5. 4. 1). In 408 precise rules were laid down as to consent of relatives in this case (C. 5. 4. 20). In 371 the marriage of a widow *sui iuris* was made subject to consent of father (h. t. 18). 5 Inst. 1. 10. pr.; C. 5. 4. 24. 6 23. 3. 39. 1. 7 Arg. G. 1. 196; Ulp. 11. 28. School dispute, Proculians decided by age, Sabinians by maturity. 8 23. 2. 4. 9 G. 1. 58 sqq. 10 Ulp. 5. 4. *Ante*, §§ XXXIV sqq. 11 See Girard, *Textes*, 125 sqq.; Bruns, 1. 274 sqq. 12 There were of course *cives* who could not marry, *castrati*, *mente capti*, divorced women accused of adultery, etc. (P. 2. 19. 7; D. 23. 2. 26), soldiers in actual service, Dio Cass. 60. 24. See Meyer, *Das Konkubinat*, 100 sqq.

capable of intermarriage. The restrictions were numerous and rested on various principles.

(*a*) Rank. In early law freeborn and freed might not intermarry[1], but in the empire the prohibition to marry freed persons applied only to those of senatorial rank. The *l. Papia* forbade those of this rank to marry actors, actresses and some others without the Emperor's leave[2], and the Christian Emperors legislated further on the matter[3]. Justin, to allow his nephew Justinian to marry Theodora, allowed marriage with retired actresses[4], and Justinian abolished the rule altogether[5].

(*b*) Moral, religious and political considerations. There might be no marriage between an adulteress and her paramour[6], or between Christian and Jew[7]. Two cases are more important. It was forbidden to a high provincial magistrate or his son to marry a person of the province unless they had been betrothed before he held the office[8]. It was also forbidden, for obvious reasons, for a *tutor* or *curator* to marry one who was or had been his ward. The reason for the rule, which dates from the second century, accounts for some exceptions. It did not apply where they were betrothed before the office began, or by her father, or she was 26, or the Emperor's leave had been obtained[9]. The rule extended to sons and grandsons, natural or adoptive, provided in this last case the tie still existed, and whether legitimate or illegitimate, and seems to have been extended even to *liberti* and *extranei heredes*[10].

In all these cases the marriage was void, not merely at civil law; it was no marriage at all[11]. In some of the cases, *e.g. tutores* and Jews, it was punishable[12]. In some, *e.g.* provincial magistrates, the marriage was validated for the future if when the prohibition ceased to apply the parties were still living together[13].

(*c*) Relationship and connexion by marriage.

1. Blood relationship. The rule in the empire is simple. Ascendant and descendant could never intermarry[14]. Other relatives could not, whether of the whole or half blood, if either of them was only one degree from the common ancestor[15]. Uncle and niece, great-uncle and great-niece could not intermarry, but cousins could[16]. The rule applied

1 Till the *l. Canuleia*, attributed to 444 B.C., patrician and plebeian could not intermarry, Livy, 4. 2 Ulp. 13. 16. 2; D. 23. 2. 23; h. t. 31, 44. pr. 3 C. 5. 5. 7; C. 5. 27. 1. 4 C. 5. 4. 23. 5 Nov. 117. 6. 6 48. 5. 41. pr. 7 C. 1. 9. 6. 8 23. 2. 57, 63. Not his daughter, 23. 2. 38. The rule has the double object of preventing: (1) abuse of power, and (2) relations which would weaken his devotion to Rome of which he was the representative. 9 23. 2. 36, 59, 60, 66. 10 23. 2. 59, 60. 6, 64, 66; C. 5. 6. 4. Not to daughter marrying *pupillus*, 23. 2. 64. 2. 11 The prohibitions of *l. Iulia* and *l. Papia*, at first mere prohibitions, were interpreted by *scc.* as nullifying, 23. 1. 16; 23. 2. 16. pr. 12 *Tutor*, 23. 2. 64, 66. pr.; C. 5. 6. 7 (infamy as well); Jew, C. 1. 9. 6. 13 23. 2. 65. 1; C. 5. 4. 6. 14 G. 1. 59; Ulp. 5. 6; Inst. 1. 10. 1. 15 G. 1. 60, 61; Coll. 6. 3. 1; Inst. 1. 10. 2. 16 Ulp. 5. 6.

whether the relation was civil or not, and even though one or both had been born in slavery[1]. Claudius, desiring to marry his niece Agrippina, allowed marriage with a brother's daughter, though not with a sister's. The sons of Constantine declared such a marriage incestuous and restored the old rule[2].

2. Adoptive relationship. As between ascendant and descendant the rule was the same[3]. Between collaterals there was the modification that the bar ceased if the adoptive tie ceased. Thus, while a man might not marry his adoptive daughter or sister, the adoptive father was still barred even though she passed out of the family, while the brother could then marry her, and so also if it was he who was emancipated[4]. The tie being a purely artificial agnation, the bar ceased when that ceased. On the same principle the adoptive tie and resulting bar applied only to the person actually adopted. Thus one could marry his adoptive sister's daughter, there being no agnatic tie and no blood tie, and, for the same reason, his adoptive father's half-sister by the same mother[5]. But so long as a man was in the family he could not marry his adoptive father's aunt on the mother's side, a rule which, as there is no blood or agnatic tie, seems to jar with the others[6]. Justinian changed the rules of adoption so that an *adoptatus* usually stayed in the old agnatic group[7], but these rules were not modified.

3. Relationship by marriage. *Affinitas.* Marriage was forbidden in classical law between a party to a marriage and an ascendant or descendant of the other, *e.g.* mother-in-law, step-mother, daughter-in-law, step-daughter and remoter degrees[8]. In the later empire this was extended to brothers and sisters-in-law[9], but there was no bar to marriage with step-brother or sister. The bar extended, however, to some who cannot be called relatives by marriage. It was forbidden to marry one betrothed to a parent or child[10], though this did not extend to brother and sister. There might be no marriage with a child of a divorcéd wife by a later husband[11].

In these cases of relationship, of all three types, the marriage was not only void; it was incestuous and penalised. In particular, any *dos* given was forfeited to the State[12].

1 *Ante*, § XXIII. Justinian's statement that one who could not marry a woman could not marry her daughter is too wide. Literally it would bar relatives however remote. **2** Tac. *Ann.* 12. 6; Ulp. 5. 6; G. 1. 62; Inst. 1. 10. 3; C. Th. 3. 12. 1. For the temporary revival of the Republican rule forbidding marriage between first cousins, see Ulp. 5. 6; C. 5. 4. 19. In early Rome the prohibition was much wider. See for an exceptional *privilegium*, 23. 2. 57 a. **3** G. 1. 59; Coll. 6. 3. 2; Inst. 1. 10. 1. **4** G. 1. 60, 61; Coll. 6. 3. 2; Inst. 1. 10. 2. **5** 23. 2. 12. 4. **6** 23. 2. 55. **7** *Post*, § XLIV. **8** G. 1. 63; Coll. 6. 3. 3; Inst. 1. 10. 6. **9** C. Th. 3. 12. 2; C. 5. 5. 5. **10** 23. 2. 12. 1, 2. **11** 23. 2. 12. 3. A marriage did not become forbidden *ex post facto*. If my divorced wife married and I afterwards adrogated her husband, the marriage remained good. 23. 2. 12. pr. **12** Ulp. 5. 7; C. 5. 5. 4, 6.

XLII. Death or slavery of either party ended marriage[1]. Deportation, though it involved loss of *civitas*, did not necessarily end the marriage, though it ceased to be a civil marriage, and *potestas* over children was destroyed[2].

Divorce ended marriage, and in the relaxed social morality of the empire this became extremely common[3]. In the republic and in the earlier classical law the *paterfamilias* had full power to end by divorce the marriage of his child. A text of Paul which says that Pius forbade the separation of a *bene concordans matrimonium* by the father[4] probably refers to divorce (though another text suggests that it merely means that, though the divorce was valid, he could not compel actual separation[5]). M. Aurelius understood it in the fuller sense and confirmed it[6]. The power to divorce a son or daughter for *magna causa* survived to Justinian[7].

Divorce by the parties themselves is more important. The conception of *liberum matrimonium*, predominant in the empire, involved the right of the parties to end a marriage at any moment by agreement[8], but the facility went much further. It was open to either party to end the marriage by *repudium*, involving a formal *libellus repudii* sealed by seven witnesses[9]. There was a partial exception. A *liberta* married to her patron, though she could technically divorce him, did not thereby acquire the liberty of action which ordinarily results from divorce. She could not marry another or reclaim her *dos*. But the marriage was, apparently, ended[10], and presumably a child born after the period of gestation would not be born *ex iustis nuptiis*. Absolute freedom remained the law, till Justinian forbade divorce by mutual consent except for certain religious objects, a rule repealed by his successor immediately on his death[11]. But divorce, though free, might involve penalties. In the republic a causeless divorce would involve a *nota censoria*, and we have seen that it also involved penalisation in respect of *dos*[12]. When the empire became Christian there was much legislation on the matter. Constantine enacted that for *repudium* apart from certain specified causes, over and above the penalties in matter of *dos*, the woman might be deported and the man might not marry again; if he did, the divorced wife might seize the second wife's *dos*[13]. Ninety years later the

1 As to effect of captivity, *ante*, § XXIV. 2 G. 1. 128; Ulp. 10. 3; Inst. 1. 12. 1; D. 24. 1. 13. 1; 24. 3. 56; 48. 20. 5. 1; etc. 3 The *Laudatio Turiae* of the time of Aug. records as rare the fact of a long marriage not interrupted by divorce. See Girard, *Textes*, 813. 4 P. 5. 6. 15. 5 Vat. Fr. 116. 6 C. 5. 17. 5; P. 2. 19. 2. 7 C. 5. 17. 5. 8 Justinian's Code retains an enactment of Alexander (C. 8. 38. 2) which says that, in view of the traditional liberty of marriage, pacts not to divorce or for a penalty in case of divorce are void. It does not appear that the consent of the *paterfamilias* of the husband was essential to divorce. As to the wife, 24. 2. 5 suggests the opposite. 9 24. 1. 35; 24. 2. 9. 10 23. 2. 45; 24. 2. 11. 11 Nov. 117; Nov. 140. 12 *Ante*, § XL. 13 C. Th. 3. 16. 1.

extreme penalty was restricted to cases where there was no reason at all; if there was an insufficient reason the wife might not remarry and the husband not for two years[1]. These rules were not preserved by Justinian[2], but he kept analogous provisions of A.D. 449[3] and set up a number of other legitimate causes of divorce[4]. Finally he provided that, for divorce not for a recognised cause, the wife should be confined in a nunnery for life, her property being forfeited to various uses including the nunnery; the husband was subject only to money penalties[5]. In all this it must be noted that the divorce was valid.

There was also legislation aimed at preserving for the children of the first marriage the *dos* and *donatio* connected with it, in the event of any remarriage of the parties[6].

XLIII. *MANUS.* At a sacrifice of order, but for convenience, it is best to consider now the very different relations set up by a marriage with *manus*[7]. No doubt there was a time when all Roman marriage was with *manus*, but so early as the XII Tables there seem to have been devices for evading it[8]. At the end of the republic it was in decay and it seems to have died out altogether not long after Gaius. Ulpian, Paul and Papinian indeed all mention *manus*[9], but most of the allusions are not such as to suggest that it was still real. There is at least an allusion to it even in the Digest[10].

Manus placed the wife *loco filiae* and made her the sister of her own children. Her acquisitions vested in the *paterfamilias*, and she had the same right of succession[11] as a daughter. But the traditions of the *ll. regiae* suggest that in practice there were more restrictions on the right of the husband than on those of the father[12]. There is no sign of surrender for *noxa*, or of giving in adoption, or of the right of transferring her by *mancipatio*, like a son. In *coemptio fiduciae causa* the factitious husband sold the woman into civil bondage[13], but this shews only that

1 C. Th. 3. 16. 2. 2 See, however, C. 9. 9. 34. 3 C. 5. 17. 8. 4 C. 5. 17. 10, 11. 5 Nov. 117. 6 C. 5. 9 and 10. There are obvious reasons for forbidding remarriage of widows immediately on the husband's death. The marriage however was not void, and in classical law the woman does not seem to have incurred any penalty, but her father, if he authorised it, and the husband and his father became *infames* (see Greenidge, *Infamia*, p. 127) if the remarriage was within the year of mourning (3. 2. 1; Vat. Fr. 320). As a corollary a widow was for a time after the husband's death free from the penalties of celibacy. Ulpian, 14, gives the periods. In later law the woman was more directly reached. She became *infamis*, which was not a notion applicable to women in earlier law (*ante*, § XXXIII). She forfeited benefits from her husband's estate and any honorific rank which she held. (C. Th. 3. 8. 1; C. 5. 9. 1, 2.) 7 G. 1. 108 sqq. 8 G. 1. 111. It is however probable that at that time the idea of Roman marriage and *manus* were inseparable and the effect of the *trinoctium abesse* was to prevent the relation from being a marriage at all. 9 Ulp. 24. 23; Vat. Fr. 115; Coll. 4. 7. 1. 10 32. 41. 7, "*mater familias facta*" by the death of her husband. 11 G. 2. 96, 139; Coll. 16. 2. 3. 12 Bruns, 1. 68; Girard, *Textes*, 6. 13 *Post*, § XLVIII.

a real sale was not expressly forbidden by law, not that it was ever practised[1]. According to tradition divorce from *manus* apart from certain justifications was penalised by Romulus[2].

Three ways of acquiring *manus* are recorded.

1. *Confarreatio.* This was a religious ceremony at the altar of *Iupiter Farreus* before the *Pontifex Maximus* and the *Flamen Dialis.* As in all early ritual acts there must be witnesses, here ten, perhaps representing the ten *curiae.* There was a sacrifice and the consumption of a cake of *far*, and what Gaius describes as *complura* ritual acts of which we have indications which need not be stated[3]. It was essentially patrician. It was a necessary qualification for the post of *rex sacrorum*, or the three major flaminates, to be a party to, and issue of, a confarreate marriage[4]. When at the end of the republic *manus* was unpopular, it was difficult to find persons so qualified, and Tiberius therefore provided that one who married a *flamen Dialis* should pass into *manus* only *quoad sacra*, and in other matters should be as if not in *manus*[5]. This probably applied to the other *flamines maiores* and an imperfect text of Gaius may mean that it covered all cases of *confarreatio*[6]. Indeed the story of Tacitus suggests that this had gone out of use except for these cases, the office of *flamen* thus tending to become hereditary. Nothing is heard of *confarreatio* after Ulpian[7].

2. *Coemptio.* This was essentially a modified form of bride purchase. As described by Gaius it was a sale of the wife to the husband *per aes et libram*[8], *i.e.* by the formal method used for the transfer of property in civil law, *mancipatio*[9]. But it was not quite a *mancipatio.* The words used were different and so framed as not to treat her as a thing sold[10]. Further, she was not sold, but sold herself with the *auctoritas* of her father or *tutor*, according as she was or was not *alieni iuris*[11]. *Coemptio* must have been the usual mode of creation of *manus* in the time of Gaius, so far as real *manus* still existed, but it was by this time more important in certain fictitious applications of the process, called *coemptio fiduciae causa.* Cicero, attacking the lawyers, says they had perverted *coemptio* and used it to destroy *sacra*[12]. This may be no more than collusive

1 Such a relatively late and artificial device hardly proves anything for early law. 2 See n. 4. 3 G. 1. 112; Ulp. 9, Boethius in *Top.* 3. 14. 4 G. 1. 112. 5 Tac. *Ann.* 4. 16. Little is known of the others, *Quirinalis* and *Martialis*, see Daremberg et Saglio, *Dict. des Ant.* s.v. *Flamen.* 6 G. 1. 136. But the enactment there referred to seems to be of 11 B.C., the year in which the *flamen Dialis* was re-established (Suet. Aug. 31), *i.e.* earlier than that mentioned by Tacitus who refers also to this earlier legislation. 7 Ulp. 9. 8 G. 1. 113. 9 See *post*, § LXXXV. 10 G. 1. 123. 11 G. 1. 115; Coll. 4. 2. 3; 4. 7. 1. It is possible that in primitive Rome she was actually sold. Some late traditions (see Bruns, 2. 74 sqq.) suggest that the sale was mutual (*coemptio*), but it is not a necessary implication of the word and is in itself improbable. 12 *Pro Murena*, 12. 27.

marriage with a childless old man who would acquire the woman's property, which she would regain at his death, while the *sacra* were destroyed by the marriage. But it may have been more complex, the first application of a system fully developed later and applied in two other cases[1]. A woman *sui iuris*, of any age, was normally under guardianship. She could do no important act tending to diminish her property without the leave of her *tutor*, and an *ingenua* could not make a will at all, even with his leave, unless she had passed out of her original family by *coemptio* and *remancipatio*[2]. These rules have their origin in the original conception of *tutela*. The *tutor* was the person who would take the property if the ward died, and the *tutela* was in the interest of the *tutores* themselves, or, rather, for the protection of the family property. The present device was a means of transferring the woman to a *tutor* whose control was unreal, since his *auctoritas* could be compelled. Gaius tells us that she gave herself by *coemptio* to anyone, with consent of her original *tutor*, for the purpose of the change. The *coemptio* was purely formal, *dicis gratia*, provided she did not choose her husband for the purpose; if she did she would be *in loco filiae*[3]. The *coemptionator* must at her request hand her over by *remancipatio* to a person of her choice, on trust to manumit her. On manumission she passed under the *tutela* of the manumitter, who could be compelled to authorise her acts, and by whose formal authorisation she could make a will. The *fiducia* or trust was not applied to the *coemptio*, which was purely formal, but to the *remancipatio*. Hence it was not called *coemptio cum fiducia*, but *coemptio fiduciae causa* or *coemptio fiduciaria*[4]. When Hadrian allowed all women to make wills with the consent of the *tutor* this process ceased to be necessary for the purpose of getting the right of testation[5], but Gaius

1 G. 1. 115. He does not mention the case of the *sacra*. The passage in Cicero shews however that the powerless tutor was already in existence. 2 As to *tutela mulierum*, *post*, § LX. The rule in wills was a survival from the original will before the *comitia*, which a woman could not have made. It was not inevitable under the later forms. Its limited survival as stated aimed at the preservation of the family property. The original *tutores* were those who would take her property if she died, the agnates being the chief and most usual case. It is possible that the rule that even with their consent she could not make a will is due to the fact that the present agnates might not be those who would be alive at her death, so that they would be depriving other successors. 3 G. 1. 115 b. The *tutor* might be willing to consent as the right of succession might not compensate for the trouble of constant supervision. But the practice may possibly be later than the abolition of agnatic *tutela* over women, which disappeared a century before Gaius wrote. The testamentary *tutores* then usual had, as such, no interest in her property. Emancipation which left the former *paterfamilias* as *legitimus tutor* presumably made it possible for him to authorise a will. 4 G. 1. 115, 115 a. We are not told how the *fiducia* was enforced, or how the *coemptionator* was compelled to remancipate. For the later steps it is not likely that the *actio fiduciae* was the remedy (*post*, § CLI). The matter is disputed. See Coll. 2. 3. 1, and Jacquelin, *De la Fiducie*, 103 sqq. 5 G. 1. 115 a.

speaks of it as still applied for the purpose of change of *tutores*. In his time the *tutela* of a woman's agnates was gone, and the only case in which the *tutor* of an *ingenua* had any real power was that of an emancipating father. But Gaius speaks of her getting rid of her *tutores* and in his time there could be no plurality of *tutores* of an *ingenua* with this oppressive power[1]. Thus so far as *ingenuae* are concerned, it was now merely one of the many devices by which in classical law a woman could change her tutors, not because of their oppressive power, but precisely because they had none at all. It is perhaps in this sense that Ulpian still mentions it[2].

3. *Usus*. This was presumably originally a rule that one year's cohabitation turned an unrecognised and informal union into a marriage. As we know it, it was a rule that *manus* was superadded to marriage by one year's cohabitation. But as early as the XII Tables[3] it was provided that this could be avoided by *trinoctium abesse*, *i.e.* by the wife's absenting herself from the husband's house for three nights in each year[4], the absence being intentional and for this purpose. This was the earliest mode of creation of *manus* to disappear. It existed in the last century of the republic[5], but Gaius tells us that in his time it was gone, partly by enactments (of which we know nothing), and partly by desuetude[6].

Where there was *manus*, divorce would not necessarily be so simple. It is likely that at one time there could be no divorce from *confarreatio*; there was none in classical times for actual *flamines*[7]. But in other cases there was a process called *diffarreatio*, a reversal of the union carried out by religious observances in a similar way[8]. From the language of Gaius it seems probable that after the change made by Tiberius in the effect of *confarreatio* the wife could, here too, divorce or be divorced by mere *repudium*[9]. In the other two cases, divorce was effected by what was substantially the process for emancipating a daughter[10]. On the question whether the wife could compel this in real marriage-*manus* Gaius, in a defective text, seems to contradict himself. The passage has been explained as meaning that she could destroy the marriage aspect of the *manus* by a *libellus repudii*, and then compel *remancipatio* as if she had not been a wife at all[11].

XLIV. The next mode of acquisition of *patria potestas* is by Adoption, *i.e.* the acquiring, by voluntary process, of *potestas* over persons not

1 He may be referring to the case of a *libertina in tutela* of *liberi patroni* or joint patrons, whose power was real, *post*, § LX. 2 Ulp. 11. 5. 3 G. 1. 111; Aul. Gell. 3. 2. 13 sq. 4 *Ibid.* 5 Aul. Gell. mentions Q. M. Scaevola as treating it. From the expression "*trinoctium*" it has been inferred that the nights must be successive. 6 G. 1. 110, 111. 7 It needed an imperial dispensation, Plutarch, *Quaest. Rom.* 50. 8 Festus, vo *Diffarreatio*. 9 G. 1. 118, 136. 10 G. 1. 137. 11 G. 1. 137 a.

born into the family[1]. The adoption of a person previously *sui iuris*, was *adrogatio*; the transfer of a person *alieni iuris* from one family to another was *adoptio*[2], though this name was also used in a wide sense to cover both. They differed greatly in their character and forms.

ADOPTIO, of a person *alieni iuris*. The elaborate form is derived from a rule of the XII Tables (aimed at checking the cruelty and avarice of some fathers), which provided that if a father sold a son three times the son should be free from *potestas*[3]. The *potestas* being in principle indestructible, the rule was seized on as a means of ending it at will. The process, as we know it in classical law, was as follows: The father, *A*, sold *X*, the son, to *B*. *B* freed him and he reverted to *A*'s *potestas*. This was repeated. There was then a third sale which destroyed the *potestas* and left the son in bondage to *B*. *C*, the intending adoptor, now brought a collusive action against *B* claiming *X* as his son. There was no defence and judgment went accordingly. *B* and *C* might be the same person, but in that case *X* would be sold back to *A* after the third sale, and the claim made against *A*, a method often adopted apart from this consideration[4]. As the Tables speak of selling *filium* three times, the pontifical lawyers held, quite illogically (it is a mere subterfuge), that one sale sufficed for a daughter or grandchild[5]. The sale was by the formal *mancipatio*. It will be observed that the whole transaction had two parts, a preliminary sale or sales to destroy the *potestas*, and the act of adoption, the claim and declaration in court[6]. The vendee could be compelled to carry out the necessary releases by the magistrate, the *mancipatio* being fiduciary[7].

In classical times it was recognised that the sales were empty forms, any defect in them being remediable by the Emperor[8], the appearance before the magistrate being the essential. Justinian, recognising the uselessness of the sales, dispensed with them; all that was now needed was for the parties to go before the magistrate and have the transaction entered on the *acta* of the court[9]. There was no fictitious action, but the essence was preserved[10].

The effect of *adoptio* in classical law was to remove the person adopted from one *potestas* (and ordinarily from one agnatic group[11]) to another. The cognatic tie was unaffected[12]. The *adoptatus* acquired the

1 This definition will however include legitimation (*post*, § XLVI) which may be thought of as a kind of adoption confined to a man's own children by a *concubina*. 2 G. 1. 98, 99; Ulp. 8. 12. 3 G. 1. 132; Ulp. 10. 1. 4 G. 1. 99, 132–134. The mancipations need not be on the same day or with the same witnesses, P. 2. 25. 2. 5 G. 1. 134. 6 This is essentially *cessio in iure*, a form of conveyance, *post*, § LXXXIV. 7 *Post*, § CLI. 8 1. 7. 38. It might be on a *dies feriata*, P. 2. 25. 3. 9 Inst. 1. 12. 8; C. 8. 47. 11. 10 Gaius, Ulpian and Justinian all describe it as done essentially by the magistrate. G. 1. 98; Ulp. 8. 2; Inst. 1. 11. 1. 11 Adoption by a paternal uncle would leave him in the same agnatic group. 12 *Post*, § CXXX.

rights of a natural son, but they depended on the agnatic tie, and ceased absolutely if he passed out of his new family by emancipation[1]: he became an *emancipatus* of his real father[2]. But the adoption affected only himself; if he already had children they remained in the old family[3], and, on principles already stated, any child conceived while the *potestas* was undestroyed, *i.e.* before the third sale, was in the same position. Those conceived later were in the new family. But the father did not get all the advantages of a natural son. Thus the possession of a certain number of children gave advantages in the law of succession and exemption from irksome duties, but adoptive children did not, and the natural father did not lose them[4].

It was possible to adopt one's own child, not in one's *potestas*, even though he had been given in adoption to another[5], but a son so readopted was a new person. He did not again become the father of any children he had left in the family. A grandson so readopted would not again become the son of his father or his *suus heres* on the death of the grandfather[6]. And though an adoptive child might be emancipated or given in adoption, he could not be readopted[7].

A person might be adopted not as a son but as a grandson, even if there were no son, and might be attached as a son to any son, with his consent[8], in which case he would be a *suus heres* of the son but not of the adoptor.

Justinian made a sweeping change in the effect of adoption. Observing that there had been doubts among classical lawyers as to the rights a child given in adoption retained in the estate of his natural father, and that adoption lightly undertaken might be ended equally capriciously, so that the child would be in neither family, he provided that for the future the adoptive child should retain all his rights of succession in his old family and acquire only a right of succession on intestacy in the new, with no right of complaint if he was passed over in the will, and conversely, such acquisitions of the child as under his law went to the father for life (*bona adventitia*[9]) should go to the natural father. And the child did not pass into the *potestas* of the adoptive father[10]. To such cases Justinian gave the name *adoptio minus plena*, but in two cases he allowed the old law still to apply and these he called *adoptio plena*. These were (1) where the adoptor was a natural ascendant, in which case there was not the same risk of caprice[11], and (2) where a grandchild was given in adoption while his father was alive[12]. Here he

1 1. 7. 13. **2** G. 2. 137. **3** 1. 7. 40. pr. **4** G. 3. 41, 49; D. 31. 51. 1; Inst. 1. 25. pr., etc. A person of senatorian rank adopted by a *plebeius* was still a *senatorius*. But an *adoptatus* got the benefit of any improvement. 1. 7. 35. **5** 1. 7. 12. **6** 1. 7. 41. **7** 1. 7. 37. 1. **8** Ulp. 8. 7; Inst. 1. 11. 5; D. 1. 7. 6, 10, 11, **9** *Post*, § XCIX. **10** Inst. 1. 11. 2; C. 8. 47. 10. **11** Inst. 1. 11. 2; C. 8. 47. 10. 1 a. **12** C. 8. 47. 10. 4.

was not a *suus heres* and had technically no rights to lose. But the exception did not apply if, in the event, the father died before the grandfather, so that, but for the adoption, he would have been a *suus heres*. In that event the *adoptio* at once became *minus plena*[1].

The principle *adoptio naturam imitatur* was the source of several rules. Thus, though an adoptor need not be married, one who from physical defect was incapable of marriage could not adopt[2]. The adoptor must be old enough to be the father, and Justinian fixed the difference at 18 years[3], *plena pubertas*, the latest age at which maturity might be expected, with presumably proportionate increase where the adoption was in a remoter degree.

Women being incapable of *patria potestas* could not adopt in classical law[4]. But Diocletian in A.D. 291 allowed adoption as a consolation to a woman who had lost her children, and Justinian accepted this as a general rule, requiring however the permission of the Emperor[5]. Diocletian's case seems to have been of a person *sui iuris*, but Justinian's rule was not so limited. The effect of the adoption would be to give the ordinary right of succession, but, of course, no *potestas*.

Adoption, being in form a *legis actio*, could not be subject to *condicio* or *dies*; such a thing no doubt made it void[6].

The question whether the consent of the *adoptatus* was necessary for classical law is obscure. We may be certain that it was not needed in early law. Justinian says, once as a rule of old law, and once as a rule of his own, not necessarily new, that *contradictio* by the *adoptatus* prevented the adoption[7]. Celsus definitely says that his state of mind was not material, but he is made to follow this with words which say that he must consent or not *contradicere*, words probably added as they follow very closely Justinian's own language[8].

XLV. *ADROGATIO.* Adoption of a person *sui iuris*. This is the more ancient institution and the more important in its effects, since it destroyed a family and merged it in another. Though it underwent certain changes, it retained its essential character unaltered throughout the development of the law. Its original form is an expression of its

1 This seems rather a hidebound view, since he loses his potential rights in his father's family, and the restriction, though quite logical, leaves the evil untouched in the case which is most likely to happen. 2 G. 1. 103; Inst. 1. 11. 9; D. 1. 7. 16. 3 G. 1. 106; Inst. 1. 11. 4; D. 1. 7. 40. 1. interp. 4 G. 1. 104; Ulp. 8. 8 a. 5 Inst. 1. 11. 10; C. 8. 47. 5. 6 See 1. 7. 34. In 50. 17. 77 this is said of *emancipatio*, of which the form is essentially the same but it is probable that Papinian said *mancipatio*. 7 C. 8. 47. 10. pr.; h. t. 11. 8 1. 7. 5, there is no reason to think *infantes* could not be adopted, and it is clear that *impuberes* could: the fact that the requirement was "*non contradicere*" will save the rule for *infantes*, but if the consent of the *impubes* was given we should expect to see cases of *restitutio in integrum*, but we do not, except in *adrogatio*, where his consent was needed.

importance. There was a preliminary investigation by the pontiffs to decide whether in the actual case it was admissible[1]; they considered the question whether it satisfied the legal requirements, but it is hardly possible to set limits to the further factors which they took into account. It would perhaps be more true to say that they gradually created the standing restrictions as we know them, and considered also the material aspects of the individual case. If they approved, the matter went before the *comitia curiata*, called in this case *c. calata*, summoned in a special way, meeting on special days for this and other purposes affecting *sacra*, and presided over by the *Pontifex Maximus*[2]. The parties were *rogati* whether they assented, and there was a third *rogatio* of the *populus*[3], the vote being probably followed by a solemn *detestatio sacrorum*, renunciation by the *adrogatus* of the *sacra* of the old family[4]. Nominally this continued to be the form up to the time of Diocletian, but the *comitia curiata* fell early into decay, and the really important element was the inquisition by the pontiffs, the *comitia* being represented by 30 lictors[5], as it already was in the time of Cicero[6]. Diocletian abolished the old system, providing that it might be done by imperial rescript, which is in effect no change of principle, the existing legislative authority being substituted for the original[7].

The effect of *adrogatio* was to bring the *adrogatus* completely into the family. Like the *adoptatus* he became a *filiusfamilias* therein, but he brought with him all those in his *potestas*[8]. The *adrogator* acquired, in principle, all his property, while, as the *adrogatus* was *capite minutus*, his obligations *ex contractu* and *quasi ex contractu* ceased, at civil law, to exist, an injustice remedied by the praetor[9]. And the acquisition by the father was cut down in the Empire in the same way as in the case of any other *filiusfamilias*[10]. The principle that the adopted person got the advantage of improvement in status but did not decline held good with two exceptions. A *libertinus* who was adrogated[11] did not thereby

1 1. 7. 15. 2; h. t 17; Cicero, *de domo*, 13, 14 (34–38); Aul. Gell. 5. 19. **2** Aul. Gell. 5. 19; Mommsen, *Staatsr.* 2. 27; *D.P.R.* 3. 41. **3** G. 1. 99. **4** Mommsen, *Staatsr.* 3. 38, 318; *D.P.R.* 6. 1. 41, 362. *Detestatio* is sometimes differently explained. See Girard, *Manuel*, 175. The *rogationes* are submitted by the presiding *pontifex*. **5** Corresponding to the 30 *curiae*. As it is "*auspicatum*," Cicero, *de l. agr.* 2. 12. 31, the augurs are present. **6** Cicero, *loc. cit.* **7** C. 8. 47. 2, 6. The college of pontiffs being obsolete, the enquiry was conducted by imperial officials. In D. 1. 7. 20, 21, mention is made of the *adrogatio* of females by rescript. If these texts are unaltered, the method, at least exceptionally, is as old as Gaius. **8** G. 1. 107; Inst. 1. 11. 11; D. 1. 17. 15. pr. Though primarily a method of adopting the son of another person, it might obviously be, and frequently was, applied to the adoption of a man's own children not in the *potestas*, *e.g.*, emancipated or born out of wedlock. A freedman not infrequently bought, freed and adrogated his children born in slavery. But in later law a man might not adrogate his child by a concubine, C. 5. 27. 7. 3. **9** *Post*, § CXLI. **10** *Post*, § XCIX. **11** As to this, *post*, p. 127.

become an *ingenuus*[1], and a patrician adrogated by a plebeian did become a plebeian[2].

The restrictions stated in connexion with *adoptio* applied also here, but there were many more. *Adrogatio* destroyed a family and thus was allowed only to save another, *i.e.* to provide a *heres*. Hence the very careful investigation into the circumstances, the character of the *adrogator*, his motives, etc.[3], and hence also the fact that it needed the consent of the legislature. Nearly all the special restrictions are due to these characteristics. The chief are the following:

So long as it was done before the *comitia* it was necessarily at Rome, as the *comitia* sat there[4]. When it was by imperial rescript it might be anywhere. As a woman had no standing before the *comitia* she could not be adrogated[5]; there was no difficulty when it was done by rescript[6], but there was small advantage in it, for though she would continue the family for a generation, it must necessarily then fail, as she would be sole successor and could have no *sui heredes*. An *impubes* could not be adrogated in early law[7], perhaps for the same reason, but there was the further practical reason that to allow it was to put an easily abused power into the hands of his *tutores*[8]. Antoninus Pius, however, allowed it[9], even under the old system, subject to special rules. There was a careful investigation from the point of view of advantage to the child[10]. The *auctoritas* of *tutores* was required[11], and the *adrogator* gave security that, in the event of death of the *adrogatus* still *impubes* his property should be restored to those who would have taken it if he had not been adrogated[12]. There was a difficulty as to the person to whom this security had to be given, for, though it preceded the adrogation, the rights, if it had been given to the child himself, would have vested in the *adrogator*, the person liable. The solution found was to give the security to a public slave, perhaps with an incorrect idea that those entitled were part owners of the slave, as members of the public[13], the persons concerned

1 1. 5. 27; 1. 7. 46; 23. 2. 32; 38. 2. 49. **2** Cicero, *de domo*, 14 (34–38). Clodius was thus adrogated so as to be eligible for the tribunate of the *plebs*. Cicero attacks the proceedings, but never makes the point that it would not make him a plebeian. But by this time plebeians were rather a different than a lower order. **3** Cicero, *de domo*, 14. 36; D. 1. 7. 15. 2. 17. **4** G. 1. 100; Ulp. 8. 4. **5** G. 1. 101. He says "*magis placuit.*" There had been doubts. **6** 1. 7. 20, 21. **7** G. 1. 102. His language seems to imply that it was occasionally allowed before the change made by Pius. **8** Aul. Gell. 5. 19. 10. **9** G. 1. 102; Ulp. 8. 5. **10** 1. 7. 17. 1, 2. **11** 1. 7. 17. 1. Not enough in itself: the text notes that it would enable the *tutor* to end a pupillary substitution. **12** Inst. 1. 11. 3. **13** 1. 7. 18 (*Utilis actio* if security not given, h. t. 19. 1). Saleilles puts it down (*Personnalité juridique*, 89 sqq.) to a much more subtle notion. The personality of the *universitas*, though distinct, subsumed those of the members, not as titularies but as beneficiaries, like our cestui que trust, which is of course consistent with the *utiles actiones*. But the notion of *utiles actiones* to third parties really interested is a late

having *utiles actiones*[1], a rule which shews that it was recognised that there was no real ownership. It is perhaps the public rather than the "common" quality of the slave which accounts for his use, since in a parallel case we are told that the security could be given to a municipal magistrate[2], and it is certainly the decisive point under Justinian when it could be given to a *tabularius* who was a public official[3] and not a slave. If the *adrogator* emancipated the *adrogatus*, *impubes*, he had to restore his property at once. If he disinherited him, the *adrogatus* could claim it at his death, and in this case, and where he had emancipated without shewing cause to a court, the *adrogatus* might claim a quarter of the estate of the dead man (*quarta antonina*), *i.e.* exactly what an only child was entitled to claim against a will, unless justly disinherited[4]. It is probable but not certain that these latter liabilities were covered by the security[5]. If the *adrogatus* reached the age of puberty all these securities and liabilities were ended, and he was an ordinary *adrogatus*, except that he could have the *adrogatio* set aside by a forced *emancipatio*, at any rate if he could shew good cause[6].

Since it was allowed only as a last resort, to save a family, no one might adrogate more than one, or any, if he had a child already[7]. He must be 60 or from some cause unlikely to have children[8]. The question whether it would leave others to attend to the *sacra* of the ancestors of the *adrogatus* was also material[9]. One under 25 could not be adrogated by one who had been his *tutor* or *curator*[10], and consent of his *curator* was necessary[11]. All these restrictions might be overridden for sufficient cause; it was in the discretion of the controlling authorities, and an *adrogatio* which broke these rules was valid if actually carried out[12]. It does not appear that an *adrogator* need be married[13].

A *libertinus* could be adopted by an *ingenuus*, in early law, but did not thereby become an *ingenuus*[14]. In classical law he must not be adopted by any one but his patron[15]. But, here too, if the *adrogatio* was carried through *per obreptionem*, it was valid[16]; *non debet fieri sed factum valet*. But his patron's rights were not affected.

As the *adrogatus* was an active party in the process, it is clear that his

one and cannot be dated back to the origin of this method in *tutela*. And the notion will not explain the fact that in *tutela* it could be given to municipal magistrates (27. 8. 1. 15, 16).

1 28. 6. 40. 2 27. 8. 1. 15, 16. 3 Inst. 1. 11. 3. 4 Inst. 1. 11. 3; 37. 6. 1. 21; *post*, § CXIV. 5 1. 7. 20. 6 h. t. 32. pr. 33. He recovers *pristinum ius* which presumably means his property as well. 7 1. 7. 15. 3, 17. 3; C. 8. 47. 3. 8 1. 7. 15. 2. 9 Cicero, *de domo*, 14. 10 1. 7. 17, lest he evade the responsibility of accounting, cf. 1. 7. 32. 1. 11 1. 7. 8. 12 Arg. 1. 7. 17; cf. 38. 2. 49. 13 There is no evidence to the contrary in classical law, and Ulp. 8. 6 and D. 1. 7. 30 are not confined to *adoptio* in the narrow sense. 14 38. 2. 49; Aul. Gell. 5. 19. 10, 11. 15 1. 7. 15. 3. 16 2. 4. 10. 2; 38. 2. 49.

assent was necessary[1], and thus, if he was insane, he could not be adrogated for lack of assent[2]. If deaf or dumb he could not be, since he could not take part in the formal act. This would not be the case in *adoptio*[3].

There were some exceptional forms of adoption.

Adoption by will. At the close of the Republic and early in the Empire there are recorded in literary texts a number of cases of adoption by will[4]. The institution is not mentioned in legal texts and its nature is not clear. According to Mommsen, it was an institution as *heres* with a direction that the *institutus* was to enter the family of the testator and was followed by *rogationes in comitiis calatis*, being in effect an *adrogatio* in a somewhat modified form. According to another view it was never more than an *institutio* with a direction to take the name of the testator (which was common in the Empire), and had no effect on the family relations of the *heres*, though in one or two exceptional cases, for political reasons, the *institutus* did subsequently procure a transfer to the testator's family by *rogationes*[5].

Adoption of slaves. Justinian records a dictum of Cato[6] that owners could adopt their slaves. Whether this was by collusive conveyance, followed by *cessio in iure*, *i.e.* *adoptio*, or by *adrogatio*, is not certain; the latter is the most accepted view[7]. There is no trace of the institution in the classical law. The rule to which Justinian refers in the same text (and regulates elsewhere[8]) is merely that if a master formally declares that he regards a certain slave as his son (which he might be, in fact), this, though void as an adoption, might effect a manumission[9].

Aulus Gellius speaks of masters giving their slaves in adoption[10] and he says that ancient lawyers had held this lawful, though it clearly no longer existed. This was *adoptio*, for it was done *apud praetorem*. It would consist of the claim (*cessio in iure*) only, for the triple sale would not be needed as there was no *patria potestas* to destroy. In later law the result would be reached by manumission followed by adrogation. There would be no difficulty if, as would often be the case, the *adrogator* was a *libertinus*, father of the slave. And if, though an *ingenuus*, he was actually the father, it would no doubt be permitted, the son remaining a *libertinus*.

XLVI. LEGITIMATION. The *patria potestas* could also be acquired by legitimation. *Concubinatus* was a recognised connexion short of marri-

1 1. 7. 24. 2 Arg. 1. 7. 5; h. t. 42. 3 As to the effects of *adrogatio* on property, *post*, § CXLI. 4 This is a much more important institution in Greek law where it was in fact the only way of appointing specially a *heres*. See Daremberg et Saglio, *Dict. des Antiq.* s.v. *Testament*. 5 See for a list of the cases and discussion of these views, Michel, *Droit de Cité Romaine*, 240 sqq. 6 Inst. 1. 11. 12. 7 The fact that a slave has no standing *in comitiis* is more or less met by the fact that the proceeding makes him *capax*. 8 C. 7. 6. 1. 10. 9 *Ante*, § XXVII. 10 Aul. Gell. 5. 19. 13.

age[1], which seems to owe its recognition as a legal institution to the restrictive legislation of the early empire on marriage, in particular the rules forbidding soldiers on service to marry and restricting the marriage of provincial officials[2]. It seems to have been encouraged by the immorality of Roman women of high rank; men sometimes preferred to contract this union with women of lower class but higher character. It was a permanent relation, free from the stigma of *stuprum*, but ordinarily involving a certain loss of caste in the woman[3], so that while it did occur between those of equal rank[4], and even rarely between women of high rank and men of lower[5], there was usually a marked difference of rank the other way[6]. It might be with any woman capable of Roman marriage, and, after Severus, it might be with a peregrine. It might always have been with a man's own slave[7]. Constantine, however, forbade it between persons of senatorian rank and *libertinae* and the abject persons grouped with them[8]. It was subject to many restrictions similar to those of marriage. Thus a man might not have a wife and a concubine or two *concubinae*[9]. The parties must not be so near akin that marriage would be barred[10]. Like marriage, *concubinatus* could not exist between *tutor* and ward[11]. There must be marriageable age and consent[12]. Thus it was not always easy to tell concubinage from marriage. *Dos* was the best evidence: there was no *dos* in concubinage, and we have already mentioned the presumptions in favour of marriage. In classical law it produced little legal effect. It was not *stuprum*, but the woman did not take the man's rank[13] and there were no obstacles to gifts between them. The children were not related to the father but he could give or leave property to them, subject to the claims of *legitimi*[14], and if he did leave them anything, he could in effect appoint *tutores* to them[15]. They did not count for the *praemia patrum* under the *leges caducariae*, etc.[16] On the other hand they were cognates of the mother with cognatic succession to her and to her relatives and they counted towards the *ius liberorum*[17]. Towards the end of the classical period we

1 See on the whole subject, Meyer, *Der Römische Konkubinat.* 2 25. 7. 5. 3 23. 2. 41. 1; 25. 7. 3. 1, 5. 4 25. 7. 3. pr.; Meyer, *op. cit.* 46. 5 Meyer, 47*c*, 65. 6 In one case, that of *liberta* and her patron or his son, it was honourable and she was still entitled to the name of *matrona* (25. 7. 1. pr.; 48. 5. 14. pr.), and, as in marriage, she could not end it of her own will, at any rate where the manumission was voluntary (*ibid.*). 7 Meyer, 63 sqq., 47*b*, 74. 8 C. Th. 4. 6. 3; C. 5. 27. 1. The enactment deprives offenders of *civitas*. Modified in Nov. 89. 15. Some high officials were here ranked with *senatorii*. 9 P. 2. 20. 1; C. 5. 26. 1. 10 23. 2. 56; 25. 7. 1. 3; 38. 10. 7. 11 Meyer, *op. cit.* 61. Not the rule as to provincial governors, 25. 7. 5. 12 25. 7. 1. 4. Not, of course, *affectio maritalis*. 13 32. 49. 4. 14 *Post*, § CXIV. The children were *liberi naturales*, as opposed to *iusti* or *legitimi*. The name is also used for actual children as opposed to *liberi adoptivi*. 15 *Post*, § LI. 16 Meyer, *op. cit.* 56 sqq. 17 38. 8. 4; Inst. 3. 5. 4.

get a rule, applied earlier in the case of gentile marriage, which is the germ of the later legitimation. The issue of *concubinae* of soldiers on service acquired, by entering the army, rights of succession to the father, and *civitas* if they were not *cives* already[1].

The Christian empire was somewhat hostile to concubinage. The right to give or leave property to the concubine or the child was destroyed by Constantine, but restored, with limitations on amount, soon after[2], and these rules were varied by a bewildering mass of enactments till post-Roman times[3].

Subsequent Marriage. A change directly affecting the family law was that Constantine provided a means of legitimation. He enacted that, for existing, but not for future cases, marriage of the *concubina* should legitimate children already born, provided she was *ingenua* and not of one of the abject classes, the children consented, and there was no wife or legitimate child. Zeno seems to have repeated this[4]. Anastasius, in A.D. 517[5], laid down a general rule for future cases as well, and for all concubines, capable of marriage, if the children assented, there was no legitimate child, and the marriage was attested by writing and *dos*. Two years later, this was repealed[6]. Justinian by a series of enactments regulated the matter anew, allowing legitimation by subsequent marriage even where the *concubina* was a *libertina*, provided the marriage was attested by *instrumentum dotis* or other writing, the woman was capable of marriage at the conception or birth, and the children consented. Finally he allowed it even if there were legitimate children[7].

Oblatio Curiae. The office of *decurio* (member of the local *curia*) was avoided in later law, since a *decurio* was personally liable for many charges. As part of a scheme to keep the lists full it was provided in A.D. 443 that if a man had no legitimate child, and made his son by a *concubina* a *decurio*, or married his daughter to one, these children might receive all his property and could succeed on intestacy like legitimate children[8]. This was not legitimation; they did not become agnates or cognates of the father's relatives or go into *potestas*. Justinian allowed it where there were legitimate children, provided no more was taken than by any legitimate child. Finally he allowed them to pass into *potestas*, making it true legitimation, so far as the father was concerned, but not with regard to his relatives[9].

Rescriptum principis. Justinian also provided that on petition by a father or request in his will, in which they were instituted, a rescript of legitimation might issue. The petition must shew that he had *liberi*

1 Meyer, *op. cit.* 112. 2 C. Th. 4. 6. 2, 4. 3 Meyer, *op. cit.* 134 sqq. 4 C. 5. 27. 5. 5 C. 5. 27. 6. 6 C. 5. 27. 7. 7 C. 5. 27. 8, 10, 11; Novv. 12. 4, 18. 11, 78. 4. 8 C. 5. 27. 3. 9 C. 5. 27. 9; Inst. 1. 10. 13.

naturales, but no *legitimi*, and that the mother was dead or not worthy of marriage[1].

REVOCATIO IN PATRIAM POTESTATEM. Constantine lays down, and later emperors confirm, a rule that an emancipated son could be recalled to *potestas* for ingratitude, being bound to restore also any gifts he had received[2]. This is therefore another way of acquiring *patria potestas*. It was not exactly a revocation, since the gifts did not revert *ipso facto*. The machinery is not recorded. It was presumably a *capitis deminutio*, and the father's liability on the son's debts was probably as in *adrogatio*[3].

XLVII. We have now to consider how *patria potestas* would end.

It ended in many cases by transfer, *e.g.* where a person *alieni iuris* passed into another family by adoption or entry into *manus*, or adrogation of a *paterfamilias* who had children in *potestas* (in all which cases there was a rupture of agnatic ties), or by death, deportation or enslavement of a grandfather where the father was alive and in the family (where there was no such rupture)[4].

It was destroyed by sale of a daughter or grandchild into civil bondage, involving rupture of agnatic ties, and by three such sales of a son[5]. It was destroyed by death, loss of *civitas* or loss of liberty by the *pater* or the *filius*[6], with rupture of the agnatic ties in the cases other than death, so far as the person deported or enslaved was concerned.

It was also destroyed without effect on the agnatic ties by the acquisition by the *filiusfamilias* of certain dignities. This occurred where a man became a *flamen dialis* or a woman a vestal virgin[7]. These persons passed out of *potestas* without *capitis deminutio*. We do not know the machinery, but from the fact that they did not suffer *capitis deminutio*, and the language of Aulus Gellius[8], it seems likely that there was no act by the *paterfamilias*. But, so far as vestal virgins are concerned, they hardly became *sui iuris*. They passed under the control of the *populus*, administered by the pontiffs[9]. They acquired the right of testation[10], which did not attach to other *ingenuae* who had not suffered *capitis deminutio*, till long after these had it, so that they were thought of as having property of their own. But their agnates did not succeed to them on intestacy: their goods went to the *populus*[11]. And they could not inherit from anyone[12], so that the continuance of the agnatic

1 Nov. 74. 1, 2. 2 Vat. Fr. 248; C. Th. 8. 14. 1; C. 8. 49. 1; D. 1. 7. 12. 3 *Post*, § CXLI. 4 G. 1. 127; Ulp. 10. 2. 5 The two earlier sales merely suspend it in this case. 6 Subject to the possibility of *postliminium* and *restitutio*, *ante*, §§ XXIV, XXV; D. 48. 23. 7 G. 1. 130; Ulp. 10. 5. 8 G. 3. 114; Aul. Gell. 1. 12. 9 Aul. Gell. 1. 12. 9; Mommsen, *Staatsr.* 2. 54 sqq.; *D.P.R.* 3. 60 sqq. 10 Aul. Gell. 1. 12. 9. 11 *Ibid.* 1. 12. 18. 12 *Ibid.*, *i.e.* at civil law: it does not follow that they were excluded under praetorian law. But no one succeeded to them under either law: "*sed bona eius in publicum redigi aiunt. Id quo iure fiat, quaeritur*," Labeo, quoted Aul. Gell. *loc. cit.*

tie was rather unreal. In later law there were a few other dignities which released from *potestas*[1].

EMANCIPATION. Much more important was voluntary release[2]. The form resembled that of adoption. There were three sales (or one as the case might be)[3] to end the *potestas*. This left the son or daughter in bondage to the vendee. The next step might be a manumission from bondage in the same form as one from slavery, by the vendee, which would have the effect of making the manumitter a quasi patron, with rights of succession and *tutela*. But it was more usual to sell back to the father, who in turn would free, and acquire these rights[4]. The sales were fiduciary with the same modes of enforcement as in *adoptio*[5].

Anastasius provided that where the *filius* was absent the *emancipatio* could be effected by petition to the Emperor, a favourable reply completing the *emancipatio*[6]. Justinian abolished the old forms: emancipation was effected by attendance of all parties before a court, the transaction being entered on the *acta*, as in *adoptio*[7].

The consent of the father was not needed to *emancipatio* by the grandfather[8], and though a child could not ordinarily compel *emancipatio*[9], there were a few cases in which he could. One of these was that of *adrogatus impubes*, for cause[10]. Where a man had a gift by will on condition of emancipating his son he could not claim without doing it. This is no exception[11], but one text seems to mean that where there was such a gift with a *fideicommissum* to emancipate, and the gift was accepted[12], the *emancipatio* could be enforced, though the machinery for enforcing *fideicommissa* of liberty did not apply here. Another text, of Diocletian, but apparently modified by Justinian, may mean that if a mother instituted her child with a condition of *emancipatio*, the father could be compelled to emancipate him[13]. These seem to be the only exceptions[14].

1 Inst. 1. 12. 4; C. 12. 3. 5; Nov. 81. It was also ended in later law by certain forms of misconduct of the *pater*; see Girard, *Manuel*, 192. 2 G. 1. 132 sqq.; Inst. 1. 12. 6 sqq. 3 Where a son was noxally surrendered, Gaius tells us (4. 79) that the Proculians held three sales necessary to transfer him, the Sabinians only one; the requirement in the XII Tables referring only to voluntary transfers. 4 G. 1. 132; Ulp. 10. 1. He took his *peculium* if it was not expressly taken away (39. 5. 31. 2; Vat. Fr. 260), as in *manumissio servi inter vivos* (*ante*, § XXVI). 5 Inst. 3. 2. 8. In a recorded case, there is an express *fiducia* to remancipate. Oddly, though it is a daughter, there are three sales, Girard, *Textes*, 825. 6 C. 8. 48. 5. 7 Inst. 1. 12. 6. 8 1. 7. 28; Inst. 1. 12. 7. 9 1. 7. 31; C. 8. 48. 4. 10 *Ante*, § XLV. 11 P. 4. 13. 1. This is all the text seems to mean. 12 35. 1. 92, 93, *cognitio extraordinaria*, an inference of Paul from a piece of rough justice by Severus, contrary to principle, 35. 1. 92; 30. 114. 8. 13 C. 3. 28. 25. The words "*restituere debet*" at the end have no grammatical connexion with the rest. If they are more than a mere corruption they perhaps mean this. 14 The forfeitures of *potestas* for misconduct do not seem to require *emancipatio*, and a text dealing with cruelty by the father (37. 12. 5) does not seem to mean that there was a right to compel

The consent of the person emancipated seems to have been needed. Paul is clear[1], and Justinian adopts a *lex* of Anastasius which says much the same[2], while in his enactment on *adoptio* he says what might mean the opposite[3]. The rule no doubt was that, as he must be present, he must at least not *contradicere*[4], and Anastasius dispensed with consent in the case of an *infans*[5]. No doubt in the republic it was not needed. But there was no need for compulsory powers. The case of a bad son could be met by disinheriting[6].

We have already seen that the emancipation of an adoptive child totally ended all connexion between him and his adoptive family: he was regarded as having been directly emancipated from his original family[7]. Apart from this point, the primary legal effect of *emancipatio* was to destroy the *potestas*, and with it the agnatic tie[8]: these effects it always retained. But its practical effect underwent great changes. In early law as it absolutely destroyed all civil connexion between the *emancipatus* and his old family, he lost all right of maintenance and all right of succession to his father and his agnates. Rights of succession the other way were not wholly destroyed, since the emancipating *paterfamilias* was "quasi patron," and had from very early times the same rights of succession to the *emancipatus* as the *patronus* had, under the XII Tables, to a freedman[9]. But before the end of the republic an *emancipatus* had acquired at praetorian law a certain right of succession, and his rights in this respect were progressively improved[10] until in the time of Justinian there was little practical difference. The ancestral *sacra*, from which he was presumably excluded, were obsolete long before Justinian's day. Where it was an amicable transaction it was often accompanied by a gift of money and the *emancipatus* usually took his *peculium*[11]. It might be by way of punishment, for the rule that he must not *contradicere* means often submission rather than consent. There probably came to be rights of maintenance against the quasi patron, like those of *libertus* against his patron. An *emancipatus impubes*, or a woman, was under the *tutela* of the quasi patron[12]. In late law an *emancipatus* might have the *tutela* of his unemancipated younger brothers, though this went in principle only to agnates[13].

emancipatio in such a case by any established machinery, but that if the Emperor did in fact by his overriding authority order *emancipatio* in such a case, this also involved forfeiture of any rights of succession.

1 P. 2. 25. 5. But the text is suspected of alteration, and the rule may be post-classical. See Beseler, *Beiträge*, 4. 116. 2 C. 8. 48. 5. 3 C. 8. 47. 10. pr. See *ante*, § XLIV. 4 See C. 8. 47. 11. 5 C. 8. 48. 5. 6 *Abdicatio*, repudiation of a son, an institution of Greek law, is declared by Diocletian to have no place in Roman law, though it was clearly practised then and later, C. 8. 46. 6; Mitteis, *Reichsr. und Volksr.* 212. 7 *Ante*, § XLIV; G. 2. 136, 137. 8 G. 1. 163. 9 *Post*, § CXXXIV. 10 *Post*, § CXXX. 11 Vat. Fr. 255, 260; D. 39. 5. 31. 2. 12 *Post*, §§ LII, LX. 13 *Post*, § LII.

It appears then that in Justinian's time there was little disadvantage in *emancipatio*. The question arises: what evils had he in view when he changed the law of *adoptio*, owing to the possibility of capricious adoption followed by capricious emancipation? He explains the risk as arising in some exceptional cases. Where *A* gives his son *B* in adoption, and dies, *B*, being in another family, has no claim on the estate. Some years later the adoptor emancipates him. He is now an *emancipatus* of his original father, but this does not operate retrospectively, and he is thus excluded from either estate. Even if it were retrospective, the estate may long since have been dissipated[1].

XLVIII. CIVIL BONDAGE[2]. This was a relation set up by transfer by the *paterfamilias* to another by sale, in the form of *mancipatio*, *i.e.*, *per aes et libram*. One so sold was not a *mancipium*, a word which means a slave, but was in an analogous position and was thus said to be *in mancipio* or *in mancipii causa*[3]. Except for noxal surrender for delict, and the formal sales in *adoptio* and *emancipatio*, the institution was practically obsolete in classical law and it is not clear how far the recorded rules applied to it in earlier times. The bondsman was still free and a *civis*. His marriage was not affected[4]. His children conceived after the sale were, in the time of Gaius, in his *potestas* (in abeyance while he was *in mancipio*) or in that of his *paterfamilias*, though it is possible that before the empire they too were *in mancipio*[5]. How his political rights were affected we do not certainly know. But, though free, he was *servi loco*. He acquired for his holder as a slave did[6]. He could take nothing by the will of his holder unless freed by his will[7]. If instituted by him he was a *necessarius heres*, with however a *ius abstinendi*, like a *suus heres*[8]. For wrongful treatment of one *in mancipio* an *actio iniuriarum* would lie[9]. Gaius also tells us that an action lay on his contracts, against his holder, on the same principles as in *adrogatio*, so that the holder was liable to the extent of the property which would have been the bondsman's if he had not gone into bondage[10].

1 C. 8. 47. 10. pr. 2 See Desserteaux, *Capitis Deminutio*, 1. 233 sqq., for a full but somewhat conjectural account of this institution. 3 He is not a slave but is in an analogous position. The terminology can be compared with "*in libertate*," for one not really free but in actual liberty; "*in possessione*," for one who holds a thing but has not technical possession (6. 1. 9); "*in servitute*," for one wrongly held in apparent slavery (4. 6. 1. 1). Desserteaux (*op. cit.* 1. 245) considers that "*in mancipio*" is used where it is real, as in noxal surrender of a *filius*, and "*in mancipii causa*" where it is formal, as in adoption. But see, *e.g.*, G. 1. 135. 4 G. 1. 135. 5 Labeo held that they were, if conceived after *potestas* destroyed (G. 1. 135). But this, which was indeed rejected, proves nothing for the other case. 6 G. 2. 86; Ulp. 24. 23, 24. 7 G. 1. 123. 8 G. 2. 160. 9 G. 1. 141. 10 G. 4. 80. But as he was *alieni iuris* before he could have nothing except *p. castrense* which certainly did not go to his holder. The passage may be corrupt. See *post*, § CXLI.

The relation might be ended by manumission, like that of a slave, except that the restrictions of the *l. Aelia Sentia* and *l. Fufia Caninia* had no application[1], and he was an *ingenuus*, not a *libertinus*[2]. Where the bondage resulted from surrender by the *paterfamilias* in lieu of paying damages for a wrong committed by the *filius*, the bondsman was entitled, at least in later classical law, to demand manumission as soon as, by his labour, he had repaid the damage[3]. Further we are told by Gaius that at the *Census* a bondsman could free himself, without consent of the holder, by entering his name on the *Census* roll[4]. Whether this is ancient or not we cannot tell: it did not apply, says Gaius, in the formal cases or in noxal surrender, and these were the only surviving cases in his time[5], while the *Census* also was obsolete.

These rules no doubt represent different stages in the history of the institution, but we cannot go into the controversies as to the source of each one. There are other questions, some of which will arise in connexion with *capitis deminutio*, but some can be taken here. Could a bondsman be assigned by his holder? We know that he usually was assigned back to his father in the process of *emancipatio*[6], and though this is an artificial proceeding, there seems no good reason to doubt that he could be transferred in the ordinary way of business. Could a man sell himself into bondage? There is nothing inherently improbable in the idea; if he could not, Roman Law was exceptional, for such a right has existed in Jewish, Germanic, Greek, and many other systems[7]. What is known of *nexum* seems to shew that a man could by the process *per aes et libram* submit himself to the power of another, but a *nexus* is not *in mancipio*[8]. A woman could sell herself into *manus* by a modified form of *mancipatio*, but it was not actual *mancipatio* and she did not go into bondage[9]. The liability of the holder for debts of the bondsman to the extent of the property he brought with him, already noted and considered later[10], is unintelligible unless he was *sui iuris*, and so sold himself, for otherwise he could have no property. But the passage is probably corrupt. And there is no direct evidence of the possibility.

The subject of persons *alieni iuris* involves the consideration of their power to bind themselves by contract. We have not considered from this point of view the *filiafamilias*, the woman *in manu* and the bondsman. Gaius tells us that they could not so bind themselves[11]: it is another question how long this state of things lasted. As *manus* and

1 G. 1. 138, 139. 2 This follows from the applications in *adoptio*, etc. 3 Coll. 2. 3. 4 G. 1. 140. 5 A five-year period is common in Roman Law, *e.g.* in tax-farming contracts and in hiring of land. See also 5. 2. 9; 40. 12. 29. 1; 40. 15. 1. pr.; C. Th. 5. 7. 2, etc. 6 *Ante*, § XLVII. 7 Leviticus, 25. 47; Pollock and Maitland, *Hist. of Eng. Law*, 1. 12; Daremberg et Saglio, s.v. *Servi*. 8 *Post*, § CL. 9 *Ante*, § XLIII. 10 *Post*, § CXLI; G. 4. 80. Lenel, *E. P.* 406. 11 G. 3. 104.

bondage disappeared soon after, the question arises practically only for the *filiafamilias*. The better view seems to be that of Girard, who, in view of the incapacity of a woman *sui iuris* to bind herself without the *auctoritas* of her tutor, concludes that the disability of a woman *alieni iuris* lasted throughout the classical age and so long as the *tutela* of adult women lasted. But it was gone in Justinian's time[1].

XLIX. *CAPITIS DEMINUTIO.* Before passing to persons *sui iuris* we have to consider the principles of *capitis deminutio*. In dealing with the law of persons we have adopted the method indicated by this conception. *Caput* is civil capacity. *Capitis deminutio* is defined by Gaius as *prioris status permutatio*[2]. It has in classical and later law three degrees: *maxima*, loss of liberty, *i.e.* enslavement from any cause, involving loss of *civitas* and family rights; *media* or *minor*, loss of *civitas* without loss of liberty, as by *deportatio*, or (perhaps) joining a Latin[3] colony, involving also loss of family rights; and *minima*, change of family position (*status hominis commutatur*), of which the most salient characteristic, or requirement, is that it involves a rupture of agnatic ties, leaving liberty and *civitas* unaffected. Such cases are *adoptio*, *adrogatio*, entry into *manus*, emancipation and entry into or manumission from civil bondage[4].

This account of the institution as it stood in the time of Gaius does not tell us the meaning of the term or the history of the notion, which connected matters (for the conception of *capitis deminutio* underwent evolution) have been the subject of much controversy. The threefold scheme is relatively late: in Cicero we hear only of *capitis deminutio*, simply, and the name is in fact applied only to cases of what were later *capitis deminutio minima*[5], but his language elsewhere might be taken to indicate that he would have put on one and the same level some cases of what were later *maxima* and *media*[6]. Even in the Digest we get in some texts a distinction into two classes, *maior* and *minor*, the latter being what was usually called *minima*[7]. It seems probable that early law knew of only one *capitis deminutio*, but whether that covered all the three types of later law, or whether it applied only to cases involving loss of *civitas* or only to such as left *civitas* intact, *i.e.* the later

1 Girard, *Manuel*, 475. He cites all the material texts, and for the later law compares Inst. 4. 7. 7, and D. 14. 6. 9. 2. 2 G. 1. 159. 3 G. 1. 131, "*iussu patris.*" It is not clear that it was *c. d.* A Latin coming to Rome had a vote in the *Comitia*, Mommsen, *Staatsr.* 3. 643; *D.P.R.* 6. 2. 267. 4 G. 1. 162, 163; Ulp. 11. 13; Inst. 1.16. 3. The scheme in classical law is not symmetrical, *Familia* and *Civitas* are linked. No one can have either without both and liberty too. But a man may have liberty without the others. Probably in early times, none but *cives* were thought of as free for Roman Law. See for references to principal literature, Girard, *Manuel*, 195, n. 3. 5 *Topica*, 18, 29. 6 *Pro Caecina*, 33, 96; *De Domo*, 29, 30 (77–79). 7 38. 16. 1. 4; 38. 17. 1. 8; Cuq *Man.* 111. See also Desserteaux, *Capitis Deminutio*, 2. 1.

minima, is disputed. Not all the cases which were thought of as *capitis deminutio minima* in classical law need necessarily have been so regarded in earlier law, for the conception of the institution no doubt changed. *Status permutatio* as a definition is certainly not primitive. The only institution, recorded as a case of *capitis deminutio minima*, which is certainly extremely ancient, is *adrogatio*[1], and it is not clear that this was early thought of as *capitis deminutio*[2].

There is the same obscurity about the underlying conception of *capitis deminutio*. On one view its essential is destruction of the personality, a view suggested by some texts which speak of it as a sort of civil death[3], but this does not really fit the facts[4]. On the other hand, the conception of it as annihilation is consistent with the view[5] that death is mentioned as a mere loose comparison. On another view, which suits the name better (especially in the not uncommon form *capitis minutio*[6]), it is essentially a diminution of capacity[7]. It would follow that it occurred only where the resulting position was worse, as in *adrogatio*, or where in the process the subject was sold into quasi slavery. This would account for such facts as the passage of vestal virgins from *potestas* without *capitis deminutio*[8]. But it conflicts with rules of classical law, *e.g.* that the children of *adrogatus* suffer *capitis deminutio*[9], though they undergo no process and take no worse position, which Savigny explains as an error of Paul due to a false conception of *capitis deminutio*[10], and the rule that a woman going into *manus* suffers *capitis deminutio*, though the process does not reduce her to quasi slavery, a rule which Savigny would restrict to women *sui iuris*[11]. It conflicts also with the rule that enfranchisement from civil bondage was a *capitis deminutio*[12], a rule not known in the time of Savigny. But these difficulties and others which present themselves in connexion with the various opinions may be met by the view that development, actually traceable in the scheme of

1 Its antiquity is vouched for by its religious character. 2 Thus while Desserteaux (*op. cit.* 1. 57) thinks *adrogatio* not to have been regarded as *c. d.* till the empire, Cohn (cited, Desserteaux, *ib.*) thinks of it as one of the oldest. 3 G. 3. 101, 153, etc. 4 It destroys the will, which death brings into operation, G. 2. 145, 146; Ulp. 23. 4; Inst. 2. 17. 4. Death destroys criminal and delictal liabilities which *c. d.* leaves unaffected (*post*, § CXCVI). 5 See Eisele, *Beiträge*, 167 sqq.; Desserteaux, *op. cit.* 2. 1. 129 sqq. Eisele holds *c. d.* essentially a diminution, Desserteaux essentially a destruction, but both reject the idea of death as more than an analogy. 6 4. 5. 1, 2; Ulp. 27. 5, etc. 7 Savigny, *System*, 2. §§ 68 sqq.; Eisele, *Beiträge*, 160 sqq. See D. 4. 5. 3, Paul. 8 Aul. Gell. 1. 12. 9. 9 4. 5. 3. pr.; it may indeed be said that the children lose the position of *sui heredes*. 10 *System*, 2. 479. He thinks it an expression of a later, not generally accepted, view of *c. d.* as "*familiae mutatio*." See Eisele, *Beiträge*, 215, who, adopting in general Savigny's view, understands "*placet*" to express a personal "*Belieben*" of the jurist, but this is hardly possible. 11 *System*, 2. 65. Eisele, *op. cit.* 200, leaves open the question whether it applies to women *sui iuris*. Neither G. (1. 162) nor Ulp. (11. 13) expresses any limitation. 12 G. 1. 162, 163.

capitis deminutiones (for while it may still be doubted whether there existed originally one or two degrees, there clearly were not three) also occurred in the fundamental conception of it. It may be that at the beginning it meant extinction of gentile and therefore of civil right, and that, so far as what came to be called *capitis deminutio minima* was concerned, this conception was replaced by the notion of *familiae mutatio*. The distinction between *maxima* and *media*, which appears to be of the beginning of the empire, though the immediate effects of the two are the same, may be accounted for by the inveterate tendency to threefold arrangements[1], assisted by the separation of the conception of *libertas* from that of *civitas*, and the obvious fact that the man enslaved is really extinct, while the other may still exist, as a Latin or peregrine, and be a factor in commercial relations[2].

These considerations may explain the peculiarities of the *capitis deminutio* resulting from the first or second sale of a *filiusfamilias*. It is clear that it is a *deminutio*[3], but its characteristics are exceptional, according to Gaius. On manumission the subject reverts to *potestas*: the *minutio* and its effects are wiped out. Thus it is provisional. Again he tells us that each sale and each manumission is a *capitis deminutio*[4], but he says also that the whole process is a *capitis deminutio*[5]. He tells us that children conceived during the bondage are in the *potestas* of the old *paterfamilias*[6] and also that all *capitis deminutio* destroys the agnatic tie[7]. Either this is incorrect for that case, which is however that in connexion with which the statement is made, or children may be born into an agnatic group to which the father may not have belonged at any time between the conception and the birth. If the holder freed the bondsman after the third sale, the manumitter succeeded at civil law to the exclusion of the father[8], whose rights were destroyed. If, after the first sale, the father died, and the holder then freed him, he succeeded, as a *postumus*, to his own father[9]. The manumitter having no right to succeed to him, the rights of the quasi patron were thus non-existent[10]. These conflicting rules do not represent any coherent concep-

1 Goudy, *Trichotomy in Roman Law*, 50 sqq. 2 Eisele, accepting the view that *c. d.* is essentially diminution (pp. 163 sqq.), accepts also in general the notion of incompatibility (derived from Cohn, *Zur Lehre von der C. D.*), *i.e.* the effects of *c. d.* are in general due to the incompatibility of the old right or liability with the new position (*op. cit.* 185 sqq.). 3 G. 1. 162. 4 *Ibid.* 5 *Ibid.* "*quod accidit in his qui adoptantur.*" 6 G. 1. 135. 7 G. 1. 163. 8 G. Ep. 1. 163; Inst. 3. 9. 3. 9 G. 3. 6; Ulp. 23. 3; Coll. 16. 3. 7. 10 Even the view of Kniep (*Der Rechtsgelehrte Gaius*, 48; *Gai Comm. Prim.* 270) that the statement of Gaius (1. 162) that each sale and *manumissio* is a *c. d.* is a later addition, that the sale and manumission together constitute a *c. d.*, and that in the case of a son Gaius does not mean each sale but only the third, does not mend the matter. The son released would not be, in effect, a *postumus* as he was (n. 9), but would have been a *suus* all the time. And one sold a third time but not yet released would not have suffered *c. d.* at all, though *potestas* was destroyed.

tion, and it may be supposed that they represent a state of things in which the old conception of *capitis deminutio*, whatever it was, is breaking down and rules belonging to the older ideas are retained side by side with others which belong to the conception of it as (at least in the case of *minima*) a *familiae mutatio* simply, a conception not fully reached till the later classical age[1].

The obscurity of the early conceptions gives rise to the question whether a Latin suffered *capitis deminutio* on attaining Roman citizenship. The only evidence seems to be a passage quoted by Girard[2] from the *l. Salpensana*, which provides that those who became Roman *cives* in the colony, *e.g.* through magistracy, should remain in the *manus*, *potestas* or *bondage* in which they were, if their holder also acquired *civitas* and should not lose any rights they had as patrons or *patroni liberi*[3]. These are express provisions to avoid results which are exactly those of a *capitis deminutio*. One of the provisions seems to be corrupt, but they testify to a close similarity between the institutions of the colony and those of Rome[4] (apart from express adoption of Roman rules, also evidenced). The accounts of *capitis deminutio* do not mention this case[5], nor do those dealing with attainment of *civitas* by Latins, which are fairly full[6], say anything about *capitis deminutio*. In any case certain results of *capitis deminutio* did not occur[7].

L. In considering the effects of *capitis deminutio* it is necessary to distinguish between those which are really the effect of the *deminutio*, however conceived, and those which are merely accompaniments, but result not from the *deminutio* but from the juristic event of which it also is a result. It may be doubted indeed whether the distinction can be clearly made out[8]. The following however are indicated in the texts as results of the *capitis deminutio* itself.

(i) Destruction of agnatic ties and *potestas*[9]. This is the most striking result, and might, in classical law, almost serve for a definition, but for the fact that vestal virgins and *flamines diales* passed out of the

1 So Desserteaux, *Capitis Dem.* 1. 37, 239, etc., but his argument, in attempting to shew that with his view of the evolution the doctrines can be made wholly coherent, seems to require that Gaius shall have laid down rules which had ceased to be true a century earlier. 2 *Manuel*, 197, n. 1. 3 *Lex Salpensana*, XXII, XXIII, Girard, *Textes*, 109, 110. 4 The text seems to attribute *tutoris optio* to males—if this is so it is an error or a rule different from that of Rome. 5 G. 1. 153–163; Ulp. 11. 9–13. 6 G. 1. 28–35; 1. 67 sqq.; Ulp. 3. 1–6. 7 The magistrate cannot have dropped his assets and liabilities, any more than a Roman would who passed voluntarily to a Latin colony. 8 It is indeed maintained by Desserteaux (*op. cit.*) that the effects are never those of the *c. d.* but of the juristic act concerned. The *c. d.* is a mere descriptive term (2. 1. 60, 93, 97, etc.), but when in the empire certain juristic acts lost characteristics which had produced these effects, while the effects remained, it became the custom to attribute these effects to the *c. d.* as their cause (*ib.* 98, 301, etc.). The greater part of 2. 1 aims at demonstrating this thesis. 9 G. 1. 163; 3. 21, etc.; Inst. 3. 5. 1, etc.

potestas without *capitis deminutio*[1]. Cognatic ties were not affected. In practice this affected only *capitis deminutio minima*, for enslavement, being *iuris gentium*, destroyed cognation, and a *deportatus*, being a peregrine, *sine civitate certa*, could not take under a will or on intestacy[2]. Though *potestas* and *manus* were destroyed, marriage, being *iuris gentium*, was not ended except by *maxima capitis deminutio*, though *media* converted it to *nuptiae non iustae*[3]. Ordinary marriage was in no way affected by *capitis deminutio minima*, but, if the wife was *in manu*, adrogation would transfer the *manus* to the new *paterfamilias*, while emancipation and *adoptio* would apparently leave the wife in the old *familia*.

(ii) Destruction of life interests (*ususfructus*, *usus*)[4]. The effect of this, for *capitis deminutio minima*, was evaded in classical law by devices for renewal of the right so destroyed, and in Justinian's law the rule no longer applied to this case[5].

(iii) Avoidance of a will previously made. This is laid down generally[6], but the existence of *peculium castrense*, in regard to which a *filius* was regarded as a *paterfamilias* and had the power of testation, caused some difficulty. It was clear in later classical law that his will dealing with this remained valid[7]. The effect of the general rule was modified by the praetor who gave *bonorum possessio* notwithstanding the *capitis deminutio*, if the testator was *capax* when he made the will and at death, provided the *deminutio* was not the effect of his own voluntary act[8].

(iv) Transfer of the assets of the *minutus*. All passed from him, but the ultimate destination of those not destroyed depended on the rules of each case, which have nothing to do with the *minutio*[9]. There were however exceptions. A *civis* passing to a Latin colony may have suffered *capitis deminutio*. If this was *iussu patris* he had indeed no assets to lose[10], but a *paterfamilias* who so passed over did not lose them: he sometimes did it so as to avoid a fine. Where a *filiusfamilias* was emancipated or adopted, his *peculium castrense* and *quasi castrense* went

1 *Ante*, § XLVII. 2 G. 2. 110; Inst. 1. 16. 6; D. 38. 10. 4. 11. 3 *Ante*, § XXXIX. See G. 1. 128. 4 7. 4. 1. pr. Not the later developed *habitatio* and *operae servorum*, *post*, § XCVI. 5 Inst. 2. 4. 3; C. 3. 33. 16. 2. 6 G. 2. 145, 146; Ulp. 23. 4; Inst. 2. 17. 4. 7 28. 3. 6. 13; 37. 11. 1. 8. Eisele however, *Beiträge*, 195 sqq., attributes this to Justinian. No difficulty in case of an actual *miles*: his will needs no form (*post*, § CXXVI), and is therefore valid *ex nova voluntate*, 29. 1. 22; Inst. 2. 11. 5. 8 37. 11. 11. 2. Testator was adrogated and later again became *sui iuris*. (Other reliefs in case of *maior capitis deminutio*, *post*, § CII.) In the time of Gaius the *bonorum possessio* was *sine re*, later it became *cum re*, *post*, § CXXXIX. 9 As to *adrogatio*, *post*, § CXLI; *adoptio*, *ante*, § XLIV; enslavement, *ante*, § XXIV. On *deportatio* the property went to the State as part of the *condemnatio*, and, though something might be left to him in compassion, he had no rights against his old debtors, *ante*, § XXXVI. 10 G. 1. 131.

with him: the *capitis deminutio* did not affect them[1]. The right of an *adstipulator*, by reason of its intensely personal nature[2], was extinguished by a *capitis deminutio*, and the same is true of rights under a pending *iudicium legitimum*[3]. On the dominant view of classical lawyers partnership was ordinarily ended by *capitis deminutio minima*, but at some time, probably before Justinian, it was treated as continuing and not a new partnership[4]. Patronal rights were in general ended. In *maxima* or *media* the rights of *liberi patroni* appear to have taken their place[5], but these rights being independent this is rather extinction than transfer. On adrogation they passed to the new *paterfamilias*, except that any *operae*, due under *iusiurandum liberti*, ceased, and *reverentia* was still due to the *adrogatus*[6]. If the *libertus* suffered *capitis deminutio maxima* or *media* the patronal relation was destroyed, if *minima*, the patron's right was not affected, subject to *restitutio natalium*[7]. *Tutela* was of course ended if the ward suffered *capitis deminutio*, but was not affected by *capitis deminutio minima* of the tutor except in two cases. *Tutela legitima* was ended as it was based on a right of succession, itself destroyed[8], and *tutela cessicia* was also destroyed[9]. Against destruction of rights of succession by *capitis deminutio maxima* or *media* there might be relief in case of restoration[10], and *minima* had little effect in the praetorian scheme of succession, except where the *minutus* was transferred to, and was still in, another family[11]. The rule itself did not apply to the reciprocal rights of succession between mother and child introduced in the empire[12]. Further, a woman's claim for the recovery of her *dos* was not affected by her *capitis deminutio*, *e.g.* if she was emancipated by her *paterfamilias*[13].

(v) Destruction of liabilities, other than criminal or delictal[14]. This

1 *Post*, § XCIX. The *bona adventicia* of late law were regulated by legislation which did not give any operation to *capitis deminutio* as such. **2** G. 3. 114, *post*, §§ CXLIII, CLV. **3** G. 3. 83. As to the nature of *iudicia legitima*, *post*, § CCXXXII. **4** G. 3. 153; D. 17. 2. 58. 2; h. t. 65. 11, 12. See Eisele, *Beiträge*, 171, 190 sqq.; Desserteaux, *op. cit.* 2. 169 sqq. **5** 37. 14. 4, 21. **6** G. 3. 83; D. 2. 4. 10. 2. **7** *Ante*, § XXXII. **8** G. 1. 158; *post*, § CXXIX. *Tutela* is a *publicum munus* and like other such is not affected, 4. 5. 6, 7. **9** G. 1. 170. **10** As to restoration from slavery, see Buckland, *Slavery*, 410 sqq. **11** *Post*, § CXXX. **12** 4. 5. 7. pr.; 38. 17. 1. 8. A wife emancipated did not lose her claim for *dos*, 4. 5. 8, 9. **13** 4. 5. 8, 9; *ante*, § XL. **14** 4. 5. 2. 3. The discharge from other obligations left a *naturalis obligatio*, *post*, § CLXXXIX. It has been said (Senn, *N.R.H.* 37. 191) that there was a further exception. In a group of actions, all *bonae fidei* and all infaming (*pro socio*, *depositi*, *mandati*, *tutelae*) the claim survived *capitis deminutio minima*. The texts cited are 17. 1. 61; 17. 2. 58. 2; 16. 3. 21. pr.; 27. 3. 4. 1; h. t. 11. These scarcely establish the proposition. All are cases in which the *minutus* continues performance of the contract, etc., after the *minutio*, and they shew merely that in such a case the thing must be treated as a whole. They are closely analogous to the case of continued administration by a manumitted slave in which a similar rule is laid down by some jurists (3. 5. 16–17), though it is admitted that a slave cannot be sued after freedom on transactions during slavery (3. 5. 16; C. 4. 14, *passim*). This is clearly brought out in 16. 3. 21 where the cases of the

exception, retained as being necessary, has its origin in the fact that these remedies are substitutes for revenge[1], the desire for which is not affected by the *minutio*. The extinction of other liabilities, whatever its origin, obviously produced very unfair results and was relieved against in many ways. In the case of penal slavery or forfeiture the *fiscus* took only the nett balance: it was liable to creditors and could sue debtors[2]. The praetor applied similar rules, giving *utiles actiones* at least against the holder where on *capitis deminutio maxima* or *media*, the property passed into private hands[3].

In the case of *adrogatio* and *manus* there were remedies which can best be considered in dealing with universal succession[4]. In that of *emancipatio*, liabilities in respect of *peculium castrense* and *quasi castrense* were not affected. Apart from these there was a difficulty. A *filius-familias* of full age was capable of civil *obligatio*, but this was extinguished by the *capitis deminutio*. The praetor gave an action, but as the transaction may have concerned the father's affairs only, and, in any case, the assets in connexion with which it was gone through did not ordinarily pass, it was given only *causa cognita*[5], and subject to *beneficium competentiae*[6].

slave and son are treated side by side. In the case of deposit it is simply for return of the thing, which the depositee still holds. So in 17. 1. 61, what the suggested doctrine requires is that if performance under the mandate is not continued the *mandatarius* can be sued for what was done before the *minutio*; but this is not shewn.

1 *Post*, § CXCVI. **2** 48. 20. 4; h. t. 10. pr.; 49. 14. 6; h. t. 21. **3** 4. 5. 2. pr. If a man enslaved was afterwards released by the State he did not revert to his old rights and liabilities, apart from express *restitutio*, which might be more or less complete, 44. 7. 30; C. 9. 51. 4; h. t. 5. In the case of *deportatio*, if the estate was insufficient the creditors had *utiles actiones* against the *deportatus* by which later acquired property could be made available, *ante*, § XXXVI. **4** *Post*, § CXLI. **5** 14. 5. 2. **6** 14. 5. 2. pr. See Lenel, *E. P.* 269. If the son had inherited, the action was *in solidum*, and the creditor might choose between this action and an action against him for his share of the debt as *heres*, 14. 5. 4. pr. Against the *heres* of the *minutus* it was always *in solidum*, h. t. 4. 3. But in both these cases it would seem to be still given only *causa cognita*.

CHAPTER IV

THE LAW OF PERSONS (*cont.*). THE LAW OF THE FAMILY (*cont.*). PERSONS *SUI IURIS*

LI. Persons *sui iuris*, *Tutela Impuberum*, p. 143; *Tutela testamentaria*, 144; LII. *Tutela Legitima*, 145; *Tutela Fiduciaria*, 147; LIII. *Tutela a magistratu dativa*, 148; LIV. Nature of *Tutela*, 150; Exemptions, 151; Restrictions on Appointment, 152; LV. Functions of *Tutor*, 154; *Administratio*, 155; LVI. *Auctoritatis interpositio*, 158; LVII. Close of *Tutela*, 160; Removal for misconduct, *crimen suspecti tutoris*, 161; LVIII. Plurality of *tutores*, 162; LIX. Remedies, *Actio de rationibus distrahendis*, 164; *Actio tutelae*, *ib.*; LX. *Tutela perpetua mulierum*, 166; Devices for change of *tutor*, 168; Difference of functions, *ib.*; LXI. *Cura*, 169; *Cura furiosi*, *ib.*; *Prodigi*, 170; LXII. *Cura minoris*, 171; Other cases of *cura*, 174; LXIII. Juristic Persons, *ib.*; LXIV. The State and the Emperor, the *Fiscus*, 176; Municipalities, 177; Private corporations, 178; LXV. The Church and *Piae Causae*, 179.

LI. In dealing with persons *sui iuris* we have to consider them only so far as they were subject to disabilities. Owing to defects of various kinds they might be under guardianship, and this might be either *tutela* or *cura* (*curatio*). *Tutela*, which is the more important, might be over males or females on account of their youth, or, in classical law, over women of any age on account of their sex[1].

TUTELA of *IMPUBERES*. The governing principle was that every person *sui iuris* under puberty must have a *tutor*, at least if he had property or expectations[2]. Though guardianship is no doubt a universal notion, it had in Rome forms and technicalities not found elsewhere, and as it was provided for in the XII Tables it was regarded as a civil law institution[3]. It seems to have been originally conceived of as an artificial extension of the *potestas* till the child was capable of founding a *potestas* for himself, a notion which led to perpetual *tutela* in the case of women, since they could never have *potestas* or *sui heredes*. There was a very practical reason for this way of regulating the matter. It is clear that originally *tutela* was not so much in the interest of the child as in that of the guardian. The tutor was the person who would take the property if the child died *impubes*: *ubi emolumentum successionis ibi onus tutelae*[4], in which expression the word *onus* would have been represented in early law by *ius*. So soon as a child reached the age of puberty he might have

1 G. 1. 142–144; Inst. 1. 13. pr. 2 See C. 5. 31. 2. 3 Inst. 1. 13. 1; D. 26. 1. 1. pr. The institution existed in Latin colonies. The *l. Salpensana*, c. XXIX (Bruns, 1. 146; Girard, *Textes*, 112), contains provisions as to their appointment by local magistrates to Latin members of the community, and c. XXII contains provisions as to *tutoris optio* (*post*, § LX). Schol. Sin. 16 (Girard, *Textes*, 614) speaks of a brother as *tutor* of an *impubes* who has been made a member of a Latin colony. 4 Inst. 1. 17. pr.; C. 5. 30. 5. 3.

children: the interest of his relatives in the property would cease, and accordingly the *tutela* ceased. By the close of the republic this view of *tutela* had been superseded by the more modern conception of guardianship[1]. But the old view remains reflected in the fundamental rules of the institution. The rule, out of harmony with the new conception, that *tutela* of children ended at puberty, was retained but supplemented by such devices as *restitutio in integrum* and *curatio*[2], which gave similar but less effective protection. The perpetual *tutela* of women was not abolished when its absurdity became apparent, but types of tutor were invented who could not refuse their *auctoritas*[3].

Justinian, following Gaius, classifies *tutores* according to the mode of appointment: *testamentarii*, *legitimi*, *fiduciarii*, *a magistratu dativi*. The order is not historical, for *legitimi* were certainly the oldest, but *tutela* by will is given priority as being the most usual and important[4].

TUTELA TESTAMENTARIA. The XII Tables authorised a *paterfamilias* to appoint tutors by his will to *sui heredes impuberes*, *i.e.* those *impuberes* who become *sui iuris* by his death[5]. The practice of the jurists extended this to *postumi*, *i.e.* those who were not *sui heredes* when the will was made but became such afterwards, *e.g.* a child born after the will was made, or even after the testator's death, or grandchildren who became *sui heredes* by the death of the father after the grandfather's will was made. Justinian defines these as those who are in such a position that if they were born in the lifetime of the testator they would be *sui heredes*[6]. This is, as the text says, only one of the many cases in which *postumi* are treated as already born. When, at the beginning of the empire, codicils were admitted, the rule appeared that a *tutor* could be appointed by codicil if the codicil was confirmed, actually or by anticipation, by a will[7]. Classical law required formal words, *e.g.*, *Titium tutorem do*, or *T. tutor esto*[8]. In later law the appointment might be in Greek and under

1 "*Ad tuendum eum*," Inst. 1. 13. 1. It is as old as Servius, D. 26. 1. 1. pr. 2 *Post*, § LXII. 3 *Post*, § LX. 4 G. 1. 188, notes disagreements on classification. *Fiduciarii* (for whom the Digest has no separate title) seem to have been, for some jurists, a mere variety of *legitimi*. G. classifies *tutores* by the immediate appointing authority. Ulp. (11. 2) classifies by the ultimate legislative authority on which the appointment rests: *legitimi*, *senatusconsultis constituti*, *moribus introducti*. The first group covers all the ordinary types, all of which rest ultimately on *lex*. The second consists of special cases provided by *sc.*, *e.g.* substitute tutor for a woman in case of emergency. The third deals with special *tutores praetoriae* appointed where litigation arose between tutor and ward, a practice which seems to have grown up without legislative sanction: it does not appear in the Edict. 5 Ulp. 11. 14, 15. 6 Inst. 1. 13. 4; G. 1. 146. This way of stating the matter is more satisfactory than that of Gaius in 1. 147 (26. 2. 1. 1), and Q. Mucius (50. 17. 73. 1). Strictly these would validate appointment by *avus* where *pater* survived him. They are stating cases in which the appointment may be effective. The Inst. state the case in which it will be effective. 7 26. 2. 3. pr.; *post*, § CXXVI. 8 G. 1. 149; Vat. Fr. 229.

Justinian there were no rules of form[1]. The *tutor* must be a *persona certa*[2], and it must be clear to which child or children he was appointed[3]. The appointment might be conditional or from or to a certain time. Any one might be appointed with whom there was *testamenti factio*, except that the *l. Junia* expressly excluded Junian Latins[5]. Thus a man might appoint his slave, and, at least in later law, this implied a gift of freedom[6]. He might appoint another man's slave, *cum liber erit*, and if these words were omitted they would be implied[7]. The appointment might be to any child, even though he was disinherited[8].

In the foregoing cases the appointment was valid at civil law, but there were others in which, though the appointment was in some way defective, it would be confirmed by the praetor as a matter of course and the *tutor* considered as a testamentary tutor, the so-called *tutela testamentaria imperfecta*, *e.g.* where the appointment was in an unconfirmed codicil or informal writing[9], or in a will which did not take effect[10], or informal words were used, or he was called *curator*[11], or where the appointment was to a son not *in potestas* (emancipated or by a *concubina*)[12], provided in these last cases that property was left to him. If the praetor was satisfied that the father had died without changing his mind the confirmation went with no enquiry as to fitness[13]. In other cases the appointment might be confirmed after enquiry, *e.g.* where an *extraneus* appointed, or a patron to his *libertus*[14], provided in both cases that the *impubes* was instituted and had no other provision. But these were really appointments by the magistrate[15].

LII. *TUTELA LEGITIMA*. Though this was said to be based on the XII Tables[16], and therefore called *legitima*, it was probably much older: it represented the primitive notion of *tutela*, as a right in potential successors to look after the estate. The cases of *legitima tutela* were the following.

1 C. 5. 28. 8. In classical law it was doubted if it could be "*post mortem heredis*" or before the *institutio heredis*, G. 2. 234, *post*, § CIV. **2** 26. 2. 20; G. 2. 240. **3** Vat. Fr. 229; D. 26. 2. 23, 30. **4** 26. 2. 8. 2. **5** 26. 2. 21; Ulp. 11. 16. **6** *Ante*, § XXVII. **7** It might even imply a fideicommissary gift, C. 7. 4. 10; see 26. 2. 10. 4, 32. 2. But this may be due to Justinian, Eisele, *Z.S.S.* 11. 27. It is possible that appointment of a *servus alienus* "*cum liber erit*" needed magisterial confirmation, as did the appointment of one freed by *fideicommissum*, 26. 2. 28. 1. It is likely that similar rules applied in the case of other temporary disabilities, 26. 2. 10. 3; as to *captivus*, G. 1. 187. **8** 26. 2. 4. **9** 26. 3. 1. 1, 10. **10** h. t. 3. **11** h. t. 1. 1, 6. **12** 26. 3. 7; C. 5. 29. 4. **13** 26. 3. 8. No doubt a praetorian will was in the same position. **14** 26. 2. 28. 2; 26. 3. 5. **15** Thus there might be need for security (*post*, § LV). The texts on appointment by the mother are not clear (see 26. 2. 4; 26. 3. 2; 31. 69. 2; C. 5. 28. 4; C. 5. 29. 1). Apparently there was always an enquiry as to fitness. If this was clear and the mother had instituted the child the *tutela* was in effect, as it seems, *testamentary*. But if there was no institution of the child, it was in effect an appointment by the magistrate. **16** 26. 4. 1. pr., 5. pr.; G. 1. 155.

Agnates. The XII Tables expressly provided that *impuberes sui iuris* were in the *tutela* of their agnates if there was no testamentary tutor. As this was in view of the right of succession, the *tutores* were those who would succeed, the *proximi*[1]. If however the nearest agnate was a woman, *e.g.* a sister, incapable of *tutela*, the *tutela* was in the next[2], who would normally be the *tutor* of the woman also. If the nearest agnate died, or was *capite minutus*, the *tutela* passed to the next[3]. If there were several qualified agnates in the same degree, *e.g.* brothers, or even an uncle and nephew, of the ward, they shared the *tutela*[4]. Changes in the law of succession led, but only in the later empire, to corresponding extensions of *legitima tutela*. In A.D. 498 emancipated brothers shared in the *tutela*, though no longer agnates[5]. Justinian in a novel[6] gave the *tutela* to the next of kin whether agnatic or cognatic. It should be added that in default of agnates there was a gentile *tutela* in early law, but it cannot be traced beyond the beginning of the empire, when gentile succession had already disappeared[7].

Legitima tutela arose only if there was no testamentary *tutor*[8], a rule construed widely, with a tendency to exclusion of the *legitimus*. Thus the *legitimus* was not admitted if there was a possibility of a testamentary *tutor*, *e.g.* one was appointed conditionally or *ex die*[9], or by a will not yet certain to operate[10], or the *tutor* appointed was under age, or captive or insane or deaf or dumb[11], or was excused from serving, or removed for misconduct[12]. But if the testamentary *tutor* died or lost citizenship, this admitted the *legitimus tutor*[13].

Patronus. The patron had *legitima tutela* not by express provision of the XII Tables, but by juristic inference from the right of succession given to him by the statute[14]. Here too the *tutela* in general followed the succession. Of several patrons, as all succeeded, all were *tutores*[15], and if some were dead or *capite minuti* the others as they took the whole succession took the *tutela*[16]. If there had been manumission by a bonitary owner, and *iteratio* by the quiritary owner the latter was *tutor*, though the former took the *bona*[17]. A patron was *tutor* even though the

1 26. 4. 1; h. t. 9; G. 1. 164; Inst. 1. 16. 7. 2 26. 4. 1. 1, and the same is no doubt true if for any other reason the nearest agnate is incapable of *tutela*. Inst. 3. 2. 7. But this would be important only in later law. 3 26. 4. 2, 3. 9. 4 26. 4. 8, 9. 5 C. 5. 30. 4. 6 Nov. 118. 5. The *tutela* given to mothers in certain cases in later law (*post*, § LIV) does not seem to have been *legitima* till very late. 7 See the *Laudatio Turiae*, Girard, *Textes*, 814. 8 G. 1. 155; Inst. 1. 15. pr. 9 26. 2. 10. pr., 11. pr. 10 Inst. 1. 20. 1. 11 26. 1. 17; Inst. 1. 20. 2. 12 26. 2. 11. 1, 2. Where a woman frees there is no *legitima tutela*, for the *patrona* cannot act and *liberi patronae* are not *l. patroni*. G. 1. 195. In 26. 4. 1. 1 the woman was a joint patron. 13 All, if there were several, not if merely some of them did, 26. 2. 11. 4. 14 G. 1. 165; D. 26. 4. 3. pr.; Inst. 1. 17. pr. 15 26. 4. 3, 4. 16 h. t. 3. 5. If one is a woman the others are the tutors, h. t. 3. 4. 17 One freed by his bonitary owner was a Latin. The right to *bona*

manumission was under a trust, for he had the succession[1], but if deprived of the *libertus* for wrongly impeding the freedom he was, of course, not *tutor*[2]. In this case of *tutela* there is no question of exclusion by a testamentary *tutor*.

Liberi patroni. Here too the *tutela* was a juristic construction from the independent right of succession. The principles are as in the last case[3]. Thus the children shared it[4] and survivors held it to the exclusion of the children of deceased *liberi*[5].

Parens manumissor. Where an emancipating father received back the son in bondage, and then freed him, he was in a position very like that of patron. He was a quasi-patron, with the same right of succession. Accordingly Justinian mentions him in stating the different cases of *legitima tutela*[6]. But neither Gaius nor Ulpian does so in the enumeration[7], though the former calls him *legitimus* in one passage[8] and in another says that he is a fiduciary *tutor* who "*et legitimus habeatur*[9]," and Ulpian in the Digest says that he "*vicem legitimi tutoris obtinet*[10]." He was essentially a fiduciary *tutor* since he derived his right from the *pater fiduciarius* to whom the son was sold and from whom he was reacquired for the purpose of manumission. But, as Gaius says, he was like a patron and was to be honoured in the same way[11]. Thus the classical lawyers gave him honorary rank as a *legitimus tutor* distinct from patron, one practical result being that he did not necessarily give security[12]. In this case there could be no joint *tutor*.

TUTELA FIDUCIARIA. As the name shews this was *tutela* arising from a trust. There were two types.

Extraneus manumissor. If, in the process of emancipation, the purchaser in the third sale freed the son, instead of, as was usually arranged, selling him back to the *parens* to free[13], the manumitter became his quasi-patron and had at civil law the same right of succession as the *parens* (though the praetor postponed him to near relatives[14]). Accordingly he had *tutela*, but he was always regarded as fiduciary *tutor*, not as *legitimus*[15]. Justinian's change in the form of emancipation prevented this case from arising[16].

was with the manumitter, but not at civil law. By an express provision of the *l. Iunia*, the *tutela* was in any case with the quiritary owner, G. 1. 167; Ulp. 11. 19.

1 26. 4. 3. 1, 2. **2** 26. 4. 3. 3, *ante*, § XXXI. **3** Arg. 26. 4. 3. pr. **4** h. t. 3. 6. **5** h. t. 3. 7. A woman was excluded: if the only living child was a daughter, the *tutela* went to *nepotes*, 26. 4. 1. 1. If the patron had "assigned" the *libertus* to a daughter (*post*, § CXLI) though she took the whole succession her brothers who took nothing were *tutores*, 26. 4. 1. 3. **6** Inst. 1. 18. **7** Ulp. 11. 3; G. 1. 166. Modern editors usually insert a long passage making Gaius mention him, but this does not seem justified. **8** G. 1. 175. **9** G. 1. 172, cf. 1. 168. **10** 26. 4. 3. 10. **11** G. 1. 172. **12** *Post*, § LV. **13** *Ante*, § XLVII. **14** Coll. 16. 9. 2; *post*, § CXXXV. **15** G. 1. 166, Inst. 1. 19. It was of course possible to employ a woman or two persons for the purpose of the sale but it is unlikely that this would happen. **16** *Ante*, § XLVII.

Children of the *parens manumissor*. This case would not arise where the final manumission had not been by the father. It is always called fiduciary[1]. Justinian, noticing that the *tutela* of patron and *pater* is *legitima* and that of *liberi patroni* also is, while that of *liberi patris manumissoris* is not, explains this by the proposition that whereas in the case of *liberi patroni* the slave, if the manumission had not occurred, would have been in the control of the *liberi* and therefore falls into their *tutela*, the brother if he had not been emancipated would not have passed into the control of his brothers and thus not into their *tutela*, which is thus not *legitima* but fiduciary. The reasoning is very defective, and the premises are not correct. A grandson would have fallen into the son's *potestas* and yet the *tutela* was fiduciary. A slave would not have fallen into the control of a son who had been disinherited, but did fall into his *legitima tutela*, as the disherison did not affect his potential right of succession to the *libertus*, which was independently provided for by the XII Tables and not simply inherited from the father[2]. And the *tutela* is made to rest on control, which is not its basis: it rests on right of succession. Agnates could never have had control, but they were *legitimi tutores*. The argument does not shew why it was fiduciary: there is no *fiducia*, and the *liberi* do not take it voluntarily as Gaius says fiduciary tutors do[3]. The true explanation seems to lie in the equivocal nature of the *tutela* of the *parens*: this was primarily fiduciary and is in some sort inherited by his children. We do not indeed know that disinherited children were excluded. The case is rarely mentioned and was probably not common[4]. It was confined to males, and from the language of Justinian it is likely that surviving children held it to the exclusion of grandchildren, as in the case of *liberi patroni*[5], though the analogy may be a false one, as there seems to be no evidence of any civil law right of succession[6].

LIII. *TUTELA A MAGISTRATU DATIVA*. If there was no *tutor* under any of the earlier provisions, one was appointed by the magistrate[7]. Such an appointment was, however, not an exercise of *imperium* or of *jurisdictio*: it was not a normal magisterial function at all, and existed only so far as it was expressly created by legislation[8]. It involved the recognition of a change in the conception of *tutela*, and it appeared early. A *lex Atilia*, of unknown but early date[9], provided for the appointment of

1 G. 1. 175; Inst. 1. 19. 2 *Post*, § CXXXIV. 3 G. 1. 172. 4 A text attributed to Gaius (26. 1. 16. 1) says that *tutela* never passes by inheritance to another and adds, "*sed ad liberos virilis sexus perfectae aetatis descendunt legitimae, ceterae non descendunt.*" The words *perfectae aetatis* are certainly due to Justinian and it is possible that the whole clause is. 5 Inst. 1. 19; see also G. 1. 175. 6 The name *fiduciaria* survives in Justinian's law though there is now no *fiducia*, even inherited. 7 G. 1. 185; Ulp. 11. 18; Inst. 1. 20. pr. 8 26. 1. 6. 2. 9 See Girard, *Manuel*, 210.

tutores in Rome by the praetor and the majority of the tribunes, and a *lex Titia*, or *Iulia et Titia*, perhaps two laws, of the end of the republic, provided for the appointment in the provinces by the *praeses*. Gaius and Ulpian[1] both speak of this as the existing system, but literary evidence shews that Claudius[2] allowed it to be done by the *Consul extra ordinem*, and it seems that this became the usual method[3]. M. Aurelius and Verus transferred it to a new official, the *praetor tutelaris*[4]. There was other change and there is some obscurity, especially as to Italy outside Rome[5]. In later law it was the duty of the *praefectus urbis* or the *praetor tutelaris*, at Rome, *secundum suam jurisdictionem*[6], which presumably means that the former dealt with cases from the higher classes. In the provinces, which now included all the territory but the capitals, appointments were by the *praeses*[7], or, where the estate was small (under Justinian, under 500 *solidi*), by local magistrates, needing however, till Justinian, authorisation by the *praeses*[8]. In all these cases except that of appointment by local authorities there was an enquiry as to fitness, replaced in the last case by the taking of security[9].

The cases of application of this *tutela* follow from what has been said. There might be none of the other *tutores*, or those that existed might be disqualified or excused or removed[10]. A testamentary *tutor* might be appointed conditionally or *ex die* or might at the moment be a *captivus*[11]. In the case of temporary excuse a *tutor* might be appointed, but in later law it seems to have been usual to appoint a *curator* in such cases, and a *tutor* only if actual *auctoritas* to some formal act was wanted. Many texts in the Digest seem to have been altered to express the new system[12].

Ulpian tells us that such an appointment could not be conditional[13], and Papinian that it could not be *in diem*[14], restrictions which seem to be due to the fact that it was done in court, *pro tribunali*, and not *de plano*[15].

1 G. 1. 183, 185, 195; Ulp. 11. 18. **2** Suetonius, *Claudius*, 23. **3** See Inst. 1. 20. 3. **4** *Vita M. Aurelii*, 10. **5** It is usually held that the *l. Atilia* applied to Italy as well as Rome, and the language of Ulpian (11. 18) seems to imply that though "*Romae tantum locum habet*" it left only the provinces to be provided for. But see Karlowa, *RRg.* 2. 285 sqq. As to the rules in the early Empire, for Italy, see Girard, *Manuel*, 211. **6** Inst. 1. 20. 4. **7** It seems that persons interested might nominate fit persons to be appointed and the *praeses* might receive names from the municipal magistrates in cases where these could not themselves appoint (27. 7. rub.; 27. 8. 1. 3, 10). **8** Inst. 1. 20. 4, 5. **9** *Post*, § LV. **10** G. 1. 182, 186; Ulp. 11. 23. **11** 26. 1. 17; Inst. 1. 20. 2. **12** *E.g.*, 26. 5. 7, 15; 27. 1. 28. 2; where litigation arose, by *legis actio*, between ward and *tutor*, a special *tutor* was appointed, called *tutor praetorius*, and when *legis actio* disappeared the same rule was applied in all *legitima iudicia* (*post*, § CCXXXII), the *tutor* being appointed by the urban *praetor*, not the *praetor tutelaris*. Under Justinian it is a *curator*, G. 1. 184; Inst. 1. 21. 3. *Post*, § LXI. **13** 26. 1. 6. 1; 50. 17. 77. **14** 50. 17. 77. **15** 26. 3. 7. 1.

Any relative or friend could take steps to have a *tutor* appointed[1], and if these failed to do so, it was open to creditors and others interested to give them notice to apply and, in default, themselves to apply to the magistrate[2]. In some cases there was a duty to apply. Thus *liberti*, if they did not apply for a *tutor* to be appointed to their patron's child, were punishable as for failure in *obsequium*[3]. Mothers were bound to apply if necessary, and to take pains to offer suitable *tutores* on penalty of being struck out of the list of successors on intestacy, unless they had some grounds of excuse[4].

LIV. *Tutela* was a *publicum munus*[5] and therefore anyone duly appointed was bound to serve unless disqualified or excused. To this there were in earlier law two exceptions which had disappeared under Justinian. Ulpian says that a testamentary *tutor* who "abdicates," which he explains as meaning "*dicere nolle se tutorem esse*," ceases to hold the office[6]. But there are texts of Ulpian himself, in the Vatican Fragments[7], and thus not altered by Justinian, which shew the testamentary *tutor* as bound, subject to excuse like others, and the same rule appears in the Digest[8]. It may be that the rule was changed in Ulpian's time, or that the right to abdicate was not absolute, or, more probably, that it applied only to *tutela* of adult women, since it is mentioned in close connexion with *cessio tutelae* which applied only there[9]. In any case it had disappeared in later law. The other exception is that of *potioris nominatio*, applying only to those appointed by the magistrate. This was the right to name a person more nearly connected and therefore more appropriate[10]. This might not be done by one himself closely connected[11], but a *libertus* could so act in the case of his patron's child[12]. The namer must shew in detail the grounds of the *nominatio*[13], and the person nominated might himself nominate over[14]. There were elaborate rules as to forms and the time within which the *nominatio* must be made. This might be regarded as a form of *excusatio*[15] but it is clearly

1 26. 6. 2. pr.; C. 5. 31. 5. **2** 26. 6. 2. 3. **3** 26. 6. 2. 1; C. 5. 31. 2. **4** 26. 6. 2. 1; C. 5. 31. 6 sqq.; Inst. 3. 3. 6; D. 38. 17. 2. 28 (which may be interpolated) applies the same rule to grandmothers and an enactment of A.D. 357 (C. Th. 3. 18. 1) which does not appear in Justinian's Code applies it to all grandparents. **5** 26. 6. 2. 2; 4. 5. 6, 7; Inst. 1. 25. pr. **6** Ulp. 11. 17. Cicero (*ad Att.* 6. 1. 4) seems to refer to the same rule. **7** Vat. Fr. 156, 173 a, 202. **8** 27. 1. 6. 17, 13. pr., etc. **9** *Post*, § LX. It occurs in the same connexion in Sch. Sin. 18. **10** P. 2. 28; Vat. Fr. 157–167; 206–220. **11** A fellow-*decurio*, or member of same gild, or one of the excepted *personae* under the *l. Papia Poppaea*, Vat. Fr. 158, 210–214. Relative wealth might come into account, P. 2. 28. 2, 3; Vat. Fr. 157, 166. **12** Vat. Fr. 160, 211. **13** P. 2. 28. 1; Vat. Fr. 166, 210. One who has pleaded an excuse and failed can still nominate another, but not *vice versa*—his act admits that he has no excuse, Vat. Fr. 206, 207. **14** Vat. Fr. 206. See also *ib.* 164, 208. It is an admission that he is *potior*, and has no excuse. **15** See Vat. Fr. 157. The time allowed is the same, Vat. Fr. 164, 207. But one who has pleaded an excuse and failed can plead another, but *potioris nominatio* bars excuse.

distinguished in the texts. There seems to be no trace of it under Justinian.

The law as to exemptions or excuses is a great mass of detail[1]. Modestinus applies the rules in general words to all *tutores*[2], but there is little other evidence that they applied to *legitimi* or *fiduciarii*[3]. The excuse must be pleaded before the officer charged with the appointment of *tutores*[4] and within limits of time dependent on distance from the place of the court[5]. The grounds of excuse were very numerous and various, some available against any *tutela*, some of only special application, some permanent, some temporary. Among general grounds were age, permanent ill-health, ignorance, poverty, exile, high office[6], a certain number of natural born children[7], holding already three substantially independent guardianships[8], and many others. Of special application were, *e.g.* litigation or hostility between the parties, remoteness of residence, etc.[9] Some might be temporary, *e.g.* absence on public affairs, illness, etc.[10]

Certain cases of partial exemption will recur in the discussion of restrictions on the appointment of *tutor*.

It may be added that these excuses were not available to one who had promised the father that he would serve[11], and that in general a *libertus* who was appointed by a magistrate to his patron's child could not plead them, though, if appointed by the patron's will to a *collibertus*, he could urge them to prevent the confirmation of the appointment by the magistrate[12]. Any person appointed by the father, whether subject to confirmation or not, if he claimed excuse, lost any benefit under the father's will, apart from evidence of the testator's intent to the contrary[13].

1 Vat. Fr. 123–247; D. 27. 1. Fully organised under M. Aurelius, 27. 1. 13. 2. 2 27. 1. 2. 5. 3 27. 1. 13. pr. See however the general language of h. t. 2. 5. 4 See, *e.g.*, Vat. Fr. 166. 5 Vat. Fr. 154–156; D. 27. 1. 13. 1 sqq. In general it must be an excuse existing at the time of appointment, but supervening matters might sometimes be pleaded after *tutela* had begun. Inst. 1. 25. 3; Vat. Fr. 184, 238, etc.; D. 27. 1. 12. 1, 40. 6 27. 1. 2. pr., 6. 1 sqq.; 6. 19, 7, 40, etc.; Vat. Fr. 129 sqq.; 151, 182–184, 223, 238–243, etc. 7 3 in Rome, 4 in Italy, 5 in a province, those given in adoption or killed in battle counting, Inst. 1. 25. pr.; D. 27. 1. 2. 3 sqq., 18; Vat. Fr. 168, 169, 191 sqq. 8 Inst. 1. 25. 5; D. 27. 1. 2. 9 sqq., 15. 5, 16, 31; Vat. Fr. 125 sqq., 186 sqq. Held by himself or his *paterfamilias* or *filiusfamilias*, but not such as he could have refused. 9 P. 2. 27. 1; Vat. Fr. 203, 241; Inst. 1. 25. 4, 9–12; D. 27. 1. 15 sqq., 21. pr., 46. 2. 10 27. 1. 10. 2, 3, 22. 1, 41; C. 5. 62. 10. In some cases the exemption lasted a year after. In some cases exemptions, though of the general type, might not be pleaded in all cases; thus *veterani* could not plead them in the case of children of *veterani* of the same legion, members of certain trade gilds in the case of children of other members. Vat. Fr. 142, 175–180, 233–237; D. 27. 1. 8, etc. Inhabitants of the historic region of Ilium were excused from *tutela* of any but *Ilienses*, h. t. 17. 1. 11 Vat. Fr. 153. 12 P. 2. 29; Vat. Fr. 152, 160; D. 27. 1. 14. 24, 30. 3. Must be a patron with full right. 13 27. 1. 28. 1, 32.

RESTRICTIONS ON APPOINTMENT OF *TUTORES*. As *tutela* was a *publicum munus* a *filiusfamilias* could serve[1], his disabilities being essentially of private law. But there were many persons who could not be *tutores*, *e.g.* slaves, peregrines and Junian Latins[2], this last being an express provision of the *l. Iunia*: colonary Latins could serve.

Sex. A woman could not be *tutor*[3]. In classical law there was no exception, but in A.D. 390 it was provided that if there was no *legitimus* or *testamentarius tutor*, a mother, so desiring, the father being dead, might be appointed by the magistrate, on her undertaking (by oath, under Justinian) not to marry again. If she did, the *tutela* ended and the husband might be sued on liabilities already accrued[4]. In 530 Justinian extended this to mothers of natural children, on their renouncing the privilege of the *Sc. Velleianum*[5]. By a novel the oath was remitted and the renunciation required in both cases[6]. By another novel mothers and grandmothers were *legitimi tutores* if they made the above renunciation[7].

Age. To be under 25 was a ground of excuse in classical law, a disqualification under Justinian[8]. The fact of being under puberty was always a disqualification except in *legitimae tutelae*, and Justinian made it one for all cases[9]. We are expressly told of the classical rule for *legitima tutela* only in the case of women, and, after the abolition of agnatic *tutela* of women early in the empire[10], these must be *libertinae*: the texts deal with the only probable case, that of *patroni filii*[11]. Such a *tutor* could not give *auctoritas*, and a *tutor praetorius* was appointed where this became necessary[12].

Defect, physical or mental. Deaf or dumb persons could not be *tutores*, except *legitimi* in classical law, and Justinian excluded them altogether[13]. Here too we learn of their capacity only in *tutela* of women[14]: a text of Hermogenianus denies it for *legitima tutela*[15], but this has probably been altered. Lunacy (*furor*) seems to have been always regarded as curable, and thus was not a disqualification but a ground of temporary excuse[16]. In classical law it was no bar at all in *legitima tutela*[17].

Privilege. Some persons by reason of station or function were ex-

1 Inst. 1. 14. pr. **2** Ulp. 11. 16; Inst. 1. 14. 1. **3** 26. 1. 16. pr., 26. 2. 26. pr.; C. 5. 35. 1. See the interpolated 26. 1. 18. **4** C. Th. 3. 17. 4; C. 5. 35. 2. **5** C. 5. 35. 3. As to this privilege, *post*, § CLVI. **6** Nov. 94. **7** Nov. 118. 5. **8** Inst. 1. 25. 13. **9** *Ib.*; C. 5. 30. 5 points out the absurd effect of the old rule which indeed gave the result that of two brothers, each might be the other's tutor. **10** *Post*, § LX. **11** G. 1. 177–179; Ulp. 11. 20, 22. **12** Ulp., *ib.* **13** 26. 1. 1. 2, 3. **14** G. 1. 180; Ulp. 11. 21. **15** 26. 4. 10. 1. In Vat. Fr. 238 it is said to be a ground of excuse. **16** 27. 1. 10. 8; h. t. 12; Vat. Fr. 184 (in Vat. Fr. 238 it is perpetual). A *curator* is appointed meanwhile (Vat. Fr. 184; D. 26. 1. 17). **17** G. 1. 180.

cluded from *tutela*. Thus *milites* and certain officials might not be *tutores* even if willing to serve[1], and there were cases in which a person of one class might not be appointed *tutor* to one of another[2].

Misconduct. This does not seem to have been an absolute disqualification, but would have its effect in the magistrates' enquiry before appointment. If a *paterfamilias* appointed an unworthy person, this would apparently be valid, and as *legitima tutela*, in basis, was to safeguard the property rights of the *tutor*, misconduct would, here too, be immaterial.

Appointment *ad certam rem*. The *tutor* was appointed to the *persona* of the pupil rather than to his *res*, and the rule "*tutor ad certam rem dari non potest*" is a natural corollary. So Justinian treats the matter. He appears to regard the rule as absolute[3]. It seems indeed to have been absolute so far as testamentary *tutores* were concerned. Ulpian and others express it very strongly[4], and though Ulpian adds the remark that in practice the appointment by will of one *tutor* to the African property and another to the Asiatic, is good[5], the meaning no doubt is that each is in strictness appointed to the whole *tutela*, the words being a direction as to the distribution of actual administration according to the usual plan, shortly to be considered. But where this interpretation was impossible, *e.g.* where one *tutor* was appointed alone, and there was a limitation to specific properties, the whole appointment was bad[6]. It seems to have been equally absolute in all normal appointments to *impuberes* by a magistrate, but there were a few exceptions where a *tutor* was temporarily replaced[7]. There was the *tutor praetorius* (in classical law, under Justinian, a *curator*), to act for the ward in litigation (in classical law a *iudicium legitimum*) between him and the *tutor*[8]. So too in the case of *impubes legitimus tutor* who could not give *auctoritas*, and was replaced by another[9], *e.g.* to authorise entry on a *hereditas*, a case which could not occur under Justinian, or of a *furiosus tutor* or the like[10]. There was also a rule that a *tutor* could not be compelled to administer property in a region remote from his residence[11], the difficulty being met by the appointment of a *tutor* to manage those properties, and we are told that he was appointed only to those, so that it is no mere question of distribution of administration[12].

1 26. 5. 21. 3; Inst. 1. 25. 14; Nov. 123. 5; D. 27. 1. 23. 1, which speaks of *castris merentes* as excused, is dealing with *veterani*. In Nov. 72 Justinian forbids debtors or creditors to be *tutores*, and requires such persons appointed to declare the fact at once, subject to heavy penalties. 2 *E.g.*, *ingenui* to *libertini* (by magistrates) if *libertini* were available, 27. 1. 1. 4. 3 Inst. 1. 14. 4. 4 26. 2. 12–14. 5 h. t. 15. 6 26. 2. 13. 7 The temporary substitute for a *tutor* absent or excused (*ante*, § LIV) is not an instance: such a substitute is *tutor* over all affairs. 8 G. 1. 184; Inst. 1. 21. 3; Ulp. 11. 24. 9 G. 1. 178, 179. 10 Ulp. 11. 21. 22; G. 1. 180. 11 27. 1. 19. 12 27. 1. 21. 2, 4.

LV. FUNCTIONS AND DUTIES OF THE *TUTOR*. The first duty of the *tutor*, in certain cases, was to give security *rem salvam pupillo fore*[1]. This was not required of a testamentary *tutor*[2], or of one confirmed or appointed by the superior magistrates after enquiry[3], but was in all other cases, *i.e. legitimi*[4], *fiduciarii*[5] and those appointed by the local magistrates[6]. We are however told that if the *tutor* was a patron or *patroni filius*, the estate small, and the *tutor* a man of substance and probity, the security might be remitted[7]. It was the duty of the local magistrates to see that proper security was given[8]. We are not told how they were informed of the matter, in the case, *e.g.*, of *legitimi*, but as there was a rule that in cases where security was required the acts of the *tutor* did not bind the pupil until this had been provided[9], those who had, or wished to have, dealings would apply the necessary pressure. The security was by personal surety to the ward, or, if he was *infans*, to a slave of his, or if he had none, to a *servus publicus*, or even to the magistrate or a third party nominated by him[10]. In the latter cases, as in *adrogatio*, the ward had only *utiles actiones*[11]. Ulpian in the Digest says that the actual verbal contract need not have been made[12]: the sureties were liable if in their presence and without contradiction their names were submitted by the *tutores* and entered on the *acta*.

The first step in the actual administration was to make an inventory of the estate, unless, under Justinian, the *tutor* was expressly released from this obligation by the testator from whom the property came[13]. It was done with the co-operation of *publicae personae*, and failure to do it involved heavy liabilities[14].

Though the *tutor* was appointed to the *persona*, he was not in classical or later law the custodian of the child. If there was difficulty as to the care of him the magistrate decided[15] and was not necessarily bound by

1 G. 1. 199; Inst. 1. 24. pr.; D. 26. 4. 5. 1. The question whether this was expressly provided in the edict is disputed. The texts cited point in different directions, but none is conclusive. The security dates from Trajan at latest, C. 5. 75. 5. See the reff. in Cuq, *Manuel*, 214, n. 2. It was no doubt applied at first only to *dativi* but extended to the others by the time of Hadrian. 2 G. 1. 200; Inst. 1. 24. pr.; D. 26. 2. 17. 3 *Ib.*; D. 26. 3. 2, 3. 4 26. 4. 5. 1. 5 If the very general language of G. and J. (n. 1) is to be accepted. But as he was chosen by the father it may be that the rule was not applied in his case. 6 26. 3. 5; 27. 8. 1. 7 26. 5. 13. 1. In these cases it was exacted only if, *causa cognita*, it seemed to be desirable (26 4. 5. 1), and it may be presumed that it was not required of the *parens manumissor*. 8 27. 8. 1. 11. 9 C. 5. 42. 1 sqq.; C. 2. 40. 4. There was a machinery, imperfectly known, for compelling the giving of security by seizure of pledges, probably only in later law, Inst. 1. 24. 3. 10 27. 8. 1. 15, 16; 46. 6. 2, 3. In h. t. 6 we are told that, *propter utilitatem*, the pupil may stipulate if he can speak, though he has not *intellectus*. The *tabularius* is not mentioned in this connexion. 11 27. 8. 1. 16; 46. 6. 4. pr. 12 27. 7. 4. 3. 13 26. 7. 7. pr.; C. 5. 37. 24; 5. 51. 13. 2, where it seems to be implied that a fresh inventory must be made of each new succession. 14 *Ib.*, etc. 15 27. 2. 1.

any directions in the will[1]. The *tutor* must however provide out of the estate an appropriate sum for the maintenance of the child[2]: here, too, the magistrate might intervene and say how much might be so spent, and the *tutor* would not get credit, in accounting, for more than this, or, in any case, for more than in the circumstances was a reasonable amount[3].

The real business of the *tutor* was with the *patrimonium*, and his functions may be divided into two branches: *administratio, negotiorum gestio*, the management of the pupil's affairs, and *auctoritatis interpositio*, the authorisation of "acts in the law" by the *pupillus*. So long as the child was *infans* he could do no legal acts, and there was no room for authorisation[4], but as he grew older this became more and more important[5]. Except in form the distinction is not of first rate importance, since the responsibility of the *tutor* was the same in both cases, and to some extent the rights and liabilities created by the *tutor* took effect in the ward[6]. What would be an improper act of administration it would be equally improper to authorise.

Administratio. In general he must do the business in a businesslike way, but there were some respects in which he was bound to act in a way in which a man acting carefully in his own interest would not necessarily act. At the end of the second century Severus forbade *tutores* to sell lands, rustic or suburban (*i.e.* unbuilt but in an urban area), except under directions in the will, or, in case of urgency, under authorisation of the magistrate[7]. The enactment adds that even this authority would not save the *tutor* from liability if, as events shewed, he did not properly inform the magistrate as to the facts[8]. By an enactment of unknown date a contrary direction was given as to unproductive or perishable moveables, or urban property (*i.e.* houses) or urban slaves[9]. Here, even though the alienation was forbidden by the will, the *tutor* was still entitled to sell, though not bound, unless the interests of the ward required it[10]. The system did not work well and Constantine[11] forbade the *tutor* to sell urban or suburban property or valuable moveables except in circumstances which would justify the sale of *rustica praedia*.

1 27. 2. 1. 1. The mother is the natural person, C. 5. 49. 1. **2** 27. 2. 3. **3** 27. 2. 2, 3. **4** As to *infantia*, and exceptional rules, *post*, § LVI. **5** See 36. 1. 38. 1. **6** *Post*, p. 157. **7** An *Oratio*, see 27. 9. 1. A *transactio*, compromise of a dispute (*post*, § CLXXXI), was a conveyance for this purpose, C. 5. 71. 4 (260). So too a pupil could not repudiate a legacy of land without authorisation by the magistrate, for as it had vested in him (*post*, § CXVII) this was an alienation, 27. 9. 5. 8. The texts shew that the prohibition was extended in practice to *curatores*. **8** 27. 9. 1; C. 5. 71. 5. **9** See C. 5. 37. 22. pr. It may possibly have been in the *Oratio* of Severus. **10** 26. 7. 5. 9. But this may have been written before the enactment. See also 26. 7. 7. 1; 50. 16. 198; C. 5. 38. 3. **11** C. 5. 37. 22. 1 sqq. Under Justinian, in case of *praedia rustica* or *suburbana*, though the conveyance was void it was validated by lapse of five years from full age, C. 5. 74. 3. Constantine had allowed one year to suffice. C. Th. 3. 32. 1.

The *tutor* must take steps to recover debts due to the ward at once[1]. He could bring and defend actions on behalf of the pupil[2], or, (if the pupil was old enough and the proceedings were in his name, as, in that case, and if he was available, they should be,) represent him in the litigation[3]. He must invest moneys within a certain time, being liable for interest if he delayed without good reason, at the maximum rate if he used it for his own purposes[4]. These rules, and others similar[5], express the change in the conception of *tutela*: the interests of the *pupillus* were in the foreground and were safeguarded to an almost unreasonable extent.

It was not in all fields that the *tutor* could act alone: shortly, it may be said that he could act on the ward's behalf in all acts *iuris gentium*, but not in acts *iuris civilis*. He could not alienate or acquire for him by *mancipatio*[6]: whether he could do so by *cessio in iure* depends on the interpretation of the rule allowing representation in the *legis actio* "*pro tutela*[7]." He could acquire *bonorum possessio*, *i.e.* a praetorian succession, for the child[8], but not civil law succession till the later empire, when this was allowed if the child was *infans*[9]. He could acquire and alienate by *traditio* by the time of Hadrian or earlier. Some of the restrictions could be evaded by using a slave of the ward who could acquire and probably alienate for him by *mancipatio*[10], and accept a civil succession for him[11]. If the ward had none, one could be bought[12].

Contract was a more personal matter. In early classical law the tutor's contract was his own: the ward took no right and incurred no liability, though of course the matter would come into account. But, here too, a remedy was found before the close of the classical age. The texts are much interpolated, and there has been much discussion[13]. The course of the evolution may have been somewhat as follows. Where the *tutor* had defended an action for the ward, or had sued on his behalf, the pupil being absent or *infans*, so that it was reasonable for the *tutor* to act personally instead of giving *auctoritas*, the *actio iudicati* lay directly against or to the pupil, from, at latest, the time of Antoninus

1 He must not allow time, even though this be to the advantage of both sides, 26. 7. 15. **2** 12. 2. 17. 2; 26. 7. 1. 2, 2, 15, 22, 23, etc. **3** 26. 7. 1. 2, 2. But one of active *contutores* cannot sue another, *pupilli nomine*, 26. 7. 12. pr. **4** 26. 7. 7. 4. **5** *E.g.* 26. 7. 5. 8, 7. 1, 7. 8, 7. 14, etc. **6** Mitteis, *Rom. Pr.* 1. 208. But the matter is not wholly clear. **7** Inst. 4. 10. pr. The power under *l. Hostilia* applies only to *furtum*. From the fact that special machinery was devised to enable an *infans* to free *vindicta* (40. 5. 30) it seems that *tutor* could not *lege agere* for the ward. There is however another reason for this. *Manumissio* is not administration, 40. 1. 13; 40. 9. 22. **8** 37. 1. 7. 1, but not repudiate it, h. t. 8; 38. 9. 1. 4. **9** C. Th. 8. 18. 8; C. 6. 30. 18. **10** *Post*, § LXXXV; G. 2. 87. **11** *Post*, § CIX. **12** Though, if he was *infans*, civil ownership could not be acquired, bonitary could, and a slave acquired for this bonitary owner, G. 2. 88; P. 1. 7. 6. **13** See, *e.g.*, Wenger, *Actio Iudicati*, 193 sqq.; Solazzi, four articles in *Bull.* vols. 22–25.

Pius. There was nothing *utilis* about the action, nor was it postponed to the end of the *tutela*[1]. It was as if he had been a *cognitor*[2]. By the time of Justinian the limitation to cases of absence, etc., had disappeared[3]. But contract was a personal matter, in which there was no representation, and thus a contract by the *tutor* was enforceable only by or against him[4]. But as early as Aristo there was a rule that the ward was liable to the extent of his enrichment for any fraud of the *tutor* in his affairs, in a special action described as *tributoria*[5]. When the *tutela* ended the *tutor* was no longer concerned, and a rule appeared that where he had himself reasonably contracted on behalf of the ward, he could not then be sued on the contract and an *actio utilis* lay against the ward[6]. Some such rule was necessary, for he could not assign his liabilities to the ward so as to bind creditors from proceeding against him, and the rule seems to be quite general under Justinian, *i.e.* not limited to cases of *infantia*[7], etc. But the same difficulty did not arise the other way: the *tutor* could transfer his rights of action (*procuratio in rem suam*) to the ward[8], and cease to be concerned in the matter. It is however generally held that the same rule applied: the ward could bring a *utilis actio*[9]. But this is doubtful. The texts, above cited, laying down the general rule, deal only with the other case. Ulpian says that obligations are not acquired for the pupil by the *tutor*, but remain with him[10], and Diocletian says that the ward cannot acquire an action through the *tutor*, "*nisi ex certis causis*[11]." Two such *certae causae* are recorded. If *A* lent *B*'s money, *B* acquired a *condictio*, though not any subsidiary obligations which might have been created[12]. This was equally true if *A* was *B*'s *tutor*, and there was nothing *utilis*[13] about it. But if, as was usual, the loan was accompanied by a *stipulatio*, this superseded the *mutuum*, and thus barred the *condictio*[14]. Relief was given against this purely technical obstacle, by an *actio utilis*, where the tutor's act was reasonable. This limit, and the *utilis* character of the action, were gone under Justinian, and there was never any question of postponement to the end of the *tutela*[15]. Again, if a *tutor* made a *constitutum* for payment to the ward,

1 26. 7. 2. pr. (interp.); 26. 9. 5 (ref. to *tutor* is interp.); 26. 9. 6; 26. 9. 7; 42. 1. 4. 1. D. 26. 7. 39. 12 deals with *cognitio extraordinaria* and the facts are not clear. **2** *Post*, § CCXXXIX. **3** It has thus disappeared from some of the texts in n. 1. **4** 26. 7. 39. 4; C. 2. 24. 4. **5** 26. 9. 1. 3, 4. In 1 the extension to *culpa*, and other provisions, are due to Justinian. **6** 2. 11. 15; 4. 4. 27. 1 (interp. Solazzi, *Bull.* 25. 90); 26. 9. 5. 1; h. t. 8 = 36. 3. 18. 2; C. 5. 37. 26. 3 (Bas. 38. 9. 39); C. 5. 39. 1. See also, 21. 2. 4. 1. **7** C. 5. 39. 3 does not speak of the action as *utilis*, and the expression *actio personalis* suggests Justinian. **8** *Post*, § CCXXXIX. **9** Girard, *Manuel*, 217; Mitteis, *Rom. Pr.* 1. 222; Duquesne, *Translatio Iudicii*, 47, 153. **10** 13. 7. 11. 6. **11** C. 5. 39. 5. **12** C. 4. 27. 3. **13** 26. 7. 47. 5. **14** See the discussion in 26. 7. 16; 45. 1. 126. 2, and *post*, §§ CLXII, CXCIV. **15** 12. 1. 26; 26. 7. 9. pr.; 26. 9. 2; C. 5. 39. 2. Similar concession where the lender was *procurator* of a *miles*. 12. 1. 26.

the ward could sue *utilitatis gratia*. But this rule, which the text[1] applies to other cases, was an exception to the rule that there could not be a valid promise of payment to a third person[2]: there was no question of the end of the *tutela*.

The *tutor* must shew a certain care in his administration, but the degree seems to have varied historically. The better view seems to be that here[3], as in all infaming actions, the liability was originally only for *dolus*, a restriction consistent with the original conception of *tutela*. This would in practice cover liability for gross negligence[4], difficult as a matter of evidence to disentangle from *dolus*. But, at some time, possibly as early as Celsus, an increased liability appeared: the *tutor* must shew the same care that he did in his own affairs[5], a notion also perhaps influenced by the conception of *dolus*. Some texts make him liable for all negligence, *culpa levis*[6]. But there were disputes among the lawyers, and the whole story of *culpa* is much disputed[7].

It must further be noticed that all this was *administratio* and was governed by that notion. A *tutor* could not by act or authorisation, make gifts of the property[8]. Acts of spoliation were not *administratio*, and thus not merely gave an action for damages but were void[9].

LVI. *Auctoritatis interpositio*. The expression denotes co-operation of the *tutor* with the ward: the act was formally done by the ward with *auctoritas* of the *tutor*. This *auctoritas* was itself a somewhat formal act. It involved presence: it could not be given by letter or ratification[10]. It could not be conditional[11] and could be given only by oral declaration[12], and there is evidence that it was commonly in answer to an interrogation by the other party[13]. But in later law actual presence of the other party was not necessary[14].

The possibility of *auctoritatis interpositio* did not in strictness arise till the child had reached a certain development. He could not be authorised to act till he was capable of conscious action. He must have *intellectus*[15]: what the *tutor* provided was judgment whether it was wise to do the act or not. Hence arose the rule that there could be no *auctoritas*

1 13. 5. 5. 9. *Curator furiosi* or *minoris, actor municipii*. As to this rule, *post*, § CXLIX. 2 *Post*, §§ CXLIX, CLIV. 3 Mitteis, *Rom. Pr.* 1. 324 sqq. 4 *Culpa lata*. See 26. 7. 7. 2, "*lata neglegentia*." See also 26. 10. 7. 1; C. 2. 18. 20; C. 5. 51. 2; C. 5. 55. 2. 5 16. 3. 32, written of *tutela*, see Mitteis, *op. cit.* 326; 27. 3. 1. pr. "*Diligentia quam suis rebus*" called by moderns "*culpa levis in concreto*." 6 Coll. 10. 2. 3; D. 26. 7. 10, etc. *Dolus* only, 26. 7. 7. pr. etc. Mitteis, *op. cit.* 327. 7 *Post*, § CXC. 8 26. 7. 22; C. 5. 37. 16. In the same way a slave with *administratio peculii* cannot make gifts out of it, 20. 3. 1. 1; 20. 6. 8. 5. 9 41. 4. 7. 3. For similar reasons a *tutor* could not act in matters between himself and the ward. Inst. 1. 21. 3; G. 1. 184. 10 26. 8. 9. 5, 10; Inst. 1. 21. 2. 11 26. 8. 8. 12 26. 8. 3. If not in proper form it was void, h. t. 2. 13 26. 8. 3. 14 26. 8. 9. 6. 15 G. 3. 109.

while he was *infans* or *infantiae proximus*[1]. But the strict principle was departed from and the terms used need explanation. Till the fifth century *infantia* was used in its literal sense: it meant incapacity to speak[2]. But in A.D. 407 or a little later the limit of *infantia* was fixed at seven years[3]. Though some texts link *infantia* and lack of *intellectus*[4], these are not the same thing. A child too young to speak cannot well have *intellectus*, but he is also barred from many transactions, all those in which speech is needed, by the fact of being unable to speak[5]. And a child may be able to speak and yet not have *intellectus*[6]. Such a child was said to be *infantiae proximus* and when past that stage *pubertati proximus*, but there was no question of a fixed age in this matter. On grounds of utility however, and in view of the fact that the *tutor* could really supply the necessary mental element, those *infantiae proximi* were allowed to contract with the *auctoritas* of the *tutor* as early as the time of Gaius[7], and the same was allowed, then or a little later, to *infantes*, in matters which did not involve speech, though it is clear that such children could have no real understanding of the matter[8].

As the judgment of the *tutor* was the foundation of the whole institution his *auctoritas* could not be compelled, though there were of course remedies for improper refusal[9].

The *tutor* could not validly authorise acts in which he himself had an interest. Thus a loan to the pupil by him with his *auctoritas* was invalid and created only a *naturalis obligatio* to the extent of enrichment[10]. If he was sole *tutor* no such transaction was possible, unless a *tutor praetorius* was appointed for the purpose of authorising it[11]. If there were other *tutores* one of these could authorise it, if the *tutela* was such, and the transaction such, that the *auctoritas* of one *tutor* sufficed[12].

Not every transaction needed *auctoritas*: the ward could carry through transactions which could only benefit him, not bind him,

1 G. 3. 109. For the distinction between *infantiae proximus* and *pubertati proximus*, and refutation of the older opinion that this corresponded to some definite age limit, see Dirksen, *Verm. Schriften*, 1. 180 sqq. 2 Varro, *L. L.* 6. 52; D. 27. 8. 1. 15; 40. 5. 30; 45. 1. 70, etc. See also Inst. 3. 19. 10 and Theophilus thereon. 3 C. Th. 8. 18. 8; C. 6. 30. 18. D. 23. 1. 14; 26. 7. 1. 2 are interpolated. See Girard, *Manuel*, 203, n. 4. 4 41. 2. 32. 2; 47. 2. 23; 50. 17. 5, etc. 5 26. 7. 9. pr., etc. Cf. 45. 1. 1. pr. A dumb man is excluded for the same reason though he may be of perfectly sound mind. 6 29. 2. 9; 44. 7. 1. 13. 7 G. 3. 109; Theoph. ad Inst. 3. 19. 10; D. 29. 2. 9. 8 36. 1. 67. 3; C. 7. 32. 3. In 41. 2. 32. 2, where it is a question of acquiring possession there is a double illogicality, for, as we shall see, *auctoritas* was not in principle needed for acts which involved no assumption of liability or possible loss, like *possessio*, 41. 2. 1. 3. The point of *intellectus* was however still material in respect of liability for wrongdoing. See, *e.g.*, G. 3. 208; Inst. 4. 1. 18; D. 4. 3. 13. 1; 9. 2. 5. 2; C. 9. 47. 7, etc. 9 26. 8. 17. 10 Inst. 1. 21. 3; D. 26. 8. 1. pr. 11 This was the method where litigation arose between them, *ante*, § LV: a *curator* under Justinian. 12 As to this case, *post*, § LVIII.

without *auctoritas*[1]. Informal acts of acquisition could be done for an *infans* by the *tutor*, and by the *impubes* capable of acting at all, and the formal acts which had created difficulty during *infantia* could now be done by him, or, if they involved liability, by co-operation, though the *tutor* could not perform them on behalf of the ward[2]. Thus in unilateral transactions the matter was simple: if it was one which bound the other party it was valid; if it purported to bind the *pupillus* it was void unless there was *auctoritas*. But the most common transactions are bilateral; they impose duties on both sides, and here the matter was not so simple. To treat the other party as bound and the ward as not bound would be unjust, and the matter was otherwise dealt with. If a pupil had purported to go through such a transaction he could not cry off without returning any benefits he had received, and he could not enforce the contract without doing his part[3]. If he had done his part he could recover what he had handed over or sue on the contract[4]. If the transaction had been carried out on both sides without *auctoritas* the pupil could, *e.g.* in sale, recover his property but must refund to the extent of enrichment or, conversely, could recover the price on returning the goods[5]. The case of payment to a pupil was specially dealt with. A receipt by the pupil was not valid, but if he sued again for the money he must account for what he still had or had advantageously expended[6]. A receipt by the *tutor* was not quite safe, as the pupil might get *restitutio in integrum* and fraud of the *tutor* would suffice for this[7]. The safe way was to pay it to the ward with presence and *auctoritas* of the *tutor*. This created difficulties, as the ward was not in the charge of the *tutor*, and might be far away. Justinian therefore provided that payment might be validly made to the *tutor* under sanction of a *iudex*[8].

LVII. CLOSE OF *TUTELA*. The *tutela* might end in many ways, *e.g.* by death or *capitis deminutio*[9], or puberty, of the ward[10], by occurrence of

1 G. 2. 83; 3. 107; Inst. 1. 21. pr.; D. 26. 8. 9. 2 Formal acceptance of a *hereditas* (*cretio*, *post*, § CIX), formal conveyance of property, *mancipatio*; formal manumission, *vindicta*; *acceptilatio*, and formal surrender of rights or property, *cessio in iure*. G. 2. 80; D. 40. 5. 30. 1–4; 46. 4. 13. 10. 3 If he had agreed to sell he could not sue for the price without delivering the goods (and conversely he could not claim the goods without payment), 18. 5. 7. 1; 44. 4. 8. pr. 4 G. 2. 82. 5 26. 8. 5. pr. 1. As he had only to restore enrichment, there might be loss to the other side: who thus bore the risk. See Inst. 2. 8. 2. 6 G. 2. 84; Inst. 2. 8. 2. The rule applies only to voluntarily undertaken obligations. Those which result incidentally from ownership of property (quasi-contract, *post*, § CLXXXV) bind a *pupillus* like anybody else, 44. 7. 46. 7 It is clear that the payment could be validly made to a *tutor*, even one *tutor* of several, if he was an acting *tutor* (*post*, § LVIII), 46. 3. 14, 100. 8 C. 5. 37. 25, 27. This applies to capital payments and to rents, interest and the like above a certain limit. Below this limit they can be paid to the *tutor*, as before. 9 Sch. *Sin.* XVI (42) shews a man *tutor* to his *impubes* brother who has been sent to a Latin colony. The allusion may be to a case in which the *tutela* was expressly preserved (see *l. Salpensana*, cc. XXII, XXIX; Girard, *Textes*, 109), but see *ante*, § XLIX. See also Sch. *Sin.* XX (54). 10 As to this, *ante*, § XLI.

the date or event till which the *tutor* had been appointed[1], completion of the purpose for which a temporary *tutor* had been appointed (such as temporary excuse of the ordinary *tutor*), death or *capitis deminutio maxima* or *media* of the *tutor*, or supervening ground of exemption. In several of these cases there was only a transfer of *tutela* and, apart from this, which does not need discussion, the only thing that need be said is that in later law puberty was fixed at 14 for males, 12 for females, while in the time of Gaius it was still disputed whether in the case of males it was determined by age or by actual physical development[2]. There are two cases of more importance.

Capitis deminutio minima of the *tutor*[3]. This operated only in the case of *tutores legitimi*. In this case the *tutela* was ended and passed to the next person with a civil law right of succession. *Capitis deminutio minima* of one of two patrons left the *tutela* wholly with the other[4]. That of a sole patron would normally transfer it to his *adrogator*[5], and the same is presumably true in the case of *parens manumissor*[6].

Removal for misconduct. If a *tutor* wronged the pupil this would have to be accounted for when the *tutela* ended[7]. If he committed an actual delict an ordinary delictal action would lie, and there were special remedies for certain cases[8]. But apart from this there was a machinery for removing him in case of misconduct, called the *Crimen Suspecti Tutoris*[9]. This was a petition for his removal, based on the XII Tables[10] and tried before the chief magistrate of the district[11]. *Tutela* being a *publicum munus*, any one might bring the accusation (*postulatio*) except the *impubes* himself, *e.g.* a fellow *tutor*, or even a woman if a near relative, or the magistrate was satisfied of the purity of her motives[12]. Immediately on the accusation the *tutor* was suspended from acting[13]. It was available against any *tutor*, even a patron[14]. There was no definite list of grounds of removal: it was at the discretion of the Court. It might be fraud or incompetence or gross negligence[15], but mere poverty was not sufficient[16]. The effect was not in all cases the same. If the evidence shewed *dolus* the *tutor* became *infamis*, but not for mere incompetence

1 Inst. 1. 14. 3. 2 G. 1. 196. The latter was the Proculian view. Javolenus required both, Ulp. 11. 28. 3 Ulp. 11. 9, 17. As to effect of *c. d.* on previous rights, etc., 27. 3. 11. 4 G. 1. 165; 3. 60. 5 *Post*, § CXLI. 6 Children pass with them. 7 *Post*, § LIX. 8 Inst. 1. 26. 11; D. 26. 10. 1. 8, 2. 9 Inst. 1. 26; D. 26. 10; C. 5. 43. 10 Inst. 1. 26. pr.; D. 26. 10. 1. 2. 11 Inst. 1. 26. 1; D. 26. 10. 1. 3. 12 Inst. 1. 26. 3; D. 26. 10. 1. 7. 13 Inst. 1. 26. 7; C. 5. 43. 7. 14 Inst. 1. 26. 3; D. 26. 10. 1. 5; h. t. 5; C. 5. 43. 4. It is probable however that it applied originally only to testamentary *tutores*, that it was extended to *dativi* (*Atiliani*, *Titiani*) when they appeared, and that its application to *legitimi* is Byzantine. See Solazzi, *Bull.* 28. 131 sqq. 15 Failure to provide maintenance, evil life, etc., 26. 10. 3. 5 sqq., 5, 6, 7. 1, 7. 2, 8; Inst. 1. 26. 5, 9–13; C. 5. 43. 1–3, 5, 9. 16 26. 10. 8; Inst. 1. 26. 13; C. 5. 43. 6. 2.

or negligence[1]. The purpose being removal, the proceeding ended if the *tutor* died or the *tutela* ended otherwise[2]. The misconduct must have been during the *tutela*, though, at least in later law, it might be before actual administration[3]. Although a patron could be removed, there were special rules in his case. The grounds of his removal were not stated, so that he never became *famosus*[4]. His own *libertus* might not accuse him[5], and it was usual, as it was in the case of *patres* and other relatives, not to remove him but to appoint a *curator* to act with him[6]. This was also usual in case of poverty[7].

The foregoing is the institution as presented by the Sources. But many of the texts shew signs of interpolation and there are divergent views as to its history. It has recently been maintained, not without support from the texts, that besides this *postulatio suspecti* there was also a power of *remotio* by the magistrate *mero motu*, later in origin and applicable to cases not attainable by the *crimen*. The *crimen*, it is said, was applicable only in case of *dolus* and only to *tutores testamentarii* and *dativi*. The power of *remotio* was applied to cases of neglect to act or negligent administration and to *legitimi tutores*. It is only, it is said, by the compilers that the two institutions were fused. Thus Ulpian seems to hold that all removal by the *crimen* involves *infamia*[8]. On the other hand neither Gaius nor Ulpian[9] seems to know of any mode of removal except as *suspectus*[10].

LVIII. Plurality of *tutores*[11]. Where there were several *tutores* it was possible, though usually not the most convenient course, for all of them to administer in common. In this case any one of them was competent to administer in any matter, but the question arises how far the *auctoritas* of one would suffice. The rule of classical law seems to have been that of testamentary *tutores* the *auctoritas* of one sufficed, except, no doubt, for a matter which would end the *tutela*, such as *adrogatio*, and thus if a question arose between a *tutor* and the ward, no temporary *tutor* was needed—another could act[12]. Some jurists held that the same was true of *dativi* appointed after enquiry, but in all other cases all must authorise[13]. Justinian provided however that in all cases of undivided

1 Inst. 1. 26. 6; D. 26. 10. 3. 18; C. 5. 43. 9. **2** Inst. 1. 26. 8; D. 26. 10. 11. **3** 26. 10. 3. 5; 4. 4, 6 sqq.; C. 5. 43. 2; Inst. 1. 26. 5. Thus if a man was excused and afterwards reappointed, no *crimen* would lie under the second *tutela* for wrong during the first, 26. 10. 3. 7. **4** 26. 10. 1. 5, 4. 2. **5** 26. 10. 3. 1. **6** 26. 10. 9. **7** C. 5. 43. 6. **8** Vat. Fr. 340*b*. See also 26. 10. 4. 4. **9** G. 1. 182; Ulp. 11. 23. **10** See Taubenschlag, *Vormundschaftsrechtl. Studien*, 27 sqq.; Solazzi, *Minore Età*, 259 sqq.; *Bull.* 28. 131 sqq., *contra*, Berger, *Z.S.S.* 35. 39 sqq. **11** The texts dealing with *contutores* have been much altered and there is acute controversy on the evolution of the rules. See Levy, *Z.S.S.* 37. 14 sqq., and reff.; Beseler, *Beiträge*, 1. 92; *post*, § LIX. **12** 26. 2. 24. As to limitations on the rule that actions against one *tutor* could be brought by or with the *auctoritas* of another, see Peters, *Z.S.S.* 32. 218 sqq. **13** Ulp. 11. 26; C. 5. 59. 5.

tutela the *auctoritas* of one would suffice, except in a matter which would end the *tutela*[1].

It was possible for the *tutores* to make a private arrangement to distribute the administration[2], or one or more might give the other or others a mandate to act, or might simply permit him to act, taking security. But all this made no difference to their capacity in law or to their ultimate responsibility *in solidum* for breaches of duty[3]. But the case was different if these arrangements were made under the provisions of an edict dealing with this matter[4]. This edict dealt in its terms only with testamentary *tutores*. The *Praetor* summoned the *tutores* to arrange how the work was to be done[5]. It might be all assigned to one, either to one named in the will, or if there was none or the *Praetor* did not approve him, to one whom the *Praetor* allowed them to elect[6]. Or one might offer security and it might be assigned to him unless another offered equal security, when he might be preferred, or the *Praetor* might choose the *idoneor*, which seems to mean the most substantial man, otherwise desirable[7]. Or it might be given to all who offered security, in common, or with divided administration[8]. If none of these plans was adopted it might be distributed either as directed by the will, or by the *Praetor*[9] at the wish of the *tutores*, either *in partes* or *in regiones*, *i.e.* according to the nature of the property or the place of the interests[10]. But if the *tutores* insisted on acting in common, this must be allowed[11]. A rescript of M. Aurelius and Verus applied the same system to those appointed *ex inquisitione*[12], as to whom in the opinion of some jurists the *auctoritas* of one sufficed, and later still, probably not till Justinian, it was applied to *legitimi*, though not to *patroni* or probably *liberi patroni*[13].

Thus, according to the texts, all the *tutores* might administer in common, or they might privately arrange a distribution, in which case those not acting[14], or not acting in the particular field, were liable only in the last resort. Or they might do so under the Edict, in which case those not acting, or not acting in the particular field, were liable only in the last resort, and only in respect of failure in supervision, *e.g.* for not getting the acting *tutor* removed if necessary, or leaving large sums of

1 C. 5. 59. 5. Here he says all must authorise: "*ut quod omnes similiter tangit ab omnibus comprobetur*," a proposition destined to a much wider application. See Figgis, *From Gerson to Grotius*, 11. 2 C. 5. 52. 2. 3. 3 26. 7. 55. 2; C. 5. 52. 2. 3, 3. 4 Lenel, *E.P.* 306. 5 26. 7. 3. 7; Inst. 1. 24. 1 suggests a certain order of preference among possible courses, but it is clear that all was in the discretion of the praetor, 26. 2. 17. pr.; 26. 7. 3. 3, 6. 6 26. 2. 19; 26. 7. 3. 7. 7 26. 2. 17. pr.; h. t. 18. 8 26. 2. 17. pr. 9 26. 7. 3. 9. 10 26. 7. 4. 11 26. 7. 3. 8. 12 26. 2. 19. 13 26. 4. 5. 2. As security was always needed in case of agnates, the edictal proceedings must have been to some extent modified. 14 Sometimes called *honorarii*, but this seems to be late and to confuse them with *tutores* expressly appointed by will *honoris causa* with no duties and no liabilities, 23. 2. 60. 2; 46. 3. 14. 1; Levy, *Z.S.S.* 37. 71 sqq.

money in his hands uninvested[1]. It seems to have been possible to appoint *tutores* with a general duty of supervision, but the same responsibility as if they were *gerentes*. This might be by the will or *ex inquisitione*[2], and the appointee would usually be a *libertus* chosen for his knowledge of the business[3]. But it is very uncertain how far all this represents classical law[4].

As this scheme of distribution was praetorian it might seem that it did not affect civil law rights and there are texts which suggest that action or authorisation by a non-acting *tutor* was met by praetorian defences[5]. But it seems clear that, at any rate in all *iure gentium* matters, his intervention was void, if the other party knew the facts. Thus in such a case ownership did not pass[6]. But we are told that if a pupil accepted a *hereditas* with the *auctoritas* of a *tutor* who was not acting, he was bound (a text written no doubt of formal acceptance, *cretio*), and the same may have been true of *mancipatio* or *cessio in iure*[7]. We are told that payment might be made to a non-acting *tutor*. The text[8] has been so mutilated by Justinian that its sense is not clear: it probably applies only to a *de facto* arrangement, for the text adds that this is not so if the praetor has forbidden the *tutor* to administer.

LIX. We have now to consider the remedies against a *tutor* who fails in his duty, removal not being a remedy but a preventive of future damage.

The two primary remedies are:

Actio de rationibus distrahendis. This action lay against any *tutor* when the *tutela* ended[9]. It lay only for actual embezzlement of the ward's property[10]. It was essentially delictal, giving double damages[11], and available to, but not against, *heredes*[12]. It dates from the XII Tables[13] and was by itself a crude and insufficient remedy.

Actio tutelae. This action, later in origin, but dating from the republic[14], gave a remedy for any breach of duty by a *tutor*. It was available only at the end of the *tutela*[15], and condemnation involved infamy[16]. It originally lay only for maladministration and thus was not available where a *tutor* refused to act at all, however detrimental to the ward his inaction was. But from the first century of the empire[17] the rule was

1 26. 7. 3. 2; h. t. 14; C. 5. 52. 2. 1. **2** 26. 2. 32. 1; 27. 3. 1. 7; 46. 3. 14. 1; h. t. 14. 6. **3** C. 5. 38. 1. In this case an allowance might be made to the *tutor*, at any rate under Justinian, 26. 7. 33. 3, interp.? **4** See *post*, p. 166, n. 6. **5** 26. 7. 4, "*exceptione summovebitur*"; 26. 8. 4, "*nec enim id ratum haberi.*" **6** 26. 8. 4. **7** 29. 2. 49. See however Peters, *Z.S.S.* 32. 232, and reff. See also Levy, *Z.S.S.* 37. 73, who gives many instances of the invalidity of the action of such a *tutor*. **8** 46. 2. 14. 1. **9** 27. 3. 1. 19; h. t. 1. 24. **10** 27. 3. 2. pr. **11** P. 2. 30; D. 26. 7. 55. 1. **12** 27. 3. 1. 23. **13** 26. 7. 55. 1. **14** Cicero, *de Off.* 3. 17. 70. **15** 27. 3. 1. 24. It is a *bonae fidei iudicium*, Cicero, *loc. cit.*; G. 4. 62. **16** G. 4. 182. **17** Inst. 1. 20. 3; D. 46. 6. 4. 3. As to this evolution, see Girard, *Manuel*, 222.

that if, on application, the magistrate ordered him to act, he at once became responsible, and in the second century, without any such steps, inaction was put practically on a level with maladministration[1]. The ward's claim was privileged in the sense that it took precedence of other unsecured debts of the *tutor*[2], and in later law there was a tacit hypothec[3], dating presumably from the time when the liability first accrued, with priority over debts secured by pledge of a later date. The action, being quasicontractual, was available to and against *heredes*[4]. As it was for settlement of accounts the *tutor* could deduct what had been properly expended out of his own funds[5]. This right of retention was all he had at first: to give him a right of action was to bind the *pupillus*. But as the funds in his hands might be less than was due to him the praetor introduced an *actio contraria tutelae*[6] by which he could claim reimbursement. It was *perpetua* and available to and against the *heres*[7].

Besides these primary remedies there were others. For any delict committed by the *tutor* the ordinary action lay, when the *tutela* ended[8]. So, where security had been given, actions lay on this, on the promise of the *tutor* and those of his sureties, on ordinary principles, but not till the end of the *tutela*, for the account was not due till then[9]. Further there was an action, sometimes called *subsidiaria*, against the inferior magistrates who were required to exact security, if they had not adequately provided for this, or, in cases where they did not appoint but nominated for appointment by the superior magistrates, had nominated carelessly[10]. They were liable only in the last resort when all the other resources had failed[11]. They were not absolutely liable for any deficit, but only if they did not take such security and precaution as were reasonably adequate at the time, not, *e.g.*, if a surety afterwards lost

1 Vat. Fr. 155; D. 26. 7. 1. The action is however *utilis*, 46. 6. 4. 3. **2** 26. 7. 42, 44. 1; 27. 3. 22. All sorts of claims of the ward against his *tutor* could be brought into this action instead of being enforced by the action appropriate to them, with the advantage of giving this privilege, and also, of perpetuating them where the action was *temporaria*, since *actio tutelae* was *perpetua*. The principle was that it was his duty as *tutor* to collect these debts from himself—*a semetipso exigere*. 27. 3. 5; 26. 7. 9. 2–5; 46. 1. 69, etc. See hereon, and on the extent to which action could be brought, *pendente tutela*, Peters, *Z.S.S.* 32. 190 sqq. **3** C. 5. 37. 20; C. Th. 3. 30. 1. **4** 27. 3. 1. 16, 17. *Heres* liable only where there was *dolus* or gross negligence, 27. 7. 4. **5** 27. 3. 1. 4–9; 27. 4. 1. 4. **6** 27. 4. 1. See however Partsch, *Neg. Gestio*, 40 sqq., who holds that till Justinian he had only *n. g. utilis*. The *actio tutelae* being *bonae fidei* the tutor's counter-claims would come in, and it is at least possible (see Partsch, *Neg. Gestio*, 55 sqq.) that the *formula* was so expressed as to permit of judgment against the pupil for them where they exceeded what was due to him. As to "*contraria iudicia*" of this type, *post*, §§ CCXVIII, CCXXXIV. **7** 27. 4. 3. 9. It may lie even where expense greater than estate (h. t. 3. pr.), but only lies at end of *tutela*, h. t. 1. 3. **8** 27. 3. 1. 22; h. t. 2. 1; 47. 2. 33. **9** As to difficulties and changes in the rules on the availability during *tutela* of other actions between *tutor* and ward, Peters, *Z.S.S.* 32. 218. **10** C. 5. 75. 5; cf. D. 27. 8. 1. **11** C. 5. 75. 3.

his money[1]. If they had been guilty of *dolus* in the matter, their heirs were equally liable[2].

If there were several *tutores* each was liable in the *actio de rationibus distrahendis* only for his own malversation[3]. But in the *actio tutelae*, if they acted in common all were liable. If they made a private division those not acting were liable last[4]. If the administration had been formally divided, or wholly vested in one, none was liable beyond his own sphere, unless, at least in later law, he had failed in the duty of supervision[5]. He was not then responsible unless the persons directly liable had proved insufficient[6].

There was other machinery which needs mention. There was an *actio protutelae* where a person acted as *tutor*, but was not validly in that position[7], and similarly there were remedies to third persons who had suffered loss owing to the intervention of such a person or of one not qualified to give *auctoritas* in that particular matter[8]. A *tutor* who continued to act after the *tutela* had expired was liable as a *negotiorum gestor*[9].

LX. *TUTELA PERPETUA MULIERUM.* This institution was plainly in the interest of the *tutor*. Gaius indeed says that it was due to the light-mindedness of women, but elsewhere observes that this is "*magis speciosa*

1 27. 8. 1. 11, 12. 2 27. 8. 4. In addition to these, in later classical law, a pupil, like a minor, could get *rest. in integrum*, though the *tutor* had authorised the transaction, but, as it seems, only exceptionally, *causa cognita*, *post*, § CCXLIV. 3 27. 3. 2. pr. 4 26. 7. 38; h. t. 55. 2; C. 5. 52. 2. 3, *ante*, § LVIII. A surety for one is liable like his principal, and other *tutores* are treated like sureties for the one in fault, can claim *beneficium divisionis* (*post*, § CLVII), 27. 3. 1. 11; C. 5. 52. 1, and can claim to have the creditor's action transferred, in fact, buying the debt, 27. 3. 1. 18; h. t. 21; C. 5. 52. 2. If one *tutor* paid a debt this transfer implied after Pius, 27. 3. 1. 13. 5 C. 5. 52. 2. 1. 6 46. 6. 12. See 27. 3. 1. 15; 26. 7. 3. 2; h. t. 39. 11; 27. 3. 1. 15 (corrupt); C. 5. 52. 3; C. 5. 55. 1. There is much difficulty as to the rules in case of *contutores* and no doubt much change. Levy, *Z.S.S.* 37. 14 sqq., suggests the following evolution. No non-acting *tutor* is liable to the *actio tutelae*. One totally freed from *gestio* by the praetor or the will, or limited to a particular field, is not liable at all outside the field assigned to him. One merely not acting or not acting by agreement with the others is at first not liable at all (see Vat. Fr. 228), later by *utilis actio*. But because of this the conception of *gestio* is wide: one who gets another to act for him is acting. *Tutela* is thought of as a whole: it is not a question of individual transactions. No man can be both *gerens* and *cessans*. All *gerentes* are equally liable for the acts of any. All *cessantes* are equally liable for damage from inaction of other *cessantes*. *Cessantes* are liable only subsidiarily, if *gerentes* cannot satisfy, but before the magistrates. All much changed by the Byzantines. They look at the individual transaction and hold that a man can be *gerens* as to one transaction and *cessans* as to another, apart from exclusion, so that he may be primarily liable on one transaction and secondarily on another. This leads to a general duty of supervision in *cessantes*, even in those excluded from *gestio*. All *tutores* are now primarily responsible for their own acts and negligences and subsidiarily for all others. Hence the joint liability of all is limited to what they have done or neglected in common, and this is subject finally to *b. divisionis*. The author makes the fact of change clear, but his main thesis requires a great number of uncertain interpolations. 7 As to this action, *post*, § CLXXXV. 8 D. 27. 6. Edictal, h. t. 1. pr. 9 P. 1. 4. 2; D. 27. 3. 13 As to transfer of actions on puberty, *ante*, § LV.

quam vera[1]." Its real origin was in the fact that a woman could have no *sui heredes* to exclude the agnates or the patron: the expectation of succession being lifelong, so also was the *tutela*. It was discredited in classical law but it lasted at any rate to Diocletian[2].

Most of the rules being the same as those of *tutela impuberum*, it will suffice to state the points of difference.

Modes of appointment:

Tutores testamentarii. Here the chief difference was that the husband of a woman *in manu*, as *paterfamilias*, could not only appoint a *tutor*, but could give the wife a choice of *tutores*, a rule inconsistent with the principle that the *tutor* must be a *certa persona*[3]. A *tutor* so chosen was called *tutor optivus*[4]. The choice allowed might be general or limited. *Optio tutoris* in general terms gave the right to change as often as she chose—*tutoris optio plena*, but it might be *tutoris optio duntaxat semel, bis*, etc.[5]

Legitimi tutores. The chief point is that a *lex Claudia* abolished the agnatic *tutela* of women, apparently even if they were under age[6]. Constantine so far abolished this rule that for young girls the *tutela* was restored[7], the perpetual *tutela* being practically obsolete. One result of the *l. Claudia* was that *tutela legitima*, the only serious one, could not arise in the case of an *ingenua*, except in her *paterfamilias*, who emancipated her[8].

Tutores fiduciarii. There was a case of this *tutela* which could not occur with males, *i.e.* the *tutor* obtained by *coemptio fiduciae causa* for the purpose of change of *tutor*[9]. He was in the same position as the *extraneus manumissor* of an *impubes*: the only difference is that here he was produced by the activity of the woman herself, with the consent of her existing *tutor*.

Tutores a magistratu dati. Here the only thing to note is that in the absence of agnatic *tutela* there was more occasion for these[10].

1 G. 1. 144, 190; Ulp. 11. 1 says: "*infirmitas sexus et ignorantia rerum forensium.*" 2 Vat. Fr. 325. An Egyptian case of A.D. 350 or later (*Arch. für Papyrusf.* 1. 293) shews women with *tutores*. One has none and says nothing about release. One is in *tutela* of her husband. But the law in Egypt was largely Greek. See G. 1. 193. Or it may be under the enactment of Constantine abolished in 362 (C. Th. 3. 1. 3) by which a minor wife was in *tutela* of the husband, who had more power than an ordinary *tutor*: he could sell her *praedia* without a *decretum*, *ante*, § LV. One of the women is stated to have the *ius liberorum*. Girard notes that, as *ius liberorum* releases, the system cannot have lasted after 410 when all women received this right (*Man.* 227); C. Th. 8. 17. 3. See, however, Cuq, *Manuel*, 222. 3 G. 1. 148, 150 sqq., *ante*, § LI. 4 G. 1. 154. 5 G. 1. 152, 153. As to *abdicatio*, *ante*, § LIV. 6 G. 1. 157, 171; Ulp. 11. 8. 7 C. Th. 3. 17. 2; C. 5. 30. 3. In terms Constantine's enactment (C. Th. 3. 17. 2) reintroduces agnatic *tutela* simply: the enactment of his in C. 5. 30. 3 confines it to *pupillae*. 8 Thus Ulpian speaking of *cessio tutelae* treats *tutela libertae* as the typical case, Ulp. 19. 11. 9 *Ante*, § XLIII; G. 1. 115. 10 See G. 1. 195.

Tutores cessicii. These existed only in the case of women. It was permitted to *legitimi tutores*, in the strict sense[1], to make formal *cessio* or surrender of the *tutela* to another[2]. It is in connexion with this case that Gaius tells us that *parens manumissor* is treated as a *legitimus tutor*[3]. The reason he assigns for the privilege is that the *tutela* is burdensome[4], but this would apply to other cases than *legitima*, and the real reason is that the *tutela* was in the interest of the *tutor* who was thus merely allowed to waive his rights. The *tutor cessicius* was a sort of representative. If he died or was *capite minutus*, or purported to cede it again, the *tutela* reverted to the *cedens* and if the *cedens* died or was *capite minutus* the *tutela cessicia* ended[5].

The unreality of the *tutela* of adult women in classical law is shewn by the number of devices for change of *tutor*. Besides *tutoris optio*, *tutela cessicia* and *coemptio fiduciae causa*, which involved consent or co-operation of someone else, there was a rule that a woman inconvenienced by absence of her *tutor* might apply to a magistrate to have another appointed, which done, the former ceased to serve[6]. In the case of a *legitimus tutor*, the only one who had real control, this was not allowed, though here too, if the *tutor* was away and there was temporary urgency, *e.g.* need to arrange for *dos*, or an inheritance to be accepted, a *tutor praetorius* would be appointed who ceased to serve as soon as the urgency was over[7]. There was a similar relief where a *legitimus tutor* was deaf or dumb or mad or a *pupillus*, and apparently the *tutor* so appointed was not permanent but created for each occurrence of the need[8]. Thus the rule *tutor ad certam rem dari non potest* has its application much cut down in this case.

There were great differences in function. The *tutor* of an adult woman did not administer: his only function was *auctoritatis interpositio*[9]. Further, a woman could do, without *auctoritas*, many things which a *pupillus* could not. She could alienate her less important property, *res nec mancipi*[10]. She could give a valid receipt[11]. She could be party to the less formal modes of litigation, *iudicia imperio continentia*[12], and appoint a *procurator* to act for her in others[13]. But, without *auctoritas*, she could not contract an obligation or take part in a *iure civili* transaction[14], which includes testation, formal manumission, formal convey-

1 G. 1. 168–172; Ulp. 11. 6–8. Doubts in the case of *parens manumissor* and *extraneus manumissor*. **2** Not to another *legitimus tutor*, Sch. *Sin.* 51. **3** G. 1. 172. **4** G. 1. 168. **5** G. 1. 170; Ulp. 11. 7. It would probably be most frequent in the case of a *liberta*. See Ulp. 19. 11. **6** G. 1. 173. **7** G. 1. 174–178, 181; Ulp. 11. 20–22. **8** G. 1. 179, 180; Ulp. 11. 21. **9** G. 1. 190, 191; Ulp. 11. 25. **10** G. 2. 80, and so make a valid loan by *mutuum*, G. 2. 81. **11** G. 2. 85, as early as Cicero, *Top.* 11. 46. **12** Ulp. 11. 27. **13** Vat. Fr. 325, 327. **14** G. 1. 190 sqq.; Ulp. 11. 27. *Obligatio* in strictness meant civil obligation and perhaps so here.

ance of property, creation of servitudes, creation of *dos* (except by *datio* where the *dos* contained no *res mancipi*[1]), acceptance of a *hereditas* or giving a fictitious release (*acceptilatio*[2]). But though *auctoritas* was thus often needed, it was usually unreal, for all *tutores* except *legitimi* could be compelled to give it[3], the *tutela* being in such cases no protection but merely a nuisance. But *legitimi tutores* could not be compelled to authorise the making of a will or a contract to bind the ward, or alienation of *res mancipi*, for which Gaius gives the honest reason that it might be against their interests[4]. No doubt the same rule applied to her passing into *manus*. The rule meant more than the same rule did in the case of *impuberes*, for there the *tutor* might in the long run have to pay damages for refusal, but that was not so here. Accordingly there was an exception: if the case was very urgent and clear, the *praetor* would compel even these to authorise[5].

The *tutela* was *perpetua*: maturity did not end it[6]. All the other modes of ending applied and there was from the beginning of the empire a mode peculiar to this case. A woman with the *ius liberorum* (three children, or four if a *liberta* in the patron's *tutela*) was free of *tutela*, a right sometimes given without actual satisfaction of the requirement[7].

As the *tutor* did not administer he had no accounts to render: there was no *actio tutelae* against him[8], or any other of the remedies for mal-administration. It does not appear that he ever had to give security in the case of an adult.

LXI. *Cura, curatio.* This name is applied to several cases of guardianship which have little in common except the fact that they cannot be contemplated as a substitute for, or artificial extension of, *potestas* till the subject is able to found one, the original conception of *tutela*. Even in the oldest cases, in which the interest of the guardian is certainly in view, the *curatio* may supervene after the subject of it has been in enjoyment of full rights as a *civis sui iuris*.

Cura furiosi. By the XII Tables, *furiosi*, lunatics conceived of as capable of lucid intervals, were placed in the *cura* of their agnates, or, failing these, *gentiles*[9]. The praetors extended similar protection to all cases of mental incapacitation (*insani, mente capti*) and even permanently incapacitating disease[10]. In cases clearly not within the XII Tables the magistrate appointed the *curator*, accepting and confirming a testa-

1 G. 1. 178, 2. 118, 3. 176; Fr. D. 15; Ulp. 1. 17; Vat. Fr. 45. 2 G. 1. 176; Ulp. 11. 27. 3 G. 1. 190. 4 G. 1. 192. 5 G. 1. 191, 192. 6 G. 1. 190; Ulp. 11. 1. 7 G. 1. 145, 194, 3. 44; Ulp. 29. 3; P. 4. 9. Women were released from *tutela* by becoming Vestal virgins, G. 1. 145. 8 G. 1. 191. The *tutor* of a girl under 12 had the same responsibility as the *tutor* of a male *impubes*. Thus at 12 the *actio tutelae* lay for an account though the *tutela* was not ended. 9 See Bruns, 1. 23; Girard, *Textes* 14. 10 50. 16. 53. pr.; Inst. 1. 23. 4. Not *caeci*, P. 4. 12. 9.

mentary nomination by the *paterfamilias*[1]. As to cases within the XII Tables the better view seems to be that, in strictness, the praetor appointed only if there were no agnates[2], but that there was a tendency to depart from this, notably to the exclusion of unworthy relatives[3] and more generally in later law. The *curator* had the care of the person of the *furiosus*[4], but apart from this his functions were similar to those of *tutor infantis*. The XII Tables gave the *curator* the power of alienation of the lunatic's property, presumably even by formal modes[5]. The *furiosus* regained capacity in a lucid interval and the *curator* ceased to act, but though there had been doubts, it is clear that at least in later law, he needed no reappointment on relapse[6]. The law as to excuses and security (elaborately regulated by Justinian[7]) was similar to that in *tutela*. The remedy for maladministration was an *actio negotiorum gestorum*, available at any time and privileged like the similar claims under *tutela*[8].

Cura prodigi. By the XII Tables, following older custom, persons who wasted property received on intestacy from their ancestors were placed under the *cura* of their agnates. As prodigality is not an exact notion, a magisterial interdiction was provided for by the XII Tables[9]. The rule did not apply to what came from other sources, or even to what came from the ancestors by will[10]. The praetor however extended the interdiction and the resulting *cura* to all cases of prodigality[11]. The evolution as to modes of appointment, security, excuses and remedies, seems to have been as in the last case[12]. There was however no question of intermission: the *cura* was continuous till the interdiction was removed. The functions were different. The *prodigus* was much in the position of a *pupillus pubertati proximus*. He could do acts which could not harm the estate[13]. We have little information as to the powers of the *curator*. According to one view the rules were as in the last case, except

1 27. 10. 16. pr.; Inst. 1 23. 3. Those appointed under the XII Tables are *legitimi*, those by the praetor, *honorarii*; Ulp. 12. 1. **2** C. 5. 70. 5. **3** 27. 10. 1. 1; h. t. 13; C. 5. 70. 7. 6. **4** 27. 10. 7. pr. **5** G. 2. 64. As to formal modes, see the texts cited, Mitteis, *Röm. Pr.* 1. 210 and Girard, *Manuel*, 229. The texts tell us nothing as to power of acquisition by formal modes *inter vivos*, and we learn that the *curator* could not accept a *hereditas* for the *furiosus* (C. 5. 70. 7. 3) till Justinian. **6** 27. 10. 1. pr.; C. 5. 70. 6. **7** 27. 10. 7. 1, 2; C. 5. 70. 7. 4 sqq. **8** 27. 10. 15. 1; 27. 3. 4. 3. **9** Ulp. 12. 2; D. 27. 10. 1. pr. **10** Ulp. 12. 2, 3. It might be a woman, P. 3. 4a. 6; D. 27. 10. 15. The reason or cause of the limitation may be that the rule was introduced before the *institutio* of *sui heredes* was in practice. The old form of *interdictio* continued to be used though it was too narrow, P. 3. 4a. 7. **11** Ulp. 12. 3. **12** 27. 10. 1. pr.; h. t. 13, 15. 1, 16. 1; 27. 3. 4. 3; C. 5. 70. 1. If the father nominated, the praetor must usually appoint the nominee (27. 10. 16. 1) if the case was clearly one of prodigality. The following passages, no doubt due to Justinian, consider how the father could have avoided the need of a *curator*. **13** 12. 1. 9. 7; 27. 10. 10. pr.; 45. 1. 6.

that the *prodigus* could enter on a *hereditas*[1]. According to another, suggested by this last rule, which involved the possibility of loss, the *prodigus* could go through ordinary transactions with the consent of the *curator*, though he could make no will[2]. But in fact no sufficient evidence is available[3]. The restrictions on alienation which were imposed in *tutela* apply here as in *cura furiosi*[4]. The action is *actio negotiorum gestorum*.

LXII. *Cura minoris*. This is the guardianship of persons *sui iuris* between 12 and 25. It is much later: as a system it is almost post-classical. The development begins, so far as we know, with a *l. Plaetoria*, dating probably from the latter part of the third century B.C. The machinery set up by this *lex*, which is mentioned in many literary texts, but little in legal sources, is imperfectly known[5]. An action based on fraud on minors seems to have been set up by it, and another, based on acts contrary to the *lex*, to have been introduced not much later. One of these, probably the first, is described by Cicero as a *iudicium publicum rei privatae*[6]. Both of them appear to have been noxal. They leave but little trace in later law. There was also, though no doubt of somewhat later development, an *exceptio legis Plaetoriae*, a defence if an action was brought to enforce the impeached transaction. Further we are told by a non-legal writer of the fourth century that *curatores* were appointed *e lege Plaetoria* for specific causes. This seems to mean not that the *lex* provided for these, but that persons dealing with minors took the precaution of seeing that the minor had an adviser. This was probably a mere *de facto* guarantee of good faith. The *curator* probably acted only in the specific transaction and it may be doubted if he had any legal *status*[7].

The praetor carried the matter further. He supplemented the provisions of the *lex* by a machinery for setting the transaction aside—*restitutio in integrum*[8]. Not every unprofitable transaction could be set aside but only one in which either the minor was tricked or he made a bad bargain owing to inexperience, what Ulpian calls *inconsulta facilitas*[9]. It was in the hands of the praetor, decided *causa cognita* and on the merits of each case[10].

1 29. 2. 5. 1; Girard, *Manuel*, 231. **2** Ulp. 20. 13; P. 3. 4a. 12. **3** 2. 14. 28. 1 and G. 1. 53 seem to make in opposite directions. **4** C. 5. 70. 2. **5** The chief texts are Plautus, *Pseud.* 1. 3. 69; *Rudens*, 5. 3. 24; Cicero, *de nat. deor.* 3. 30. 74; *de off.* 3. 15. 61; *Vita Marci* (Capitolinus), 10; Suetonius, *ap.* Priscian, 8. 4. 21; 18. 19. 149; Tab. Heracl. 1. 112 (Bruns, 1. 108; Girard, *Textes*, 87); *Fr. de form. Fab.* 4; C. Th. 8. 12. 2; *Berl. Gr. Urk.* no. 611. 1. 6. It appears to be referred to in 4. 4. 24. 3; 44. 1. 7. 1; 46. 2. 19; sometimes called *Laetoria*, *Vita Marci*, *cit.*; C. Th. 8. 12. 2. **6** *De nat. deor.* 3. 30. 74. **7** See for various views, Girard, *Manuel*, 233; Cuq, *Manuel*, 227; Debray, *Mél. Girard*, 1. 265 sqq.; Roby, *R.P.L.* 1. 123. **8** P. 1. 7. 2; D. 4. 4. **9** 4. 4. 1, 7. 1, 7. 5, 7. 7, 9. 2, 11. 3–5, 24. 1, 24. 2, 44; C. 2. 21. 5; *post*, § CCXLIV. **10** 4. 4. 11. 3, 16. pr.; no *restitutio* where the act of the *minor* was a delict or offence, P. 1. 9. 1; D. 4. 4. 9. 2, 37.

Here too the presence of an adviser was a protection: it was *prima facie* evidence that the transaction was fair. But it was not conclusive: there might still be *restitutio* if the adviser was careless or fraudulent[1], but not otherwise. If competent persons acting carefully and honestly thought it a fair bargain there was no *restitutio* however badly it turned out.

The first appearance of anything like an official *curator* of minors was the right of persons who had certain dealings with a minor to require that he should have a *curator* for the transaction, *e.g.* for the settlement of the accounts of a *tutor* at the end of the *tutela*[2], for the payment of a debt[3], and where an action was to be brought against the minor[4]. These were only temporary. But in the second century a change occurred which is attributed to M. Aurelius[5]. Any minor might apply to have a *curator* appointed, who, once appointed, acted for the whole minority[6]. An appointment by the father's will was confirmed without enquiry, but, in general, the magistrate appointed[7]. The function of the *curator* differed somewhat from that of the *tutor*, and the remedy against him was the *actio negotiorum gestorum*[8]. But the rules as to the magistrate who appointed, security, excuses, removal for misconduct, restrictions on alienation, termination, etc., were, in later law, in the main the same[9]. The age of termination was 25, subject to *venia aetatis*, *i.e.* Severus and Caracalla allowed the privilege of full age in exceptional cases, by imperial decree, before it was actually attained[10], and Constantine provided that this might be applied for only by a man of 20 or a woman of 18[11].

As to function and capacity two periods must be distinguished, in both of which however the rule seems to have been that no one need have a *curator* unless he so wished, though it was usual, and, under Justinian, almost a matter of course. One with no *curator* was under the régime of *restitutio in integrum*. One with a *curator* was not in classical

1 4. 4. 39. 1; C. 2. 24. 2–5. **2** C. 5. 31. 7. **3** 4. 4. 7. 2. **4** Inst. 1. 23. 2; C. 5. 31. 1. **5** *Vita Marci*, 10. Gaius speaks of *cura minorum* in the imperfect, 1. 197 sqq. (which is older than M. Aurelius; Fitting, *Alter und Folge*, 56). Accordingly it is only in certain cases, "*ex iisdem causis.*" **6** 4. 4. 1. 3. **7** 26. 3. 6; 26. 5. 12. pr. A *furiosus minor* had a *curator*, *qua minor*, 26. 1. 3. 1. **8** Lenel, *E.P.* 309. Available during the *cura*, 26. 7. 26; 27. 3. 16. See on the nature of the remedy, *post*, § CLXXXV. **9** There are differences in detail. A man need not be *curator* to one whose *tutor* he had been, C. 5. 62. 20; Inst. 1. 25. 18; P. 2. 27. 2; Vat. Fr. 200 (except *libertus* to patron's child, C. 5. 62. 5); or to his wife or *sponsa* or daughter-in-law, 27. 1. 1. 5; C. 5. 34. 2; C. 5. 62. 17; Vat. Fr. 201. Many texts dealing with *curator* are interpolated and refer to the system established about the time of Diocletian (*post*, p. 173). Thus the *curator* is often introduced into texts which originally dealt only with *tutor*, by Justinian (see *e.g.*, Albertario, *Z.S.S.* 33. 240). The rules were not necessarily then new: the Vat. Frr. shew the assimilation with *tutela* in progress. **10** 4. 4. 3. pr.; C. 2. 44. 1. **11** C. 2. 44. 2. As to the machinery of the application, C. 2. 44. 2; D. 4. 4. 3. pr. Justinian holds such persons still bound by the restrictions on alienation, C. 2. 44. 3, *ante*, § LV.

law deprived of powers: he could act as if he had none and was then under the old régime[1]. But it was safer to act with the *consensus* of the *curator*, which unlike the *auctoritas* of the *tutor* was quite informal[2]. It was not indeed a complete protection against *restitutio*[3], but made it much less likely. The *curator* could act alone, and did so to an increasing extent (as also did the *tutor*), though here too there might be *restitutio*[4]. As a result of this tendency there occurred before the time of Diocletian a change[5], the nature of which is not undisputed, but which seems to mean that, while it was still possible to act without a *curator*[6], a minor who had one lost his power of independent action and was almost in the same position as a *pupillus*: he could do no act which would make his position worse without the consent of his *curator*[7], a rule which gives the strange result that a minor *sui iuris* had less civil capacity than one *alieni iuris*[8].

There were obviously in later law two tendencies, first, to an assimilation of *tutor* and *curator minoris* and, with this, the practice of giving a *curator* as a matter of course, and secondly to independent action of these guardians[9] as opposed to giving *auctoritas* or *consensus*. Only a small proportion of the texts which deal with *cura* speak of co-operation[10]. Of these many spoke originally of *tutor* or of *cura pupilli*[11], and most of the rest are about litigation[12]. The rubric of the relevant title of the Digest[13] speaks of *consensus curatoris*, but the title gives no instance, even by interpolation. It seems plain that the *curator* usually carried

1 Thus he could litigate on his own behalf. It is said indeed that the powers of the *curator* did not extend in classical law to representation in litigation. Lenel, *Z.S.S.* 35. 197 sqq. 2 There is no authority for the view that consent could be given by letter or ratification. No text speaks of consent in absence, and most of them emphasise the need of presence (Vat. Fr. 110; D. 4. 4. 7. 2; 26. 1. 3. 2; 42. 2. 6. 3; C. 2. 24. 2; C. 2. 26. 4; C. 5. 59. 1; C. 8. 37. 7). In 4. 8. 49. pr. and 26. 7. 25 the wards are *furiosus* and *pupillus*. The *consensus* of *curator* is distinguished from *auctoritas* of *tutor* in the rubric of D. 26. 8, and *consensus* occurs in C. 3. 6. 2 and D. 23. 3. 60. *Auctoritas* is more common (1. 7. 8; 23. 3. 61. pr.; 49. 1. 17. 1; C. 5. 4. 8; C. 5. 59. rubr.). Some of these texts are interpolated: it is not evident that all are. And we find *consensus* used of a *tutor* (26. 7. 1. 4). 3 C. 2. 24. 2, *ante*, p. 171. 4 C. 2. 24. 3, 5. 5 C. 2. 21. 3. It is known to Dio Cassius. See Partsch, *Neg. Gest.* 87. 6 For the view that in all cases a minor had a *curator* after this change see Cuq, *Manuel*, 230, but the texts cited hardly bear out the contention. There seems no reason to think the change was a direct result of legislation. 7 The D. still contains an expression of the old view, 45. 1. 101. 8 See Accarias, *Précis*, 1. 451. 9 Thus the legislation and comment on restrictions on sales of property speak of the act as done by the *tutor* (27. 9 *passim*), and the same is true of the more concrete cases discussed in C. 5. 71. The relatively short title on *auctoritas tutoris* suggests that this was mainly used in formal transactions "*quae sollennitatem iuris desiderant*," 26. 8. 19. 10 See the expressive language in 4. 4. 1. 3 and h. t. 2 and C. 2. 21. 3. 11 Inst. 1. 21. 3; D. 1. 7. 8 (?); 23. 3. 60; h. t. 61. pr.; 26. 1. 3. 2; 26. 7. 25; h. t. 43. 1; 49. 1. 17. 1. 12 4. 4. 7. 2; 26. 7. 1. 4; 42. 2. 6. 3; C. 2. 26. 4; 3. 6. 2; 5. 59. 4. One at least deals with *stipulatio*, C. 5. 59. 1 = C. 8. 37. 7, and Justinian lays down a general rule, C. 5. 59. 5. 13 D. 26. 8.

on the business himself, and that *consensus* was subordinate: it would be needed where the *curator* could not do the act, *e.g.*, *aditio hereditatis*[1], or where the minor had been made a party to litigation[2].

Cura pupilli. There were several cases in which a person normally under *tutela* might have a *curator*.

(*a*) In the cases of temporary absence or excuse in which a *tutor* had been appointed in classical law a *curator* was appointed in later times[3]. In view of the similarity of powers at this time the change means little more than recognition of the fact that *tutor ad certam rem* is an anomaly.

(*b*) Where any *tutor* was incapable, or a patron or *parens manumissor* unworthy, it was usual not to remove him, but to appoint a *curator* to act with him[4]. This is a different case from that of *adiutor tutoris*. If a tutor was for some temporary reason unable to act in some business he might if the pupil was absent or *infans* or *infantiae proximus* either appoint with leave of the praetor, or ask the praetor to appoint, an *adiutor* who was merely an agent and acted at the risk of the *tutor*[5]. It was not necessary with an older pupil who could appoint a *procurator*[6].

(*c*) Where legal proceedings arose between a *tutor* and his ward a *curator* was appointed in later law[7].

(*d*) A woman over 12 but still a child could not manage her own affairs and her *tutor* had no *administratio*. A *curator* was perhaps appointed to act for her[8].

There are other forms of *cura*, such as *cura ventris*[9], which have some relation to the law of persons, and others such as the various *curationes bonorum*[10] which have hardly any.

LXIII. PERSONALITY IN ROMAN LAW. JURISTIC PERSONS.

The word *persona* has not always meant the same thing. Primarily signifying a mask it comes to mean the part played in life by a man and hence the man who plays it. It is in this untechnical sense that the Roman lawyers seem to use the word *persona*. Every man, slave or free, is a person, and has a *persona*[11]; and nothing else, no group or other

1 29. 2. 90. **2** See P. 1. 4. 2, and p. 173, n. 1. On the opinion of Partsch and Solazzi that these *curatores* did not "administer" in classical law, see Lenel, *Z.S.S.* 35. 129 sqq. See also Beseler, *Beiträge*, 4. 88. **3** 26. 5. 7, 15; Inst. 1. 21. 3; Ulp. 11. 20; G. 1. 178; *ante*, § LIV. On the evolution of *cura pupilli*, Taubenschlag, *Vormundschaftsr. Studien*, § 3. 47 sqq. **4** 26. 1. 13. pr.; Inst. 1. 23. 5; P. 2. 29. **5** 26. 1. 13. 1; 26. 7. 24; Inst. 1. 23. 6. **6** 26. 7. 24; C. 2. 12. 11. **7** Inst. 1. 21. 3; cf. G. 1. 184; Ulp. 11. 24. *Ante*, § LIV. **8** See G. 1. 190; Inst. 1. 23. pr.; C. 5. 37. 12. **9** D. 37. 9, *post*, § CCXLV. The *crimen suspecti* applies, 26. 10. 3. 3. **10** See Lenel, *E.P.* 418 sqq. **11** See, *e.g.*, G. 1. 120; 3. 189; Vat. Fr. 82; Inst. 3. 17, 2, etc. Desserteaux, *Capitis Deminutio*, 2. 99, etc., holding that a slave is a *persona*, thinks that this is due to his being "doué

conception, has the name. The first sign of a more technical meaning appears in texts which speak of a more or less complete *persona*, the word beginning to bear a meaning akin to that of *caput*. Slaves and young persons incapable of taking part in legal proceedings are regarded as having an imperfect *persona*[1]. Late in the Byzantine age, but not represented in the *Corpus Iuris*, there appears a technical sense for the word in which it has come to mean a being capable of legal rights and duties[2]. We can indeed frame two meanings for the expression, besides that of "man": the "legal," *i.e.* that which is capable of rights and liabilities in law, and the "philosophical," any unity possessed of self-consciousness and will[3].

Units other than individual men can be thought of as capable of rights and liabilities, and even of acts and volitions. This is true of corporate bodies and, so far as rights and duties are concerned, of such a notion as the *hereditas iacens*, an inheritance on which the *heres* has not yet entered. For such groups and conceptions the name juristic persons is convenient, though neither this nor the mediaeval name, *persona ficta*[4], was used by the Romans.

It is important to grasp the distinction between common and corporate rights. If several persons agree to carry out a business undertaking together or to buy, *e.g.*, a yacht for their common use, they become in the ordinary way common owners of the assets of the business or of the yacht in undivided shares. Each owns his proper proportion. There is nothing corporate about this, no artificial person to whom the property belongs. But the position is quite different in the case of a corporate body, a municipality or a railway company. Here the property belongs to the corporate body and not to the individuals. A shareholder who walks on the railway is just as much a trespasser as any other person. The inhabitants of the town do not own undivided shares in the guildhall[5]. In Roman Law this group personality could not arise of itself: it was always the creation of the State[6]. Hence arose the question, put in the middle ages and still debated, whether this group personality is real or fictitious. It always had been created by the State, and when it was once conceived of

d'une fonction juridique." This half-way house between the view that he was not a *persona* and the language of the texts implies that a *servus sine domino* not held by any one would not be a *persona*. It is difficult to reconcile with the language of Gaius (1. 120, 121), where the *servilis persona* is being mancipated as a chattel, or with 30. 86. 2. It is unlikely that the expression would have been used in these texts if any such distinction had been in the writer's mind.

1 C. Th. 3. 17. 1; C. 5. 34. 11. 2 Nov. Theod. 17. 1. 2. 3 See Kuhlenbeck, *Entwicklungsgeschichte des R. Rechts*, 2. 10 sqq. 4 See Maitland, *Coll. Pap.* 3. 304 sqq. 5 The recognition of this distinction does not come by nature, see Maitland, *Township and Borough*, 12 sqq. 6 3. 4. 1. pr.

as fictitious it followed that it must be so created[1]. But into these questions we cannot go[2].

If we accept the "legal" definition, capacity for rights and duties[3], then while it is clear that personality can attach to groups, it is possible to regard it as attached to conceptions which are not groups at all, *e.g.* the *hereditas iacens*. German Law has gone far in this direction: it recognises as juristic persons Foundations (*Stiftungen*), *i.e.* Funds consisting of property earmarked for certain purposes, usually charitable, the ownership being vested, not in the administrators, who are mere agents, but in the Fund itself[4].

Roman Law recognised right-holding units other than individual[5] men, though it did not apply the word *persona* (or even *caput*, which corresponds with *persona* in its modern legal sense) to them. Ulpian indeed speaks of individuals as *personae singulares*[6], which suggests the extension, and these group persons were said to have *corpus*[7].

LXIV. In the republic there were three types of corporate body: the State (*populus Romanus*), the municipality, and private corporations of various kinds. The *populus* is in a sense the most important of all corporations[8], but it makes little appearance as a factor in private law, its rights and obligations being regulated not by the ordinary courts but by administrative machinery: it was essentially a "publicistic" entity. As the Emperor increased in power the importance of the *populus* lessened. In the third century the popular treasury, the *aerarium*, almost disappeared, and the Imperial treasury, the *Fiscus*, took its place. The right conception of fiscal property, *i.e.* of the juristic nature of the *Fiscus*, has been the subject of much discussion[9]. It is bound up with other obscure questions, *e.g.* with the relation of the so-called *privata res Caesaris* with the *patrimonium*, and of both these

1 Maitland, Introduction to *Political Theories of the Middle Age*, xviii sqq. The fiction theory necessarily involves the concession theory. The converse is not true. The State could confer "legal" personality on a slave, indeed in Rome all manumission was in theory controlled by the magistrates or the *populus*, but there was nothing fictitious about a freedman's personality. See also Maitland, *Coll. Papers*, 3. 314. 2 The matter has attracted much more attention on the Continent, where indeed it has been of much more political and practical importance. See for an exhaustive discussion and a statement of many shades of opinion, Saleilles, *La Personnalité Juridique*. 3 See, *e.g.*, Girard, *Manuel*, p. 93. 4 The ultimate beneficiaries are a quite unknown quantity. For the *Stiftung* see Windscheld, *Lehrbuch*, 1. Sec. 57; Schuster, *Princ. of Germ. Civ. Law*, 37 sqq. 5 See Mitteis, *Röm. Pr.* 1. 339 sqq.; Saleilles, *La Personnalité Juridique*, 45 sqq. 6 4. 2. 9. 1; 50. 16. 195. 1. The *hereditas sustinet personam*, but it is that of deceased or *heres*. *Post*, § CVII. See 46. 1. 22 where similar language is applied to "*municipium, decuria, societas.*" 7 3. 4. 1. pr. 8 Attribution of property to *populus* does not connote common ownership, any more than does our word Commonwealth. 9 See Mommsen, *Staatsr.* 2. 998; *D.P.R.* 5. 290; Mitteis, *op. cit.* 350; Koschaker, *Z.S.S.* 32. 407.

to the *Fiscus*. The *privata res* and *patrimonium* need not here be considered, but the *Fiscus* plays a large part in the *Corpus Juris*. It acquired property under private law in many circumstances, *e.g. bona vacantia*. It sued and could be sued before the ordinary courts in relation to the transactions of its officials[1]. Its property is described sometimes as that of the *Fiscus*[2], but often as that of Caesar[3]. But there was nothing corporate about the Emperor[4]. His own really private property he could dispose of, *e.g.*, by his will, like any other citizen[5]. But fiscal property went to his successor. It appears certainly to have been thought of in the early empire as the property of the Emperor, while as yet the imperial officials were mere agents of his, and the *populus*, represented by the Senate, shared the sovereignty with him. There is no difficulty in the fact that he was a private man: this particular property was dealt with under special "publicistic" rules[6]. But when the *populus* and the *aerarium* had lost all importance and the imperial officials were the real State officers, though the attribution to Caesar still persisted, the property was in fact contemplated as that of the State, the attribution meaning no more than does the appearance of *Rex* as plaintiff in our courts when claims of the State are in question. High modern authority[7] however goes further, and holds that the *Fiscus* itself, as an independent *Anstalt*, was really the owner of the property. Whether the ownership is here contemplated as in the group of officials, or the case is one of a true *Stiftung* and the ownership in the Fund or *Zweck* itself, is not altogether clear. But the author cited recognises that for practical purposes it was the property of the State[8].

Municipalities[9] were of many types. During the republic they seem to have been mainly the subjugated, incorporated, communities which received, or were not deprived of, corporate character, but early in the Empire similar rights were conferred on local communities of all kinds[10], the foundation, however, of such a community being always an act of State. Their power of acting as legal persons was restricted in various

1 Bethmann-Hollweg, *Rom. Civilproc.* 3. 78. But there were for the most part special tribunals in later law. See Mitteis, *op. cit.* 364 sqq. 2 *E.g.* 49. 14 *passim.* 3 *E.g. Fr. de iure Fisci, passim.* 4 The Romans approach this notion here and there. By a rescript of Pius a legacy to the Emperor takes effect in his successor if a change occurs before the will operates, even though it is a question of his really private property, and the same rule is not extended to the Empress, 31. 56, 57. 5 See Mommsen, *Staatsr.* 2. 999, n. 1; *D.P.R.* 5. 293, n. 1;Mitteis, *Rom. Pr.* 1. 354 sqq. The whole question of the legal conception of the Emperor's property is obscure. 6 The Prince of Wales is a private man, but his Duchy of Cornwall passes under rules unknown in other cases. 7 Mitteis, *op. cit.* 350. 8 The *Stiftung* idea would have been unintelligible to the Romans, and if the conception of ownership in the *Anstalt* had given any practical result differing from that of State ownership, it would no doubt have been repudiated by the Emperor. 9 See Mitteis, *op. cit.* 376 sqq. 10 46. 1. 22. Mitteis, *loc. cit.*

ways. Nerva authorised all *civitates* to receive legacies and Hadrian regulated this[1], but they could not in general be instituted *heredes* till the later empire[2]. Italian communities could free their slaves from early times, but the right was extended to the provinces only in A.D. 129[3]. As a community could not act for itself, persons were appointed to act for it, permanently in later law, but apparently only *ad hoc* in classical law[4].

Of private associations[5] Rome knew many kinds. There were the *sodalicia*, devoted to particular cults, some very ancient, others expressly founded by the State. There were numerous gilds or societies with diverse objects, trade gilds, friendly societies, burial clubs, etc. Many had corporate character, many had not, and it is not easy to say, for early law, which had and which had not. The *sodalicia* had. Many gilds had. But nothing can be inferred from the name *collegium*. The College of Pontiffs was merely a group of officials and the same is true of the other old official "colleges." Whether private *collegia* needed authorisation under the republic is uncertain, but it does not appear, in any case, that they had corporate character. They had certainly no power of litigation under the *legis actio* system, since they could not themselves appear and there was no representation. In the Empire no *collegium* could be founded without authority of the State, either express or by a general enactment, such as the senatusconsult of uncertain date which gave a general authority to found *collegia tenuiorum*, in essence, burial clubs[6]. The change dates from a certain *l. Iulia*, probably of 7 B.C., which while confirming many existing *collegia* required State authority for new ones[7]. It is widely held, on the authority of an obscure text, attributed to Gaius[8], that every *collegium* founded on authority had corporate capacity. But the text does not say this, and Mitteis remarks that while we know that *collegia* were very numerous in the empire the same text says that the power to have a *corpus* was given very sparingly, and he points out that it was not till M. Aurelius that all *collegia* acquired such normal attributes of personality as the right to free slaves and receive legacies. He concludes that the right to form a *collegium* and grant of corporate capacity were distinct and given separately till the time of M. Aurelius[9]. When corporate they could be

1 Ulp. 24. 28. The earlier instances cited by Mitteis, *loc. cit.*, may well be *privilegia*. See 30. 73. 1. 2 C. 6. 24. 12. *Post*, § CIII. 3 C. 7. 9. 3. The manumission was effected by a vote of the *curia*, C. 7. 9. 1–3; C. 11. 37. 1. 4 Liebenam, *Städteverwaltung*, 301. Mitteis, *op. cit.* 342 sqq., observes that in the republic there are still traces in corporate municipalities, of common ownership, as opposed to corporate, but that it all disappears under the organising hand of the Emperor. The rules as to the giving of security to public slaves contain a trace of the same thing, *ante*, §§ XLV, LV. 5 Mitteis, *op. cit.* 390 sqq. 6 47. 22. 1. pr., 1. 7 Mitteis, *op. cit.* 395. 8 3. 4. 1. pr. 9 Mitteis, *op. cit.* 399 sqq., 40. 3. 1; 34. 5. 20.

instituted by their *liberti*[1], but so far as is known not by other people[2]. And they had the patron's right of succession[3].

LXV. In the early empire, certain deities, but not all[4], could be instituted *heredes*, but it is far from clear who was thought of as the actual owner of the property. Probably, as Mommsen held, it was the State, for even the administration was by the magistrates and not by the temple priests[5]. Soon after the recognition of the Christian church by the State, Constantine authorised gifts by will to Christian churches[6]. All church property was contemplated as, in a sense, that of the church as a whole, but this is a sort of eminent domain, and it is fairly clear that in each community the church property was regarded as a separate patrimony. It was administered by the bishop and the *Oeconomus*, but the ownership seems to have been thought of as in the religious group as a body, though it is not clear whether in the clergy or the whole of the members, the latter being the more probable. The administration was not free: there were elaborate rules regulating the application of the various parts of the revenues, and restricting alienations of property[7]. This notion of funds earmarked for certain purposes was utilised by those desirous of founding charities, a thing difficult to do with any guarantee of permanence in the classical law[8]. Property was given or left to a church to be applied to the charitable purpose[9], and if it was to be permanent the bishop set up an establishment managed by his nominee and staffed by clergy. There were many kinds, hospitals, almshouses for the old, poorhouses, orphanages, etc.[10] In such cases the better view seems to be, though the matter is disputed[11], that the church of the place was the owner of the property. A further step was taken when men began to found such charities without express reference to the church. Gifts for these purposes to the church or to existing institutions raised no new questions, and if the founder did not specify the mode of execution it was in practice treated as one of these[12]. Thus the institution of *pauperes* or *captivos* generally, as *heredes*, was not to be objected to on account of the rules as to *incertae personae*, but was interpreted as institution of the local establishment for such purposes (or, if there was

1 37. 1. 3, 4; 40. 3. 2. 2 Mitteis, *op. cit.* 402, who mentions certain exceptions resting on *privilegia*. 3 40. 3. 2. As to *societates publicanorum*, *post*, § CLXXVIII. 4 *Post*, § CIII. 5 Mommsen, *Staatsr.* 2. 59 sqq.; *D.P.R.* 3. 67. 6 C. 1. 2. 1. 7 *E.g.* C. 1. 2. 12. 2, h. t. 17, etc. 8 To give it to a *civitas* was the safest plan. For the various experiments see Pernice, *Labeo*, 3. 1. 56 sqq.; *post*, § LXVIII. 9 *E.g.* C. 1. 2. 19. They are called *Piae causae*. The expression or its Greek equivalent is common in the Code and Novels, but it is disputed whether till later it denoted the foundation or merely the intention. Later it is the general name for such "foundations." 10 Enumerations, C. 1. 2. 15, 19, 23, etc. 11 See Saleilles, *Mél. Gérardin*, 513 sqq., who has an elaborate discussion of the whole topic, with many reff. to earlier literature. 12 C. 1. 3. 28, 48; Nov. 131. 11.

none, the bishop, who would set up the necessary *domus*) with directions as to application[1]. If the founder gave full directions as to the establishment, the *heres*, or other person charged, must set it up and only if he failed had the church any part. Even then the bishop must appoint to the control any person nominated by the founder[2]. These might still be called ecclesiastical because they were usually staffed by priests and there was a general right of supervision in the bishop, as a sort of state commissioner. It is clear that there were two classes of these establishments, those directly under the bishop and those of which the administration was independent[3]. Indeed it is clear that some founders sought to exclude the church from any interference with the charity, and Justinian enacted that such a direction should not exclude the bishop's general right of supervision[4]. These relatively independent *domus* seem to belong to the age of Justinian.

This state of the texts raises three questions. Are these establishments to be regarded as juristic persons or merely as church departments? The language of the texts from which any conclusion must be drawn, which are mostly in Greek, is so diffuse and lacking in juristic precision that no deduction from the exact wording is justifiable. But the texts so constantly treat them as on the same footing as churches, monasteries and *civitates*[5] that it is almost impossible to come to any conclusion but that they had personality, and this is in fact almost universally held. The question then arises how this comes to be attributed to them, since *corpus habere* required a state concession. It might be said that by reason of their ecclesiastical character they were thought of as covered by the concession to churches[6], but this hardly seems sufficient for those specially independent *domus*, in which the church had so little official part. Or it may be said that the authorisation of gifts to such bodies was in itself an implicit gift of personality. But it may well be that it is merely a gradual tacit extension from the recognition of those which were essentially under the bishop. The question remains: who or what constituted the person? According to one view it is the foundation itself, the Fund earmarked for certain purposes owns itself[7]. But this is of course not the Roman view: it is merely a

1 C. 1. 2. 15; 1. 3. 28, 48. The texts construe such a gift as a gift to an establishment (C. 1. 3. 48). 2 C. 1. 3. 45. 3. 3 Nov. 120. 6. 1. 4 Nov. 131. 11; C. 1. 3. 45. pr. 5 C. 1. 2. 13, 15, 19, 22, etc., esp. C. 1. 2. 23. 3. 6 See Saleilles, *Mél. Gérardin*, p. 547. 7 Girard, *Manuel*, 242, holds that some were *Stiftungen* in the strict sense, but it is difficult to identify the type he has in mind The obvious illustration of "masses de biens affectés à un office déterminé sans établissement grevé quelconque" would be funds for redemption of captives. But the texts, apart from the cases in which it is a *legatum* or the like, *sub modo* (C. 1. 3. 28. 1), seem usually to attribute this to the bishop, precisely because there is no establishment (C. 1. 3. 28. 2, 48. 2; Nov. 131. 11), and it seems rather an improbable refinement to separate this from the rest of the property the bishop held for the church.

description of the thing in terms of the rules of certain modern systems which give a similar practical result: it is no explanation at all for an English lawyer whose system recognises no such conception. The texts shew that the property is attributed to men. When we ask what men, there are two alternatives. For M. Saleilles[1], they are the indeterminate ultimate beneficiaries, all corporate idea being really gone, surviving only in a few chance descriptions of them as *corpora* and the like[2]. The other alternative, and it seems more in accord with the texts, is to regard them as true corporations[3]. It is even arguable on the texts that where the purpose was the dispensation of funds or temporary relief the ownership was in the administrators, the trustees of the charity as we should say, and where it was a permanent asylum in the residents therein[4].

1 *Mél. Gérardin*, 538 sqq. 2 *Ib.* 541. 3 The allusions to them as *corpora, domus, consortia, collegia* or Greek equivalents are too frequent to be looked on as mere survivals of a terminology that was never appropriate to them. And the frequent assimilation to bodies which were certainly corporate makes in the same direction (see p. 180, n. 5). 4 See *e.g.* C. 1. 3. 45. 10.

CHAPTER V

THE LAW OF THINGS. *RES*. PROPERTY. POSSESSION. *IURE GENTIUM* MODES OF ACQUISITION OF PROPERTY

LXVI. Subject of *Ius Rerum*, p. 182; LXVII. Classification of *Res*, 184; *Res corporales, incorporales*, 187; LXVIII. Order of the Institutes, 188; Nature of *dominium, ib.*; Restrictions, 189; LXIX. Ownership of provincial land, 191; Ownership by peregrines, 192; LXX. Bonitary ownership, *ib.*; *Exceptio rei venditae et traditae*, 193; *Actio Publiciana, ib.*; LXXI. *Actio Publiciana*, cont., 195; LXXII. Possession, 198; LXXIII. Acquisition of possession, 201; LXXIV. Loss of Possession, 204; Possession as a right, 205; LXXV. Acquisition of *Dominium*, 206; LXXVI. *Occupatio*, 207; LXXVII. *Accessio*, 210; LXXVIII. *Accessio* to buildings, 213; LXXIX. *Specificatio*, 216; LXXX. *Thesauri Inventio*, 219; LXXXI. Acquisition of fruits by non-owner, 222; *Fructuum Perceptio*; *Conductor, ib.*; Usufructuary, 223; LXXXII. *Fructuum Separatio, Emphyteuta*, 225; *Bona fide possessor ib.*; LXXXIII. *Traditio*, 228; *causa*, 229; Modalities, 231; Forms in late law, 232.

LXVI. The second and the largest of the three divisions of the Private Law is that concerned with *Res*[1]. It differs essentially from Austin's Law of Things since the classification itself starts from a different point of view. The special effects of transactions by persons in exceptional positions, *e.g.* slaves, are considered under this head, so far as they create assets for the *paterfamilias*[2], while, for Austin, these are matter for the Law of Persons[3]. The *Ius Rerum* of Justinian is not the general part of the law as opposed to that which can be most conveniently discussed in detached provisions: it is the law of patrimonial rights, the discussion of all those rights known to the law which are looked on as having a value capable of being estimated in money[4]. The rights incidentally mentioned under the law of persons do not constitute a difficulty, since they do not in general admit of valuation. A man may bring an action claiming liberty, a father may "vindicate" a son[5], but there is no question of damages in either case. Liberty, we are told, is inestimable[6]. The rights which the owner or others may have in a slave are *dominium*, usufruct, etc., and form part of the *ius rerum*.

1 General discussion of the threefold scheme, *ante*, § XXI. 2 G. 2. 86 sqq.; 3. 163 sqq.; Inst. 2. 9; 3. 28. 3 *Jurisprudence*, 2. 708 sqq. 4 Anything by which one is "actually or prospectively better off," Moyle, *Inst. Just.* 187. The word "property" is similarly used in the expression—a man of property. A man with a million in government securities would be called a man of property, though he had nothing else, but a mere claim on the State. 5 6. 1. 1. 2. 6 50. 17. 106. In Ulpian, 19. 11, *tutela legitima libertae* appears as a *res incorporalis*. This might be justified by the fact that the patron has an indefeasible right of succession to such a woman and he loses the certainty of this if he transfers the control. (*Ante*, § LX; G. 3. 43 sqq.) But the word *res* is not always used in the technical sense, see p. 183.

There is more difficulty however with respect to the rights incidentally discussed in the *ius actionum*. Besides pure procedure this branch of the law contains discussion of some obligations, of some rights of action, as well as the rules of procedure. Most of these are introduced merely incidentally as illustrating the form of action at the moment under discussion. This is plainly the case with those which are mentioned in the course of the explanation by Gaius of *actiones ficticiae*[1] and of the praetorian actions against an owner on the contracts of his slave[2], as to which Gaius expressly says[3] that he is compelled to discuss them as he has just spoken of the *actio de peculio*[4]. The discussion of this first type of accessory actions suggests that of the others, the noxal actions. But they are all considered systematically, not merely allusively. The question why it seemed more appropriate to discuss them there than in the *ius rerum* will be considered later[5].

For the purpose of the institutional scheme a *res* was an element in wealth, an asset. This is an economic conception, essentially different from the Austinian thing, a permanent external object of sensation[6], which is a physical conception. It may be supposed that Austin is really thinking of objects over which there may be ownership, a notion useless for our present purpose[7]. We shall shortly see that the sea and air were *res*. But they were *res communes*: they had a potential value, but it could not be appropriated to any individual. The important point for us is that what was present to the mind of the author of the Roman classification was legally guaranteeable value.

The subject of *res* (or *ius rerum*) is treated under two main heads, *i.e.*, what are now called *iura in rem* (including *universitates iuris*), rights available against all, and *iura in personam*, *obligationes*, available only against specific persons, the names being derived from the Roman *actio in rem*, *in personam*, which express the same distinction. But such a division cannot be quite exact. *Hereditas* included rights both *in rem* and *in personam*[8], and so, in a less complex way, did a pledge of property[9]

1 G. 4. 34 sqq. 2 G. 4. 69 sqq. 3 *Ib.* 4 The earlier mention is lost: it may have been in the two illegible pages which occur just before. 5 *Post*, § CCVI. 6 *Jurisprudence*, 1. 368. 7 *Res* is a word with as many meanings as "thing," but when used technically it always connotes a right, though not necessarily all rights, or in early law all rights having a money value came within the notion. In the famous "Uti legassit super.... suae rei" (XII T. 5. 3) it probably means nothing but physical things the subject of ownership, and rustic servitudes of the primitive kind. 8 In the XII Tables such debts as existed were not treated as part of the *hereditas* and were specially dealt with (see C. 2. 3. 26; 3. 36. 6). So Karlowa, *R.Rg.* 2. 907, though his reasons are not quite conclusive. But it is clear that they were included, in the classical law, for *hereditatis petitio* lay against one who held no part of the property but owed money to the estate and refused to pay, claiming to be *heres* (5. 3. 13. 15). Normal debtors must of course be sued by separate actions for the debts. 9 But there were pledges such as pledges of a debt to which the notion of *ius in rem* cannot possibly be applied. *Post*, § CLXVII.

(though in fact pledge was never expressly treated as a *ius in rem*). When we remember that even an ordinary contract, which is essentially a relation *in personam*, might nevertheless, in some cases, give rights against third parties, and so operate *in rem*[1], it is clear that no exact division of the law under these two rubrics can be expected.

LXVII. The treatment of the subject opens with classifications of *res*. Justinian's main classification[2] groups them according to the rights existing over them, a matter in some cases affected by the nature of the thing. *Res* were either *in patrimonio*[3], *i.e.* belonging to some one, or *extra patrimonium*. These last were of various kinds.

(*a*) *Res communes*. The common property of every one: the air, running water, the sea, and, in later law, the seashore to the highest winter floods[4]. Access to the shore was open to all, but no one might erect buildings on it, since it was not *iuris gentium* like the sea itself. But its use was, and therefore one might build shelters and the like, under license from the authorities, presumably for purposes connected with the use of the sea. These shelters appear to have been owned, but as shelters only, giving no right to the soil, and thus, if the shelter fell or was taken down, the shore was again common[5].

(*b*) *Res publicae*. Property of the State. Such were highways, rivers and harbours, so that all might navigate and fish and make fast at the ports, etc., the use of the banks being public for this purpose[6].

(*c*) *Res universitatis*. Property of a corporation, of which Justinian takes the *civitas* as the type, mentioning *theatra*, *stadia* and the like[7], but the property of the corporate *collegia* would come under the same class.

(*d*) *Res nullius*. Property belonging to no one. Such things might be either *divini* or *humani iuris*. *Divini iuris* were *res sacrae*, *religiosae* and *sanctae*. *Res sacrae* were those which had been formally accepted and consecrated by the priests, with statutory authorisation[8], as well as

1 Apart from the case of pledge. Thus an *actio doli* lay against a third party who wilfully made performance impossible and so released a party, 43. 18. 5. 2 Inst. 2. 1. pr. sqq. 3 *Patrimonium* means properly the same thing as "property" in the wide sense, or *res*. When Paul says (50. 16. 5) that *res* includes what is not in the *patrimonium* he is not discussing this classification, but perhaps limitation of jurisdiction in certain cases to *res* not above a certain value, and means that, in fixing this, all assets are included whether heritable or not, *patrimonium* being used in a narrow sense to mean heritable rights. See Lenel, *Z.S.S.* 2. 43. 4 See *post*, p. 186. 5 By a sort of *postliminium*, 1. 8. 6. pr.; 43. 8. 3. 1, etc. 6 See *post*, p. 186. 7 It is to be noted that property of the State and *universitates* is of two types. The things above mentioned are not only the property of the body but are open to the use of its members, but public slaves or land, or money in the treasury, differ from the same things in private hands only in having a different kind of owner. They are *in patrimonio universitatis*. No classical text calls public slaves *res publicae*. See 1. 8. 6. 1; 18. 1. 72. 1. 8 G. 2. 5; D. 1. 8. 9. 1, a requirement confined to land under Justinian.

dedication. Such were churches, and their contents and sites[1]. *Res sacrae* could not be commercially dealt with, and could always be reclaimed, except that Justinian allowed them to be sold for redemption of captives, and similar purposes[2]. *Res religiosae* were tombs and burial grounds. Like *res sacrae* they could not be commercially dealt with. But the rules under which land became *religiosum* were carefully laid down. The burial must be in all respects lawful[3]. The corpse must be one the buryer was entitled to bury[4], and the land must be such that he had a right to bury in it. If another had any proprietary right in the land it was not *religiosum* unless he consented[5], but with the necessary consent another's land might be made *religiosum*. Only the space occupied by the body was *religiosum*, except that the character affected in practice a whole space set apart as a sepulchre[6].

Res sanctae were the gates and walls of a city, but that conception is of little importance in private law. It was a capital offence to commit any outrage on them, *e.g.* scaling them, but no plain reason appears why the ownership might not have been regarded as vested in the city[7].

Res nullius, *humani iuris*, were those which belonged to no one. They are not mentioned in the classification at this point, but appear later in the treatment of modes of acquisition, in which the acquisition of these *res nullius* is the first point considered. Wild animals and abandoned property were the most important examples[8].

The classification differs from that of Gaius[9] in arrangement rather than in principle. After stating the distinction between *res in patrimonio* and *extra patrimonium*, Gaius gives a main division into *res divini* and *humani iuris*. The former were the *res sacrae*, *religiosae* and *sanctae*. Speaking from the pagan point of view he makes *res sacrae* devoted to the *di superi* and *religiosae* to *di inferi*, *manes*. He tells us that as no *civis* really owned provincial land it could not in strictness be made *religiosum*, but might be treated as *pro religioso*, and he makes a corresponding remark for things made *pro sacris* in the provinces by

1 The soil is *sacrum* though the church be pulled down. As the contents belong to no one there can be no *furtum* of them: it is treated as a form of sacrilege, Mommsen, *Strafr.* 762. They cannot be usucapted (*post*, § LXXXVII), but as they belong to none there is a difficulty about reclaim. Justinian allows the administrators of the church to "vindicate" (C. 1. 2. 21): in classical law probably by administrative machinery as in charities, Pernice, *Labeo*, 3. 1. 150. 2 Inst. 2. 1. 8; C. 1. 2. 21. 3 G. 2. 6; Inst. 2. 1. 9. Thus burial *in urbe* where it is forbidden does not suffice, P. 1. 21. 2; D. 47. 12. 3. 5. 4 G. 2. 6. 5 Or ratified, D. 1. 8. 6. 4. 6 Inst. 2. 1. 9; D. 1. 8. 6. 4. As it was incapable of being commercially dealt with, a tomb included in land sold was *ipso facto* excluded from the sale, P. 1. 21. 7. There would be a claim for reduction of price, if buyer was in good faith. 18. 1. 22–24. 7 The city walls cannot well be carried off and there was adequate protection for them without appealing to the law of property. See D. 1. 8. 8, 9. 8 There are things unowned but not susceptible of *occupatio*, apart from *res s. r.* and *s.* See *post*, §§ CVII, CXVII. 9 G. 2. 1 sqq.

authority, probably, of the *praeses*. He divides *res humani iuris* into public and private (the subject of private ownership), the former covering *res publicae* and *res universitatis*. He says of these that they are *nullius in bonis*. He does not here expressly mention either *res communes* or things wholly unowned, such as wild animals.

Some of the distinctions involved in this classification were evidently rather fluid in classical law. Gaius had a leaning to inclusion under the class *res nullius* of everything which had not an individual owner or owners. For him the property of a *universitas* was *nullius in bonis*, but he went on at once to say that it belonged to the corporation[1]: he could admit that a corporation could have rights but was not quite able to contemplate it as a person, an owner like a man. So too while Marcian and Justinian made the seashore common[2], Celsus made[3] it public, at any rate where the land behind was Roman. Paul[4] avoided either expression and said: "*nullius sunt, sed iure gentium omnibus vacant.*" Neratius[5] treated it similarly as a sort of *res nullius*, though he admitted that if a building erected thereon came down the acquisition was at an end. For Marcian, while the *litus* was common, it was not *iuris gentium* like the sea itself[6]. The better view is perhaps that also stated in the Institutes, *i.e.* that only the use was public, as is clearly the case with the banks of rivers[7]. As to rivers themselves the texts leave room for, and indeed contain, differences of opinion as to the sense in which they were public[8]. According to one view they were public, soil and all, but this can hardly be reconciled with the rules of *alluvio*, *insula nata*[9], etc. Accordingly it has been held that what was public was the river as such, not the water, which was common, or the soil of the bed which belonged to the riparians[10]. Others have held that the river was public only *quoad usum*. The more probable view seems to be that the earlier lawyers merely held that a river was public, without refinements. As early as Cicero[11] rules arose giving riparian owners rights, and there was

1 G. 2. 11. **2** Inst. 2. 1. 1; D. 1. 8. 2. **3** 43. 8. 3. **4** 18. 1. 51. **5** 41. 1. 14. Costa, *Le Acque nel dir. Rom.* 93 sqq., observes that the texts in n. 2 and the interpolated 47. 10. 13. 7 are the only texts which make *litus* "*commune*" while many make it public and infers that it is the compiler's doctrine, the classics making it public, Cic. *Top.* 7. 32; D. 41. 1. 14; h. t. 50, 65. 1; 43. 8. 3; 50. 16. 112. But Marcian is very late and may be the author of the doctrine. Costa also holds that the State claimed ownership over the adjacent seas, arguing from 1. 8. 10 and the leases of fishing rights, 47. 10. 13. 7, and the fact that buildings in the sea were on the same footing as those on the *litus*. But no text calls this public and a great number make the sea *commune* with no reservation. The rule as to fisheries may be construed as matter of pure jurisdiction. **6** 1. 8. 4. pr. **7** 1. 8. 5; Inst. 2. 1. 4. **8** See, *e.g.*, 1. 8. 4, 5; 43. 12. 1. 3; Inst. 2. 1. 2. **9** *Post*, § LXXVII. **10** See Pernice, *Labeo*, 1. 273. Costa (*Le Acque nel dir. Romano*) has a full discussion of the distinction between public and private waters, *rivi*, *lacus*, *stagna*, etc., and of the various rights which could be created in them. **11** *De or.* 1. 38. 173.

a tendency among classical lawyers to regard them as owners of the soil, the public rights being merely of use[1].

We have from Justinian another classification of things from a different point of view. *Res* were either *corporales* or *incorporales*[2]. The former were *quae tangi possunt*, the latter, *quae tangi non possunt*. So stated the distinction is simple. Physical objects were *res corporales* and these are given as illustrations. *Res incorporales* were abstract conceptions, notional things, and, as *res* meant assets, *res incorporales* were rights. The illustrations given by Justinian and Gaius are rights of various kinds[3]. When these are examined the fact emerges that the most important of all rights in the *ius rerum* is not there. *Dominium* was not a *res incorporalis*. It was in fact treated as a *res corporalis*, indeed the only *res corporalis*. The thing was spoken of when the ownership was meant, as it is in ordinary speech and indeed in our Real Property Law in the distinction between Corporeal and Incorporeal hereditaments[4]. Throughout the treatment of the acquisition of *dominium* both Gaius and Justinian speak of acquisition of *res corporales*.

Res incorporales were however *res* and thus did not include matters belonging to the law of persons: liberty, *patria potestas*, etc., were intangible, but were not *res*[5]. We have seen that the *ius rerum* distinguished between *iura in rem* available against all, and *iura in personam*, *obligationes*, available only against a specific person or group. Both Gaius and Justinian, after him, speak of obligations as *res incorporales*[6], but elsewhere they sharply distinguish them[7], and in fact most texts do not so include them[8]. It seems then that the use of the name *res* to include such rights *in personam* was not usual: obligations were more commonly coupled with actions[9].

1 41. 1. 65. 2. In view of the water rights which existed, it has been said that the main importance of the fact that rivers were public is that there could be no theft of the water. **2** G. 2. 12, 13; Inst. 2. 2. pr. 1. These words are post-Augustan, and though Cicero uses the idea (Affolter, *Inst. Syst.* VIII b), he is philosophising, merely restating Greek notions, not talking law. There is no evidence that notional things were dealt with in law as such for a century after. **3** G. 2. 14; Inst. 2. 2. 2. **4** With an oddly different result. Where property is given by will to *A* with a life estate reserved to *B*, *B* has the corporeal hereditament in English Law, *A* has the *res corporalis* in Roman Law. **5** As to *tutela*, *ante*, § LXVI. A more notable omission is Possession. As to the reasons for this, *post*, § LXXIV. **6** G. 2. 14=D. 1. 8. 1. 1; Inst. 2. 2. 2. **7** G. 3. 83; Inst. 3. 10. 1. **8** See Ulp. 19. 11; D. 41. 1. 43. 1; 8. 1. 14. pr.; C. 7. 33. 12. 4. There are a few texts dealing with *iura incorporalia*, which are all *iura in rem*, C. 7. 33. 12; C. 7. 37. 3; D. 41. 3. 4. 26. But these are of little significance since the name *ius* is ordinarily confined to *iura in rem*. **9** *Post*, § CXLIII. Kniep, *Gai. Inst. Comm.* 2, ad 2. 14 (p. 121), is of opinion that the passage including obligations is Gaian, and indeed from an original which he dates back into the republic, and the text which excludes them an addition. There is no obvious reason for this alternative rather than the other. And that the republican lawyers used the expression *res incorporalis* at all seems improbable. A post-classical evolution in the opposite direction is far more

The distinction between land and moveables, fundamentally important in modern law, was of only subordinate interest in Roman Law. It was, however, material in the law of *usucapio*[1], of *mancipatio*[2], of *dos*[3], of *tutela*[4], of theft[5], and to some extent in procedure[6]. In classical law, land itself was of two varieties, the distinction being of great importance, *solum italicum* and *solum provinciale*[7]. But this distinction had disappeared under Justinian, as also had the important distinction between *res mancipi* and *nec mancipi*[8].

LXVIII. *Dominium.* Before entering on the *ius rerum* itself it is necessary to say something of the order in which it is treated by Justinian (and, in the main, in these pages). *Jura in rem* are treated first, beginning with the modes of acquisition of *dominium*, *iure gentium*. Then follow the modes of acquisition of *res incorporales*, which are *iura in rem*, *i.e.* practically servitudes. Then follows the discussion of such civil law methods as existed in his day. It is however more convenient to consider all modes of acquisition of *dominium* before passing to servitudes, Justinian's order, suggested on this point by that of Gaius, being due to the fact that the discussion is in the form of a commentary on the proposition that all things are either corporeal or incorporeal. Then follows agency in acquisition and alienation, and then acquisition of *res*, *per universitatem*, of which *hereditas* is the most important case. He then proceeds to obligation. It is in the main the order of Gaius except that Gaius treats the *iure civili* methods before the *iure gentium*. They were the most important in his day, but *mancipatio* and *cessio in iure* have disappeared under Justinian. A text in the Digest from another work of Gaius declares that it is desirable to treat the *iure gentium* methods first, as being the most ancient[9]. But this piece of history may be due to the compilers, as the order suggested is, as we see, not the order of the Institutes of Gaius.

We have now to consider what is meant by *dominium*, which the existence of inferior modes of ownership makes it impossible to define as Ownership. Ownership is described as *ius utendi fruendi abutendi*. But whether the right concerned is *dominium* or one of the inferior modes it is practically never so unrestricted as this description would make it. All civilisations have found it necessary to lay down restrictions on what a man may do with his own. An owner might not cruelly treat his slaves. He might not so use his house as to make it a nuisance to his neighbours.

likely. As to the position of the inferior modes of ownership in the scheme of things corporeal and incorporeal, see *post*, § LXXI.

1 *Post*, § LXXXVII. 2 *Post*, § LXXXV. 3 *Ante*, § XL. 4 *Ante*, § LV. 5 *Post*, § CXCVI. 6 *Post*, §§ CCVIII, CCXLIX. 7 *Post*, § LXIX. 8 *Post*, §§ LXX, LXXXVI. 9 41. 1. 1. pr.; Inst. 2. 1. 11. See the Berlin stereotype edition.

The law might forbid him to build above a certain height, or within a certain distance of his boundary[1]. He might not pull down his house[2]. Thus the general principle is subject to such restrictions as the State may impose[3]. And the owner may have restricted his right by conferring rights on others, such as servitudes, *e.g.* a right of way, without ceasing to be owner.

All this is true of every form of ownership: it does not help to establish the essential characteristic of *dominium*. To reach this we must abandon the conception of *ius utendi fruendi abutendi*, which is not Roman. If, in the time of Gaius, a *dominus* of land sold it and made *traditio* of it, *i.e.* transferred it informally, he lost all practical interest in the land, but as he had not formally transferred the *dominium* he remained *dominus*, till, by lapse of time, the *dominium* had passed to the purchaser. Conversely, the buyer had all practical rights in the land but was not *dominus*: he had not the *ius Quiritium*. Our early land law provided a close analogy to this state of things in the right of a lord of the fee who had granted the land to a freehold tenant, except that there the relation was permanent: in Roman Law it was, in the case stated, temporary[4]. *Dominium* was the ultimate right to the thing, the right which had no right behind it. It might be a mere *nudum ius* with no practical content, but it was still *dominium ex iure Quiritium*[5].

The question arises whether it was possible to attach incidents to the ownership of a transferee, which were not servitudes, but should be binding on future holders. It was of course possible to contract for such restrictions but this would bind only the other party and his heirs. This is the meaning of a text attributed to Gaius[6]: "*in traditionibus rerum quodcumque pactum sit id valere manifestissimum est.*" As this is from a treatise on the XII Tables it no doubt referred originally to *mancipatio* and the allusion is to such things as the *pactum fiduciae*[7]. If the restriction were disregarded by the other party, this would be a breach of contract but no more: if by a subsequent holder there would be in general no remedy against him. There were however certain cases in which such an incident attached to a conveyance had an effect *in rem*, and not merely against the other party. There were several such cases in the law of slavery[8]. There are some slight signs of a similar tendency

1 C. 8. 10. 12. 2; C. h. t. 4; D. 8. 2. 14. **2** See, *e.g.*, 18. 1. 52. **3** See for accounts of these restrictions, Girard, *Manuel*, 261 sqq., Cuq, *Manuel*, 246. **4** Ownership of provincial lands gives a closer analogy, *post*, § LXIX. **5** If a thing which can be the subject of *dominium* is abandoned by the holder, and no one has now a claim to it, the late holder was *dominus*. **6** 2. 14. 48. **7** *Post*, § CLI. **8** Conditions that the slave should not be sold or prostituted or freed, or should be freed. They differed in their effect *in rem*: the most straightforward case is that of a slave sold not to be freed. Manumission by any later holder was void. 18. 7. 6; 40. 1. 20. 2. Buckland, *Slavery*, 68 sqq.

in the case of *pacta adiecta* in ordinary sales[1]. But they do not go far: there is no such rule as that restrictive covenants bind future holders if they had notice of them. The cases seem to be merely sporadic and to express no general principle.

There was nothing to prevent the creation of an ownership to begin in the future or on a certain event, but this possibility was much cut down, for classical law, by the fact that the most important forms of conveyance of property were *actus legitimi* which did not admit of any express suspension or condition[2]. It could be done freely by *traditio*[3]. But a determinable ownership could not be expressly created in classical law[4]; it might indeed arise by operation of law, *e.g.* where a *heres* created rights in a thing which was left to someone else conditionally. The right of the *heres* was determined by the occurrence of the condition, and the rights created by him would then fail also[5]. Apart from cases of this sort a man could not be made owner for a time. An agreement to such an effect might impose an obligation to retransfer the property, but it did not revert *ipso iure*[6]. *Dos* was no exception: the husband is spoken of as owner during the marriage, but he was owner in perpetuity like any other owner, though he was under a duty to reconvey the property in certain events[7].

Under Justinian the general rule no longer held: it was possible to convey *dominium* on the terms that it should revert *ipso facto* on a certain event. *Donatio mortis causa* is a well-known instance[8].

It was impossible in classical law to convey property with a restriction against alienation, operative *in rem*: an alienation, though a breach of contract, would be valid. This rule may have disappeared under Justinian. Two texts say that the restriction avoids any alienation[9]. Others deny this[10], and as they are more numerous it is usual to explain away the contrary texts[11].

1 In a case where a man bought part of an estate under restrictions which could not be servitudes the rights and liabilities extended to subsequent assignees if they had notice. But the facts were very like a praedial servitude, 8. 4. 13. pr. Where a man acquired a usufruct by will and knew the testator had been under restrictions, he was bound, since a fructuary must act like a *bonus paterfamilias*, to respect them, 7. 1. 27. 5. **2** *Mancipatio* and *Cessio in iure*, post, §§ LXXXIV, LXXXV. **3** 41. 2. 38. 1. As to the nature of a conditional right see Vassali, *Bull.* 27. 192 sqq. **4** See Girard, *Manuel*, 341. **5** Girard, *loc. cit.*, adverts to the case of *postliminium*. **6** Slave law provides as usual an exception. If a slave was sold on condition that he was kept abroad and this was broken, he vested in the *Fiscus*, unless the vendor had reserved a right of seizure in such event, in which case his ownership revived, Vat. Fr. 6. **7** *Ante*, § XL. As to the case of *revocatio* of a *donatio inter vivos*, post, § XCI. **8** *Post*, § XCI. The new principle can be seen by comparing Vat. Fr. 283 with its revision, C. 8. 55. 2. *Dos* provides another case under Justinian, *ante*, § XL. See in connexion with *vindicatio utilis*, post, § CCXXVIII. **9** 20. 5. 7. 2; C. 4. 51. 7. **10** 18. 1. 75; 45. 1. 135. 3, etc. As to "real" effect of restrictive and resolutive conditions, see Senn, *Études Girard*, 1. 283, who considers that the classical rule still held good under Justinian. *Post*, § CLXXIII. **11** It is clear that

The desire to keep property together in the family, one of the main causes of such restrictions, had little encouragement in Roman Law so far as conveyance *inter vivos* was concerned. Beyond creating a usufruct, a life interest, essentially inalienable, there was little that a settlor could do[1]. In the classical age it was, however, a very common thing to establish a fund for charitable or other public purposes, and it is clear that some of these had considerable permanence. But the devices employed for this purpose were precarious and usually depended on the voluntary conduct of the holder for the time being[2]. The most effective way seems to have been to give the property to a *civitas* with directions as to the disposal of the income, and in some cases a gift over to some other body if the directions were not obeyed. Neither the gifts over nor the directions were binding in law, but the taking of security might give some protection. It is, however, probable that, on an appeal to the public authorities, administrative machinery would be set at work to enforce the proper application of the funds. So far as such public trusts were concerned the difficulty disappeared when these received legal personality[3].

LXIX. Apart from the *dominium ex iure Quiritium* which we have considered, there were in classical law inferior modes of holding which may be called Ownership. Such are:

1. Ownership of provincial land[4]. The *dominium* of this was in Caesar or the *populus* according as it was in an imperial or a senatorian province. The exploitation was largely in private hands under arrangements with the authority concerned, of which the most important is the system of *Agri Tributarii*, in imperial provinces, and *Stipendiarii*, in the others, both of which were permanent holdings at a fixed rent or tribute. The holders were for practical purposes owners, but as they were not *domini* the formal methods of transfer were not applicable. The holdings were however transferable informally[5]. Of course a holder who lost possession could not recover by the action appropriate to the recovery of Italic land, *vindicatio*, since this involved an assertion of *dominium*. We are not fully informed as to the nature of his remedy. We know that he had a modified *vindicatio* as early as Trajan[6], but can only guess at its form. The most probable view is that his action instead of *dominium* asserted a right "*habere frui possidere licere*," which is found as the technical description of his right[7]. The case disappeared when

under Justinian, a thing left by *fideicommissum* was not alienable by the *heres*, post, § CXXV.

1 As to family settlements in wills, *post*, § CXXVII. 2 Pernice, *Labeo*, 3. 1. 150 sqq. 3 *Ante*, § LXV. 4 Mommsen, *Staatsrecht*, 3. 730 sqq.; *D.P.R.* 6. 2. 366. 5 G. 2. 21. 6 Frontinus, *de controv.* (ed. Lachmann), p. 36, cited Lenel, *E. P.*, 184. 7 *Lex agraria*, 50, 81, etc., Girard, *Textes*, 46 sqq. See, however, Partsch, *Schriftformel*, 105 sqq. It is not impossible that he had a *vindicatio* with a fiction that the land was Italic. But there is no evidence of this.

Justinian abolished the distinction between Italic and provincial land[1]. It must be noted that not all land in the provinces was *solum provinciale*: many provincial communities were given *ius italicum*, of which the chief element was that the land was in the *dominium* of the holder and not of the State, so that it could be transferred and claimed at law by civil law methods[2].

2. Ownership by peregrines. As in general these had not *commercium*[3] they were incapable of *dominium*. They could not transfer or acquire or claim by civil law methods. Informal methods of transfer were open to them, but we have practically no knowledge of their proprietary remedies. They may have had an *actio fictitia*, such as we know to have been used in some branches of the law[4], or more probably one alleging "*habere frui possidere licere.*" The case disappears in Justinian's law, and any difficulty as to remedies probably ceased[5] with the generalisation of *cognitiones extraordinariae*[6].

LXX. 3. Bonitary ownership. This is for our purposes much the most important of the inferior modes of ownership. It arose where a person received a *res mancipi* from the *dominus* by mere *traditio*, without the formal *mancipatio* (or *cessio in iure*) which was needed for the transfer of *dominium* in such things. The Romans had no substantive descriptive of the holder: the *res* was said to be *in bonis*[7], from which early commentators formed the name *dominium bonitarium*[8]. It is a commonplace that he was as well protected as a *dominus*, and that a main part of his protection was the *actio Publiciana*, but we are nowhere expressly told in any surviving classical text that this was available to him, and, the case being obsolete under Justinian, we could not learn it from him. But there are texts from which this application of the action may be inferred, and it may be said that there is now almost complete unanimity in favour of the view that the holder *in bonis* could use this action, though opinions differ as to the identity of the *formula* with that used by the *bona fide possessor*[9].

1 Inst. 2. 1. 40; C. 7. 31. **2** Mommsen, *Staatsrecht*, 3. 807 sqq.; *D.P.R.* 6. 2. 456. **3** *Ante*, § XXXVI. **4** G. 4. 37. **5** Girard, *Manuel*, 269. **6** For an alleged *vindicatio*, "*meum esse aio*," with no reference to *ius Quiritium* there seems to be no evidence. A few texts use the word *dominus* for others than a civil law owner. So Gaius (1. 54; 2. 40), but he does not call the holder *in bonis*, *dominus*. When he says of peregrines that they have one kind of *dominium* (2. 40, 41) it is straining his meaning to imply that inferior holdings in Rome were *dominium*. Enactments of Diocletian apply the name *dominus* to holders of provincial lands (Vat. Fr. 315, 316) and Justinian speaks of *differentiae inter dominos* (C. 7. 25). But these texts are few and do not indicate that the name *dominium* was applied technically to inferior modes of ownership. Gaius also speaks of *possessio* and *ususfructus* (G. 2. 7). **7** *E.g.*, G. 1. 54. It is the substantial ownership. Thus a slave acquired for his bonitary owner, not the quiritary. G. 2. 88; Ulp. 19. 20. **8** There is no authority for the name *possessio in bonis*. For the Greek original of *bonitarium dominium* see Theophilus, *ad Inst.* 1. 5. 3. **9** See Lenel, *E. P.* 164 sqq.; Appleton, *Propriété Prét.* 1. 54 sqq.

The statement that the bonitary owner was protected involves two main points. If the *dominus* attempted to recover the thing he would be met by the *exceptio rei venditae et traditae*. If the holder lost possession he could recover by the *actio Publiciana*[1].

Exceptio rei venditae et traditae. A bonitary owner in actual enjoyment could not be effectively attacked by anyone but the *dominus*, these expressions covering also persons holding or claiming under the original bonitary owner or *dominus* respectively[2]. If indeed there were an outstanding usufruct or pledge, created by the vendor or a previous owner, this could be enforced against the bonitary owner[3], but neither more nor less than it could even if the conveyance had been formal. The old owner was still technically *dominus* and could thus prove what the plaintiff in a *vindicatio rei* had to prove, *i.e.* that the thing was his *ex iure quiritium*. This would be conclusive at civil law, but the praetor's edict came to the relief of the bonitary owner and gave him the above *exceptio*. That is, he was allowed to plead that the plaintiff, or one through whom the plaintiff claimed, sold and delivered the thing to the defendant, or one through whom he claimed, and proof of this was a complete defence[4]. The exact form of the *exceptio* is not known, but the name probably followed it closely[5]. This was complete defensive protection, but its form shews that it was of no effect against one who did not claim under the vendor[6]. It was therefore useless to a mere *bona fide possessor*. For it was not good against the true owner, who, in such a case, was not the person from whom he acquired[7], and it was not necessary against any other person, since a claimant must prove his title[8].

Actio Publiciana. It might however happen that, from some cause, the holder lost actual possession. Some other person might during his absence, enter on the property, and refuse to give up possession. How was the bonitary owner to recover it? In some cases one or other of the possessory interdicts by which peaceful possession was protected, apart from title, might serve his turn[8], but many cases of adverse possession would not be within the terms of these interdicts. Not being *dominus*

1 Other protection is necessary and exists, *e.g.* the various remedies for interferences not amounting to ousting, and the possessory interdicts. 2 If an owner sells, delivers and dies, and the buyer resells and delivers, the *heres* replaces the vendor, the second buyer the first buyer. 3 See D. 21. 3. 4 At first probably applicable only to sale, in classical law it applied *mutatis mutandis* to any case of transfer *ex iusta causa*, *e.g.* gift, 44. 4. 4. 31. 5 21. 3. 3. 6 Except in the possible case of a non-owner who after the sale and delivery acquired the *dominium* and sued the holder under his new right, 21. 3. 1. 7 If the right alleged by the claimant is not ownership, but, *e.g.*, usufruct, the action will not be *vindicatio rei*, but the appropriate action, in this case *actio confessoria*. If the usufruct was created after the delivery, as it might be, the *exceptio* was available in an appropriate form. 8 *Post*, §§ LXXII; CCXLIX.

he could not claim that the thing was his, *ex iure quiritium*, and thus he could not vindicate. The praetor came to his relief by providing an *actio fictitia*, called the *actio Publiciana*[1]. This action was based on the fact that the bonitary owner would in the ordinary course of things become *dominus* in course of time by what was called *usucapio*[2], of which he satisfied all the requirements, as he held the thing *bona fide* and *ex iusta causa*. The action was a *vindicatio* so far modified in form that its *formula* directed the *iudex* to give judgment in favour of the plaintiff, if he would have been *dominus* had he held the thing for the period of *usucapio*. It was thus presumed in his favour that the period of *usucapio* had run. This is all that was presumed: it was still for him to shew that he was *in via usucapiendi*. This he could, on the facts, readily do if, as would usually be the case, the thing was free from any *vitium* which made it incapable of usucapion[3]. Technically it was an *actio fictitia*, in which the plaintiff was feigned *anno* or *biennio possedisse*[4]. All that was presumed was lapse of time, and this was conclusively presumed, and *bona fides*, which was always presumed, though this presumption could be rebutted. In the case we are supposing there is no question of this, since good faith is clear on the facts. The other requirements of *usucapio* he must prove. It is clear that the bonitary owner was well enough protected by the *exceptio* and the *actio*.

The *actio Publiciana* was also available, even, perhaps, primarily available, to an ordinary *bona fide possessor*, one who has received the property in good faith from one whom he supposed to be capable of transferring the ownership to him, but who, in fact, was not so capable, *e.g.* a non-owner. It is clear that his protection must be less complete, since it was not the object of the praetor to destroy the law of *usucapio*, or to bar an owner from recovering his property[5]. Such a *possessor* was not protected against the true owner, but only against third parties. Thus the *exceptio rei venditae et traditae* had in general, for reasons already stated, no application here. The *bona fide* possessor had the *actio Publiciana* against all but the true *dominus*: in a sense even against him. The facts alleged in his claim were true in that case also, but the owner

1 G. 4. 36; Inst. 4. 6. 4; D. 6. 2. Introduced presumably by an urban praetor called Publicius, probably not long before the time of Augustus. 2 *Post*, § LXXXVII. 3 *I.e.* was a *res habilis* and not privileged against *usucapio*, or *res furtiva*, etc., *post*, § LXXXVII. 4 This is not the same as a presumption that he has acquired by *usucapio*. G. does indeed say "*fingitur usucepisse*" (G. 4. 36; see also Inst. 4. 6. 4) but the *formula* which he gives at the same point is more exact. A fiction that he had acquired would leave the *iudex* nothing to try: if in a real action we begin by presuming that the thing belongs to the plaintiff, all that is left is to give judgment in his favour. 5 6. 2. 16; h. t. 17.

was allowed to plead in reply the *exceptio iusti dominii*, an allegation that he was the true owner of the thing[1]. In strictness a *bona fide possessor* cannot know that he is one; he thinks he is substantially entitled: as used here, however, the expression means one whose possession began in good faith, one who is *in via usucapiendi*. It was immaterial that he had discovered his mistake[2].

When the parties came into court the praetor, who might never have heard of any of them before, could not know, though he had to issue the *formula*, whether the claimant was bonitary owner or *bona fide possessor*, or whether the defendant was owner or not. To settle these points would be to try the case, which was not his business[3]. He could not take their words for it, unless they were agreed: cases may be imagined in which the parties themselves did not know the real state of affairs till the matter was thrashed out. Some facts might be admitted, *e.g.* that the holder was only a *bona fide possessor* in the above sense, while the plaintiff's claim that he was owner might be disputed. The essential elements of the formula would then run somewhat as follows: "If it appears that *A* would be owner of this thing which has been sold and delivered to him if he had held it for a year, then unless *N* (defendant) is *dominus* condemn him, unless at your discretion he restores; if it does not so appear, absolve him." We are told that the *exceptio iusti dominii* was allowed only after enquiry (*causa cognita*[4]), and thus the praetor would refuse it if it was clear that the defendant had sold and delivered the thing.

If all material facts were disputed the formula would run somewhat as follows: "If *A* would be owner of the thing, which was sold and delivered to him, if he had held it for a year (or two years, for land) then, unless it appears that *N* is owner, and even then if it appears that *N* or his predecessor in title sold and delivered to *A*, condemn *N* to pay the value unless he restores at your direction. If it does not so appear, absolve *N*[5]." This submits the whole issue to the *iudex*, and if he decides correctly the result will be what is laid down above[6].

LXXI. One or two possible complications must be considered.

It might happen that a bonitary owner or *bona fide possessor* lost possession and the new possessor acquired the *res* by lapse of time,

1 6. 2. 16, 17. 2 So long as he thought he was *dominus* he would not bring the Publician but a *vindicatio*. 3 In the classical and earlier law the magistrate does not normally try cases: he approves a "*formula*," in which the issue is stated, to be submitted to a *iudex* to decide; *post*, § CCVII. 4 17. 1. 57. 5 See G. 4. 36. 6 Some details are doubtful: it is not clear, *e.g.*, that all texts dealing with *exceptio iusti dominii* are in accord—it may be that there were different views as to formulation. See Appleton, *Propriété prétorienne*, ch. XVI; Lenel, *E.P.* § 60. It is disputed whether the price must have been paid. This is bound up with the question whether payment was essential to transfer of ownership by *traditio*, *post*, § LXXXIII.

usucapio. Was the *actio Publiciana* still available? It is clear that on the *formula* stated above it might be, for it would still be true that if the dispossessed holder had possessed the thing for a year (or two) he would be *dominus*. But to allow it on such facts would plainly be contrary to the whole purpose of the law of *usucapio* and even to those of the Publician itself. There is little authority on the point, and much diversity of opinion[1], not so much on the practical outcome, for it is usually held that the Publician was barred, but, in most cases, on the way in which this result was arrived at. On one view it was barred because even if he had possessed for the necessary time he would not be owner, as there had been a transfer to someone else. On another the action was available in principle, but was barred by the *exceptio iusti dominii*[2]. On another this *exceptio* was not available where the alienation was by operation of law, *e.g.*, *usucapio*, or *accessio*[3], so that in this case the Publician would still be available.

A point to be decided before forming an opinion on these questions is whether the possession feigned for the purpose of the action is to be dated forward from the date of the *traditio*, or backward from that of the action. This is material also in connexion with another point. If a bonitary owner brought his action successfully and again lost possession before *usucapio* was completed, there was nothing to bar him from bringing his action again if he needed it. But how if a *bona fide possessor* had need of the action a second time? If his feigned possession dated back from the time of the action it was a new possession. But if when he brought the first action he knew that he was not owner it might be argued that his possession was now a new possession, and did not begin in good faith, so that he was not *in via usucapiendi*, for the texts are clear that a second possession begun in bad faith cannot be added to the earlier for the purpose of *usucapio*[4]. But the better view appears to be that it is a continuation of the actual possession[5].

It may be that two persons were each entitled to the Publician, *e.g.* where a bonitary owner lent the thing to the *dominus*, who died and whose *heres* sold and delivered the thing in good faith to a third person. Which of these was entitled against the other? If one was a bonitary owner and the other a mere *bona fide possessor* the law is clear, the former would win whether defendant or plaintiff, though the form of his defence is not known. If both were *bona fide possessores* the texts are not quite clear, but it seems that if they had received the *res* from the

1 Girard, *Manuel*, 358, n. 4; Appleton, *op. cit.* chh. XX, XXI. 2 See 17. 1. 57. 3 Appleton, *op. cit.* ch. XX. 4 41. 3. 15. 2; 41. 4. 7. 4. 5 Girard, *Manuel, loc. cit.* See however Appleton, *op. cit.* ch. XV, § XIV.

same non-owner, the first deliveree would prevail, but if from different, then the actual possessor[1].

There was in the formula nothing to prevent its use by the actual *dominus*, and it has been said that in the later Empire it practically superseded *vindicatio*[2]. But the evidence is against this. In all the texts in which its use is noted the time of *usucapio* has not run, and the absence of reference to it in the Code, the prominence of *vindicatio*, and the language of some of the texts, suggest that it was used in practice only where *usucapio* was not complete, and thus only in a small percentage of cases[3]. Its chief advantages would be that there was no need to prove that time had run, and that evidence that a conveyance relied on was not by the true owner would not be fatal, as it would in *vindicatio*, apart from *usucapio*. This would not often be material, and thus the jurists have little to say about the action[4].

There are other cases than that of *traditio* of a *res mancipi* in which a holder under praetorian title will become *dominus* by *usucapio*. The formula of the Publician would be applicable at least with slight modifications in many such cases, and is actually recorded in the cases of *adiudicatio* in a *iudicium non legitimum*[5], a slave noxally liable seized *iussu praetoris* for lack of defence[6], a plaintiff in whose favour judgment was given under *iusiurandi delatio*[7], a *missio in possessionem* in *damnum infectum*[8], and *iura in re aliena* created by informal methods[9]. It may have been available in other cases[10].

1 6. 2. 9. 4; 19. 1. 31. 2. Appleton, *op. cit.* ch. XVII. In the case given above both are bonitary owners, for the *heres*, being *dominus*, could make a good conveyance. Here it was held that the first vendee could recover from the other. **2** Appleton, *ib.* But see Girard, *Manuel*, 361, n. 1. **3** *I.e.* only in those cases in which the disturbance complained of had occurred within a relatively short time after the possession had begun. **4** The words "*et nondum usucaptum*" which appear in the Edict (6. 2. 1) would appear to negative the view altogether, but they are not conclusive as, according to Lenel, *E.P.* § 60, there is no trace of them in the *formula*. **5** 6. 2. 7. pr.; *post*, § CCXXXII. **6** 6. 2. 6; *post*, § CCV. **7** 6. 2. 7. 7; *post*, §§ XC, CCXV. But here, owing to the purely relative effect of a judgment, only against the other party. **8** 39. 2. 18. 15; *post*, § CCXLV. **9** 6. 2. 11. 1; see, however, *post*, § XCIV. **10** See Appleton, *op. cit.* 1. 4 sqq., who gives a list of the possible cases. As to the possible extension in the case of *longi temporis praescriptio*, see *post*, § LXXXIX. Upon the unimportant question how these inferior modes of ownership were contemplated from the point of view of classification of *res* as *corporales* or *incorporales*, which the texts do not consider, we may suppose that in the cases such as that of the Publician, which are protected by fictitious actions, the answer would have been that whether the right was or was not a *res corporalis* it was treated by the help of fictions as if it was. As to the ownership of provincial land the *dominium* of which was in *Caesar* or the *populus*, the answer depends on the form of the remedy, which is not certainly known (*ante*, § LXIX). As to peregrine ownership so far as this was protected by fictitious actions, the answer would be as in the first case. But it may well have been held that the classification was part of the Roman Law and had nothing to do with relations outside the *commercium*.

LXXII. *Possessio.* Before entering on the modes of acquisition of *dominium* it is necessary to consider the notion of possession. No other topic in the Roman Law has been the subject of so much discussion[1]. It is easy to describe possession roughly. A man "possesses" a thing if he has control of it—if he "has" it, whether with title or not. A man possesses his watch in his pocket, but if he drops it, and someone else picks it up and keeps it, it is he who now possesses it, though it is still the property of the loser—it still "belongs" to him. From rough description to exact definition is a long step, and, before attempting to bridge it, it seems best to consider its legal importance. In this connexion the main point is that one who had possession, whether he had a legal title or not, and subject to reservations for the case of one whose possession was tainted by certain forms of wrongdoing, had the protection of what are called Possessory Interdicts.

Apart from these reservations, the general principle of these remedies was that one who had actual possession had a right not to be disturbed therein, whether he had a title or not, except by legal process. If the owner wished to recover it, he must bring an action—a *vindicatio*. If, instead of doing this, he ejected the occupier, a possessory interdict would compel him to restore possession, and he would not be allowed to plead his ownership in reply to the claim of the possessor[2]. He could however now do what he should have done at first, *i.e.* bring his *vindicatio*, and, if he proved his title, the wrongful possessor would be compelled to give up possession.

Not every one whose position agreed with the rough description above set out had possession for these purposes. It is easy to see that my guest at my table and my servants at their work have not possession of the implements they are using. But the Roman Law went further. A borrower (*commodatarius*), a depositee, a tradesman working on the thing, none of these had possession. And as there could be no possession of a *res incorporalis*[3], and interests less than ownership (*ususfructus*, etc.) were incorporeal, persons holding such rights were not said to have possession. But this last restriction is rather unreal, for, though they had not *possessio*[4], they had interdictal protection, in a slightly modified form[5].

Apart from these cases of *iura in rem*, those who hold the thing, but

1 See for an indication of the wealth of literature, Windscheid, *Lehrbuch*, § 148, n. *. 2 As to the reasons for this see *post*, § CCLII. 3 43. 3. 1. 8, etc. 4 Many texts speak of him as having "*quasi possessio*" or "*possessio iuris.*" There is however some reason to think this terminology is post-classical, on which view "*aut quasi possessione*" in G. 4. 139 is a gloss. See Albertario, *Bull.* 25. 1 sqq. and 27. 275, citing and developing Perozzi, who lays down this proposition as to the analogous case of praedial servitudes. See Vat. Fr. 90–93. 5 Vat. Fr. 90; D. 43. 16. 3. 13, 17; 43. 17. 4.

have not *possessio* for the present purpose, are said to have *possessio naturalis*[1] (*detentio* is a modern equivalent), the proper name for such possession as gives the interdictal protection being *possessio* or *possessio civilis*[2].

The exact definition of *possessio* to give the results here outlined is a matter of great difficulty. It may be that no perfectly correct solution is possible. Among the jurists, in whose writings, if anywhere, the answer is to be found, there were differences of opinion on many fundamental points, and there is none on which such differences are more easily conceivable than on this of the exact definition of possession. The texts suggest that, apart from interpolation, the same man does not always speak with the same voice on this matter, a thing readily understood when we remember that lawyers do not in every case go back to first principles and that it is much more important to have a good practical set of rules than one logically impeccable. Many attempts have however been made to answer the question, and of these two have received so much more attention than any others that some account of them must be given[3].

Of these opinions that of Savigny[4] was the earlier, and was long accepted almost universally, indeed it may still be the most widely accepted. On his view, which rests mainly on texts of Paul in which he alludes to, and argues from, *animus possidentis*[5], possession consists of physical control, (*corpus*) with the intention to hold as one's own—detention with *animus habendi* or *domini*. This last is lacking in the cases of *possessio naturalis* which we mentioned and in such cases as usufruct. If we find nevertheless that possession is attributed to *emphyteuta* and pledgee who clearly do not hold the thing as their own, this, says Savigny[6], is a case of derivative possession. Later writers have sought to avoid this expedient, by adhering to the expression *animus possidendi*, and speaking of intention to hold the thing to the exclusion of anyone else, a way of putting the matter which enables them to retain Savigny's doctrine in essentials. The fact that a depositee did not possess even where he determined to keep the thing, is explained on textual authority as resting on the principle: *nemo potest causam possessionis mutare*[7]. The original *animus* was decisive.

These views were strongly attacked by Ihering[8]. Without going into detail of his criticism, it may be said that while he draws attention to

1 Sometimes used in a looser sense, 41. 2. 1. 1. 2 Sometimes used to denote usucapion possession, *i.e.* possession with *bona fides* and *iusta causa* which may ripen into ownership. *Post*, § LXXXVII. See however Albertario, *Bull.* 27. 275 sqq.; 43. 16. 1. 9, 10. 3 See Windscheid, *Lehrb.* §§ 148 sqq.; Girard, *Manuel*, 275 sqq.; Vermond, *Possession en Droit Romain.* 4 *Recht des Besitzes*, tr. Perry. 5 13. 7. 37; 41. 2. 1. 20. 6 *Op. cit.* § 25. 7 *E.g.* 41. 2. 3. 19. 8 *Besitzwille* (French tr. by Meulenaere).

the fact that the theory does not explain some concrete cases, *e.g.* the continued possession of a fugitive slave, and the case of derivative possession, his main attack is on the conception of *animus domini*. He considers that the texts of Paul on which this rests present an opinion peculiar to him, and maintains that no other jurist gives support to this "subjective" theory which makes possession or non-possession depend on the intention of the holder. He shews the unpractical nature of the idea, and the impossibility of proof, and points out that this impossibility, coupled with the rule that a man cannot change his *causa possessionis*, has led later supporters of the subjective theory to look at the *causa* for proof of the intention[1], in such a way as to give a result similar to that arrived at by those who find the test in external circumstances. But their false theory leads them, he holds, to false conclusions on points of detail.

Ihering's own theory[2], treating *animus domini* as an error based on a doctrine peculiar to Paul, much given to subjective tests, defines possession as the externals of ownership. A man possesses who is in relation to the thing in the position in which an owner of such things ordinarily is, the *animus* needed being merely an intelligent consciousness of the fact, so that a *furiosus* cannot acquire possession: he has not *intellectus* (or *affectio*) *possidentis*[3]. This is in effect an external fact, for this sort of *animus* proves itself. The physical relation is not absolutely decisive: possession or no possession may depend on the nature of the thing[4]. A slave who has run away is in the same position to an observer as one sent on an errand. A man at his home still possesses the things at his office, and *vice versa*, though it is easy to formulate cases in which it is hard to say whether possession continues or not. Every conscious holder, whether for himself or another, satisfies the requirements of possession. For Ihering every case of detention, *possessio naturalis*, not giving the interdicts, is one, in which the law, for reasons differing in the different cases, has expressly taken away possession from persons, who, apart from this express provision, satisfy its requirements.

It is widely held that Ihering's criticism is sound, and, less widely, but still very commonly, that his constructive doctrine is also sound. It has however some difficulties[5], and the texts shew that *animus* played a more important part, according to some jurists, than Ihering's theory allows. The difficulties are almost entirely in connexion with acquisition or loss of possession through the act of third parties, in

1 *Op. cit.* §§ II, XII. 2 *Op. cit.* and *Grund des Besitzesschutzes*, also tr. Meulenaere. See Lightwood, *L.Q.R.* 1887, 32 sqq.; Bond, *L.Q.R.* 1890, 259 sqq. 3 41. 2. 1. 3; h. t. 1. 9, 10. 4 I possess my carriage in the roadway in front of my house: I should not possess my watch lying in the same place. 5 Girard, *Manuel*, 279, n. 6, cites one. Windscheid, *Lehrb.* Sect. 148, n. 4 a, gives a number of objections of varying weight.

connexion with which we shall meet them again. It may be that some jurists hesitated to hold that even the physical part of possession (*corpus*) exists where the thing is held by a person who has announced that he is not holding it for me. For it is clear that the *animus* in question must have been in some way made known. The theory of the Romans was probably not completely coherent[1].

The question why it was thought necessary to protect possession without title has had a good deal of attention. Savigny maintained[2] that it was to protect those who had no title, not in their private interest, but for the preservation of the public peace. It would not make for order if even one without title could be ejected by one who, perhaps, had no more. Ihering's view, now more widely accepted, is that possession is protected as an outwork of ownership[3]. The law assumes that a peaceful possessor is more often than not the person entitled, and that to enable him to recover his possession, as such, without proof of right, is, in most cases, to restore an owner without requiring him to prove his title. It is only accidentally, and in a minority of cases, that it works to protect a wrongful holder, not, as Savigny holds, as the intended result of the system[4].

LXXIII. Acquisition of possession by one's own act is a fairly simple matter. It involves *animus* and *corpus*[5]. The thing must be placed in our control, which does not necessarily mean about our person: effective control will vary with the nature of the thing. The *animus* is no more than consciousness and willingness. Thus, where a thing has been placed by our direction in a certain place for us, we possess without knowing that the act has been completed: previous authorisation is as good as knowledge[6]. But, as *animus* is necessary, the acquirer must be capable of this—a *furiosus* cannot acquire possession[7]. And in things *extra commercium* there can be no juristic possession any more than there can be ownership.

Acquisition through an *extraneus* presents more difficulty. One group of cases may be excluded. If I buy a thing and at my direction it is given to you, my *procurator*, for me, I possess, but it is not so clear that I am technically acquiring possession through you, any more than, if it is put in my house at my orders, I acquire possession through

1 Girard, *Manuel*, 274: "discordances dont le germe remonte, peut-être, en partie, à des hésitations ou des dissentiments des jurisconsultes." 2 *Recht des Bes.* §§ II, VI. 3 *Besitzesschutzes*, § VI. 4 It has been said (Holmes, *Common Law*, 208, from Bruns) that the view that the possessor is more likely to be entitled than the ejector is not necessarily true. This cannot well be tested, and even though it may be an objection to the theory, as a philosophic truth, it is no answer to the view that it was the Roman doctrine. 5 41. 2. 3. 1. A *pupillus* if he has *intellectus* can acquire *possessio* without his tutor's *auctoritas*, 41. 2. 1. 3; h. t. 32. 2. 6 41. 2. 18. 2. 7 41. 2. 1. 3.

my house[1]. Leaving this case out of account, the rules shew a gradual change. For Gaius it was uncertain if possession could be acquired through free persons not possessed[2]. Neratius had already held that it could be acquired through a *procurator*—a general agent[3]. Severus and Caracalla declared it settled law that it might be acquired *per liberam personam*[4], and Ulpian cites this[5] as meaning any *libera persona*. This text has been suspected of interpolation[6], but since by his time the name *procurator* was applied even to a *mandatarius* employed only for a single transaction, and in mandate ratification sufficed, and Paul, who tells us of the extended meaning of *procurator* tells also that possession can be acquired through a *procurator, utilitatis causa*[7], interpolation is doubtful[8]. In any case acquisition through any *libera persona* was the rule of later law[9]. But this refers to the *corpus*. As to *animus*, previous authorisation sufficed, even general[10], but apart from this there must be knowledge by the principal[11]. For *usucapio*, indeed, knowledge was required in any case, not from principle, but because of the danger of the other rule, "*quia contra statui captiosum erit*[12]."

In the case of a slave (and in that of a *filiusfamilias*, apart from *peculium castrense*, etc.) the main rules were simple. A slave could acquire the *corpus*, but the master's possession was not complete till he assented[13]. But on this there are some remarks to be made.

(i) The *peculium* was the master's and acquisition for it was acquisition for him. But the purpose of *peculium* would be defeated if the master had to intervene in its dealings. Hence an illogical rule, based on convenience, not on principle, that the master need not know; the slave could supply *animus* here[14].

(ii) If the master was a lunatic or *infans*, and so incapable of *animus*, there was logically no acquisition of possession. One text gets over the difficulty in the case of *infans* by saying that he could assent by *auctoritas*

1 41. 2. 18. 2. In 41. 2. 42. 1 the *procurator* is the negotiating party. In 39. 5. 13 and 41. 1. 37. 6 a thing is given to my *procurator* for me and he takes it for himself. Ulpian says I acquire, Julian says I do not. The former may be interpolated but, if it is not, the dispute may turn on the question, already adverted to, whether I can be said to have the *corpus* if the thing is held by one who renounces my right. **2** G. 2. 95, probably the word is *procurator*. **3** 41. 1. 13; 41. 3. 41. **4** C. 7. 32. 1. **5** 13. 7. 11. 6. **6** Mitteis, *Rom. Prr.* 1. 212 sqq. He holds that every text declaring for acquisition "*per liberam personam*" is interpolated, and cites 41. 1. 20. 2; h. t. 53; 13. 7. 11. 6; 47. 2. 14. 17; C. 7. 32. 1. He regards P. 5. 2. 2, with its distinction between *libera persona* and *procurator*, as decisive, but in view of the wide meaning the word *procurator* had acquired by this time (*ib.* 1. 3. 2) it seems more probable that the text is not comparing procurators and others, but *possessio* and other rights. **7** P. 1. 3. 2; 5. 2. 2. **8** See Peters, *Z.S.S.* 32. 205 sqq., for other suggested emendations. **9** Inst. 2. 9. 5. **10** 41. 2. 1. 13; 41. 2. 42. 1; 41. 3. 41. **11** P. 5. 2. 2. **12** 41. 3. 41; C. 7. 32. 1. **13** G. 2. 89; P. 5. 2. 1; 41. 2. 1. 5; h. t. 48. **14** 41. 2. 44. 1. See, however, Beseler, *Beiträge*, 4. 61 sqq.

of his *tutor*[1]. But in general, it was not till *infantia* was over that there was any question of *auctoritas*[2], and then it would not be needed for possession which does not impose an obligation[3]. Pomponius lays down the more reasonable rule, no doubt on grounds of convenience, that a slave can acquire possession for a lunatic or infant master[4].

(iii) A *hereditas* had no *animus*, and there were difficulties as to acquisition of possession for it. A *servus hereditarius* could complete *usucapio* already begun[5]. It is probable for classical, and certain for later, law that such a slave could acquire possession for his *peculium*[6]. It is not clear that even under Justinian he could so acquire it apart from *peculium*[7].

(iv) Although the *animus* came from the master, the slave contributed something to it. A man without consciousness cannot have control: thus possession could not be acquired through an insane slave[8].

(v) The slave's intent ought not to be material, but Paul says that if he takes not intending to acquire for his master, there is no acquisition by his master[9]. It is generally held that this text is either an error or an interpolation: perhaps it is not law even for Justinian's time. It is not however clear that the rule has anything to do with *animus*. The intent must be proveable, *i.e.* in some way declared, and it may be that Paul held that I could not be said to have the *corpus* if the *res* was in the hands of one, even my slave, who shewed that he was not holding it for me, just as I ceased to possess a fugitive slave, so soon as he formally claimed to be a freeman[10].

(vi) Though, at any rate from the time of Nerva *filius*, a master continued to possess a fugitive slave[11], it was not till later that it was agreed that the master could acquire possession through such a slave. Nerva and Pomponius deny it[12]. But it was clearly admitted by the later classical jurists[13].

(vii) There was an old notion that a man could not acquire possession through one he did not possess[14]. Accordingly some jurists doubted whether a usufructuary of a slave could acquire possession through

1 41. 2. 32. 2. See also Papinian, C. 7. 32. 3, in fin. As to "*per*" *tutorem*, Peters, *Z.S.S.* 32. 205. As to acquisition by the *tutor* acting by himself, see the general discussion, Lewald, *Z.S.S.* 34. 452. **2** *Ante*, § LVI. **3** 41. 2. 32. 2. The contradiction in h. t. 1. 3 is no doubt due to interpolation, as also in h. t. 1. 11. 1. 13; 41. 3. 4. 2, etc. See Lewald, *Z.S.S.* 34. 450, reviewing Solazzi. **4** 41. 3. 28. **5** 41. 3. 20; h. t. 31. 5; h. t. 40. **6** 6. 2. 9. 6; h. t. 10; 41. 2. 1. 5; 44. 7. 16. **7** 6. 2. 9. 6; h. t. 10; 41. 3. 44. 3; h. t. 45. 1. **8** 41. 2. 1. 9, 10. **9** 41. 2. 1. 19. Two texts, in conflict already noted, 39. 5. 13; 41. 1. 37. 6, conflict as to effect of slave's intent where delivery is to a common slave of intended deliveree and another. The ambiguous position of such a slave, who could acquire for the other master, may account for a difference of opinion. **10** 41. 3. 15. 1. Paul. **11** 41. 2. 1. 1; h. t. 3. 10; h. t. 47. **12** 6. 2. 15; 41. 2. 1. 14. **13** 41. 2. 1. 14; 44. 3. 8. **14** G. 2. 94; see 41. 3. 21.

him, but the difficulty was disregarded in classical law[1]. For the same reason Gaius records a doubt whether possession could be acquired through women *in manu* and persons *in mancipio*[2]. As these soon became obsolete, we have no later information, but Gaius finds no difficulty in the case of a *filiusfamilias*[3] though he too was not possessed in classical law[4], whatever may have been the original state of things.

LXXIV. In general, *possessio*, once acquired, continued normally, *animo et corpore*. If it needs both elements it ought to cease if either ceases, but this is obviously not so, as a general principle. A man does not lose possession of his goods if he goes mad or asleep[5]. But there were cases in which possession was said to be retained *animo solo*, *e.g.*, *saltus hiberni*, *aestivi*[6], which were abandoned for half the year. During this period possession would be lost by mere intent not to possess[7]. But there are texts which seem to say that what was possessed in both ways could be lost *animo solo*. Two of these illustrate the rule by facts which shew their meaning to be only that a handing over which, on the face of it, was consistent with retaining actual *possessio* would be a transfer of possession if the necessary *animus* was present[8]. Paul however says: "*si in fundo sis et tamen nolis eum possidere, protinus amittes possessionem*[9]." But this is merely *constitutum possessorium*. If a vendor of land arranged to hold it as tenant, the full process would involve handing it over and taking it back as tenant, and a tenant had only *possessio naturalis*. For simplicity, the process was taken for granted, so that the possession shifted without any actual transfer[10].

Death ended possession, and the fiction by which the *hereditas* was considered as continuing the possession did not benefit the *heres*, who, at least if there was no holding by a slave or *colonus*, did not possess until he had actually taken possession, this being a matter of fact[11]. If at the time of the owner's death, a *colonus* was in occupation, Cicero tells us that the *heres* had possession by the *colonus* with no act of his, but this is in an advocate's speech[12] and is in plain contradiction with a

1 G. 2. 94; D. 7. 1. 21; 41. 2. 1. 8, etc. In general, *b. f. possessor* was, as to acquisition, in the same position as fructuary, but in his case this particular difficulty did not arise. G. 2. 94; D. 41. 2. 1. 5. 2 G. 2. 90. 3 G. 2. 89. 4 Thus the ordinary possessory interdicts were not available: special ones were needed, Lenel, *E.P.* 468. 5 41. 3. 31. 3. 6 41. 2. 3. 11; C. 7. 32. 4. 7 41. 2. 25. 2. But a *furiosus* cannot lose *possessio*, *animo solo*, h. t. 27. Paul says that as *animus* and *corpus* are both essential to acquisition of *possessio*, this cannot be lost till both cease, 41. 2. 3. So stated this is absurd. Elsewhere (50. 17. 153) stating the same rule, he says that it is analogous to the rule in obligations, that they are to be dissolved in the way in which they were created. But one who has dropped a shilling in the street has lost possession even though he knows nothing about it. Papinian (41. 2. 46) lays down the similar but more rational rule that what is held *animo solo* can be lost *animo solo*. 8 41. 2. 17. 1; h. t. 44. 2. 9 41. 2. 3. 6. 10 41. 2. 18. pr. 11 41. 2. 23. pr. 12 *Pro Caecina*, 32. 94.

text of Paul which no doubt states the classical law[1], and says that the *heres* did not possess in such a case, till he had actually taken possession.

There is some difficulty as to loss of possession by an act of the subordinate. It might be said that, as a slave could not make his master's position worse, he could not deprive him of possession. But when once *possessio* was acquired the slave's personality was immaterial: he was a mere receptacle. If a thing fell from the slave's hand, it was much the same as if it had fallen from the master's pocket. And *possessio* or no *possessio* was a question of fact. But if my slave refused to let me have the thing, did I still possess? Yes, if it was land[2], but, in case of moveables, Paul and others said the *possessio* was lost[3]. If a slave or *colonus* wilfully abandoned land the classics disagreed as to loss of possession, till a third party had taken it[4], on which event they held it lost[5]. Justinian in an obscure and much discussed enactment seems to have provided that it was not lost in either case[6].

The question whether *possessio* was or was not a right is somewhat empty. The answer seems to be that the question whether it existed or not was one of fact, but that, if it existed, it conferred rights. It was not called a *res*, nor was it apparently thought of as a *ius in rem* analogous to ownership or usufruct. This seems to rest on the fact that it had no economic content, or rather no assignable money value. A pledge creditor, though he had more than possession, since he had an action and could resist *vindicatio*, was rarely spoken of as having a *ius*[7]. And acquisition of a *nomen* carried with it the securities by way of pledge[8] with no thought of the principle that *iura in rem* are not transferred by mere agreement. The wealth of pledgee is not increased by a pledge, though his security is[9]. The distinction is clearly brought out in a text which says that a captive retains his *iura* but loses his *possessio*[10].

1 41. 2. 30. 5. A transfer may involve loss of *possessio* without acquisition by the transferee, *e.g.*, transfer to a *furiosus*, h. t. 1. 11. 2 41. 2. 40. pr. 3 41. 3. 4. 8, 9. 4 41. 2. 3. 8; h. t. 31; h. t. 40. 1; h. t. 44. 2. 5 41. 2. 40. 1; h. t. 44. 2. Not of *saltus hiberni* or *aestivi*, which are possessed *animo solo*, till the owner knows, h. t. 3. 7, 25. 2, 46. 6 C. 7. 32. 12. 7 *E.g.* 9. 4. 30; 39. 2. 19. pr., where the decisive words look like a gloss. 8 C. 4. 10. 6, 7. 9 In a text dealing with another matter we are told that a usufruct, the claim for which is barred by certain facts, still exists till it is lost by non-user, while a *pignus* is simply destroyed by such facts: *nullum enim est pignus cuius persecutio denegatur* (9. 4. 27. pr.). This seems to turn wholly on the fact that pledge has no content but its enforceability: it is matter for the law of actions. This is not to say that it has no value: it is of the utmost importance from a procedural point of view and there are many texts which shew that the lawyers were alive to its economic importance (*e.g.* 13. 5. 14. 1; 18. 4. 6; 50. 17. 72, etc.). What it means is that notwithstanding its economic importance the considerations mentioned prevented the lawyers from regarding it as a *res*. 10 41. 2. 23. 1. A release of pledge from husband to wife was not a *donatio* (42. 8. 18; cf. D. 24. 1. 5. 16). We are however told that there could not be a *donatio* of possession between them (24. 1. 46), which probably means that there could be no *usucapio*.

It is the notion of possession as a right which leads to its treatment in our modern books in close connexion with *dominium*. But the Roman institutional writers did not so treat this merely provisional and procedural right: it came in, so far as it was treated at all, under interdictal procedure. *Bona fide possessio* was mentioned, because it gave a right to fruits. And this explains what looks like a sharp contrast in the method of the Digest. The title dealing with acquisition of *dominium* is followed by one dealing with that of possession[1]. But the next following titles shew that this is because possession was an important factor in the law of acquisition of *dominium* by *usucapio*, and is discussed as an introduction to the treatment of that subject.

LXXV. ACQUISITION OF *DOMINIUM*. The modes of acquisition of *res corporales*, *i.e.* of *dominium*, can be classified in various ways. They were Formal or Informal, a distinction which turns not on the degree of ceremonial involved but on the point that in formal transactions, *e.g.*, *mancipatio*, the form sufficed apart from intent or *causa*, while in such cases as *traditio* the intent and the *causa* were material. They were Original, *e.g.*, *occupatio*, or Derivative, *e.g.*, *traditio*, a distinction different from that between bilateral and unilateral, though all original methods were unilateral. But the institutional treatment, which will be followed, classifies them as *iuris civilis* or *iuris naturalis* (or *gentium*[2]), by which Gaius seems to mean that some were thought of as peculiar to Rome, while the others were universal. In looking at the concrete cases we see what at least look like inconsistencies. Acquisition by long possession (*usucapio*) and treasure trove are both known to other systems and in both the details were regulated by statute. But *usucapio* was *iuris civilis* and *inventio* was *iuris gentium*. *Usucapio* is treated in the XII Tables, and no doubt the civil law methods are so called as belonging to the early formal law.

ACQUISITION FROM THE STATE. This is hardly part of the private law and is not expressly treated in the Institutes. There were many cases: distribution of booty, allocation of public lands, *bonorum sectio*, and, generally, sales by the *Fiscus*[3]. The State was not bound by rules of form. All that seems to have been needed was a declaration by the official charged with the business, sometimes called *addictio*[4]. This

A *possessor* as such can draw no advantage from the thing: all he has is a right to resist if his possession is interfered with except by legal process. The case is different with those inferior modes of ownership, of provincial lands, and by peregrines, which if they have a substantival name at all must be called *possessiones*. But they are substantive rights giving enjoyment of the property and not defeasible by legal process.

1 41. 1; 41. 2. 2 G. 2. 65; Inst. 2. 1. 11. See also 41. 1. 1. pr. where the "*gentium*" is probably due to the compilers, not to Gaius. 3 Details, Cuq, *Manuel*, 258. 4 See Girard, *Manuel*, 289.

ignores the principle, involved in the modes of acquisition set out in the Institutes, that transfer of property *inter vivos* always required, not necessarily delivery, but some act or circumstance shewing an assertion of control of the thing acquired: *traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur*[1]. There were indeed exceptions, *e.g.* the rule in *societas omnium bonorum*, that the mere agreement vested in the partners in common the ownership of what had belonged to each[2], the method of creation of servitudes by pact and stipulation[3], and, in later law, some rules of *donatio* and *dos*[4]. The vesting of the owner's share in treasure is difficult to reconcile with it[5]. The rules of *traditio brevi manu* and *constitutum possessorium* were only apparent exceptions[6], and the creditor's right in hypothec was not thought of as a *ius in rem*[7]. With the exception of *traditio*, which is for practical purposes the most important of all modes of acquisition, and the special cases of acquisition of *fructus*, the *iure naturali* methods are of secondary importance in actual life. *Occupatio*, as being original and not derivative, is treated as the primary mode, and, as we shall see, most of the others have a close affinity with it.

LXXVI. *Occupatio*[8]. This was simply acquisition by taking. It was not in practice of great significance, its chief importance being in relation to wild animals captured for food or other purposes. These wild animals were acquired only when they were effectively seized, which was true of all *occupatio*[9], but there was in their case the further rule that the ownership lasted only so long as they were effectively held, subject to the modification that in the case of certain things, *e.g.* bees and pigeons, the ownership lasted so long as they retained the habit of returning to their quarters—*animus revertendi*[10]. The question what amounted to such a capture as gave effect to the intent to acquire is, in effect, what amounts to gaining possession in such a case. It was agreed after disputes that a wounded animal was not "occupied" till it was seized[11]. We are nowhere told whether killing was itself enough and, as to trapping, the matter seems to have depended somewhat on the position of the trap, but the question is of no great legal interest[12].

What amounted to loss of control is again a question of fact[13]: clearly it was not lost while the old owner was in close pursuit, and perhaps the best way of stating the matter is that the beast ceased to be owned when the chance of recovering him was not materially greater than that

1 C. 2. 3. 20. 2 *Post*, § CLXXVIII. 3 *Post*, § XCIV. 4 *Post*, § XCI; *ante*, § XL. 5 *Post*, § LXXX. 6 *Ante*, § LXXIV; *post*, § LXXXIII. 7 *Ante*, § LXXIV; *post*, § CLXVI. The rule has no application to acquisition by legacy. 8 G. 2. 66–69; Inst. 2. 1. 12 sqq. 9 Inst. *ib.* 10 41. 1. 3, 4; Inst. 2. 1. 14, 15. 11 Inst. 2. 1. 13; D. 41. 1. 5. 1. 12 41. 1. 55. 13 41. 1. 5.

of capturing any other wild animal[1]. To the question why ownership was, in this case and no other, limited by possession, the answer may be that the whole institution antedates law: it comes from a time when the strong man armed, and he alone, held his goods in peace. Whatever its origin it had a curious result. If the beast escaped, and, when free from control, did damage, the old owner was not responsible: it was not his beast. He need not therefore keep it securely however dangerous it was[2]. The aediles met the case by a provision that one who kept wild beasts of certain kinds near a way was responsible for damages if they escaped. In later law this was extended to any wild animal[3]. And Justinian[4] allowed the *actio de pauperie* in respect of wild animals, though this is contrary to the principles of the action: that depended on ownership[5], which was here lost, and required that the damage be contrary to the nature of the animal[6], which was not here the case.

Occupatio is also said to be applicable to *res derelictae*, abandoned property. The principle is simple. If a thing was intentionally abandoned by its owner, without the desire of recovery (such as existed where things were thrown overboard to lighten a ship[7]), it could be occupied by anyone. But there are difficulties. If I picked up an article which had been abandoned but which I supposed to have been accidentally dropped, and decided to keep it, had I acquired it? The difficulty is that I could hardly be said to intend to acquire what I did not think to be susceptible of acquisition. The only text on the matter requires knowledge on the part of the *occupans*[8].

Some writers hold that an owner not in actual possession could not make *derelictio*, which required a cesser of possession[9]. But it would seem that any declaration by the owner that he had done with the thing would suffice in this case. Again, the Proculians held that a thing was not derelict till some other person actually possessed it, though this opinion did not prevail against Julian's contrary view[10]. The Proculian doctrine has been explained as meaning that *derelictio* was not complete till it was too late for a change of mind[11], and this is more or less borne out by the fact that the Proculians do not say that the adverse taking must have been with a view to acquisition: any possession would, it seems, suffice. But there is a very different explanation. Many modern writers, treating the Proculian view as the logical doctrine, hold that *occupatio* had nothing to do with the matter, and regard the case as one of *traditio incertae personae*[12]. Neither Gaius nor Justinian mentions this

1 See Czyhlarz, *Eigentumserwerbsarten*, 46. 2 Inst. 4. 9. pr. 3 21. 1. 40–42; Inst. 4. 9. 1. 4 Inst. 4. 9. 1. 5 Inst. 4. 9. pr. 6 *Ib.*; *post*, § CCV. 7 Inst. 2. 1. 48. 8 41. 7. 2. pr. 9 Czyhlarz, *op. cit.* 90. 10 41. 7. 2. 1. 11 See Czyhlarz, *op. cit.* 114. 12 *Post*, § LXXXIII.

among the cases of *occupatio*, and there is no unequivocal text in the Digest which does so, while there are texts which put this case side by side with others which are treated as *traditio*[1]. The difficulty of this is however that, when the view prevailed that *derelictio* was complete by the mere abandonment, it followed that it became a *res nullius*, and there could be no *traditio* of such a *res*.

This point apart, *derelictio* of moveables was completed by throwing them away. In land, this was impossible: the owner must, so to speak, remove himself from the land. But people leave their land for long periods for many reasons other than intention not to own it[2], and as land usually has some value, it does not seem that *derelictio* often happened in that case[3].

We are told that among things capable of *occupatio* were those captured from the enemy[4]. In general however *praeda* did not go to the captor, but to the State. It was at the disposal of the general, who might give or sell it[5], but, if this happened, there was not *occupatio* but acquisition from the State. What is here referred to is enemy property in the State territory in time of war, and property belonging to members of a State with which Rome had no friendly relations[6].

Occupatio was a *iure gentium* mode of acquisition, and it has been contended that it therefore gave only *iure gentium* ownership. But the name refers to origin, not to effect[7]. The more probable suggestion has also been made that in classical law it gave only *iure gentium* ownership of *res mancipi*[8]. This is certainly true of the most important *iure gentium* mode: *traditio*, and might therefore be true of *occupatio*. If it did give civil ownership it would provide an easy way of evading the form of *mancipatio*. *A* could abandon the slave and *B* then "occupy" him, and it would be easy to create by agreement the same obligations as would have existed if he had been mancipated. The case is, as we have seen, closely associated with *traditio incertae personae*, and if so interpreted, it could not give more than *iure gentium* ownership. Classical texts give indeed no hint of anything of the kind, but there are very few refer-

1 Inst. 2. 1. 46, 47 directly associate it with a clear case of *traditio incertae personae*, using the word "*occupare*," but in a context which shews that it means no more than seizing and does not imply any particular juristic construction of the facts. D. 41. 7 which deals with *usucapio* "*pro derelicto*" uses the word "*occupantis*" in h. t. 1. But here too the word need not be technical. Even P. 2. 31. 27 is not conclusive. 2 *E.g.*, *saltus hiberni*, *aestivi*. 3 *Derelictio* of land is often mentioned in the sources (see reff. in Czyhlarz, *op. cit.* 93) but usually in the sense of leaving it uncared for, without necessary implication of intent to abandon. Arrears of tax might make it dangerous to "occupy" in any case. 4 In G. 2. 69 the acquisition contemplated is no doubt to the State. 5 Mommsen, *Strafrecht*, 765. 6 41. 1. 51. 1. Girard, *Manuel*, 323, limits this to "expédition de partisans," no doubt the usual case. 7 Cf. the case of *traditio*. 8 Girard, *Manuel*, 322.

ences to *occupatio* of *res derelictae* and *res hostis*[1], and these are the only cases in which the point could arise[2].

LXXVII. *Accessio.* This may be defined as the acquisition of property by its incorporation in what already belonged to the acquirer. The rules are somewhat complex and there are several distinct cases to consider. Before discussing them it may be noted that the question whether it created civil or merely bonitary ownership in classical law cannot arise here, for what was acquired merged in the old thing and was necessarily held as that was held.

The simplest case of *accessio*, that of moveables to moveables, was of rather rare occurrence. If two things of different owners were mixed in such a way as to be readily separable (*commixtio*), and not by consent, they were merely separated again: there was no change of ownership[3]. If it was by consent, ownership was presumably common: in neither case was there any question of *accessio*. If they were so joined as not to be readily separable (*confusio*), whether by consent or not, ownership was common: there was no *accessio*[4]. These rules seem to exclude *accessio* altogether, but there was an important exception. If, of the two things so united by *confusio*, one was merely an accessory to the other, its identity was merged in that other: there was *accessio* and the whole belonged to the owner of the principal thing[5]. Whether it was or was not an accessory was a question of fact, not always easy. In some cases it seems obvious, as where *A*'s wool was woven into *B*'s coat[6], but in some cases there were disagreements, not only whether, in a given case, the thing was an accessory, but on the tests to be applied in determining the point.

The test sometimes applied, and, as it seems, the best, is whether the total thing would retain its identity as the same thing, if the added element were removed, whether this is the thing which gives the object its essence and its name[7]. Another test applied was that of relative

1 And, as we have seen, most of these are doubtful. 2 Not all *res nullius* could be "occupied," *e.g.*, *divini iuris*. See, too, G. 2. 200 as to the Proculian view of property subject to a conditional legacy *per vindicationem*. The property in a *hereditas iacens* did not belong to any one. None of these could be occupied and the interests of those really concerned were provided for, as we have seen for *res divini iuris* and shall see later for other cases, by a variety of expedients. 3 41. 1. 12. 1. 4 Inst. 2. 1. 27. Simple soldering is *commixtio*, for it can be melted off (*plumbatura*) but welding (*ferruminatio*) is *confusio*. 6. 1. 23. 5. A mixture of "*aes*" and silver was thought of as separable, *commixtio*, 41. 1. 12. 1, one of gold and silver was not so thought of, *confusio*, h. t. 7. 8. 5 Inst. 2. 1. 26. 6 Arnò (*Mél. Girard*, 1. 27) argues that *textura* is not a true case of *accessio*, but is on an equality with *plumbatura*. He cites 10. 4. 7. 2 and contrasts G. 2. 79 and Inst. 2. 1. 25, 26. 7 See Girard, *Manuel*, 335, who cites 34. 2. 29. 1; 41. 1. 26. pr.; Inst. 2. 1. 33. A diamond ring may, it should seem, be regarded as a jewel in its setting rather than a ring with its ornament.

value[1], but this was ignored in the case of writing on parchment, which ceded to the parchment even though the lettering were of gold. Here the test applied was that the writing could not exist without the parchment, while the converse is not true[2]. In the case of painting on a tablet, there was a difference of opinion. On the view which prevailed the tablet ceded to the picture, since, says Justinian, the picture has the greater value. This is not always true, and is not alleged by Gaius (from whom Justinian adopts the opinion), who observes that there is no good reason for it[3]. Paul adverts to this reason but rejects both it and the rule[4] and makes the painting cede to the tablet as not capable of existing without it.

It was indifferent whether the absorption was *bona fide* or not, or by whom it was done, or whether there was consent, though all these points were material on the question of compensation, on which the chief rules were these[5]:

(i) If the loser himself effected the fusion voluntarily in knowledge of the facts, he was regarded as having made a gift and had no claim[6], subject to the limitation that, if he did it as a reasonable act of administration on behalf of the other party, he would have an *actio negotiorum gestorum contraria*[7].

(ii) If he did it thinking the thing was his, then, if still in possession, he could resist *vindicatio* by an *exceptio doli* unless he received compensation for his loss, not the added value[8]. If the other party had acquired possession of the thing, he had, it seems, no remedy at all[9].

(iii) If it was done in bad faith by the acquirer and he had possession, the loser could proceed for theft[10]. If on such facts the loser was still in possession, the owner could no doubt vindicate subject to payment for the added value, but would still be liable to the *actio furti*.

(iv) If it was done by the acquirer in good faith and he had possession, he was liable, at least in later law, to an *actio in factum* for the loss[11]. If the other had possession he could vindicate, subject to payment for the added value[12].

(v) In the case of the picture the point of compensation was dealt with on peculiar lines. The three texts are all substantially the same and due to Gaius[13]. They tell us that, the tablet being still in the possession of the old owner, the painter could vindicate, subject to *exceptio doli* if

1 Inst. 2. 1. 34. Another test (41. 1. 27. 1) is, on whose account the addition was made, but this is not helpful. **2** G. 2. 77; Inst. 2. 1. 33; D. 6. 1. 23. 3. The case is rather like *specificatio, post*, § LXXIX. **3** G. 2. 78; Inst. 2. 1. 34; D. 41. 1. 9. 2. **4** 6. 1. 23. 3. **5** This is matter for the law of obligations, but is discussed here in the Institutes. **6** Arg. 41. 1. 7. 12. **7** 3. 5. 44. pr. **8** G. 2. 77; Inst. 2. 1. 33. **9** 12. 6. 33; 41. 1. 7. 12; h. t. 9. pr. **10** Inst. 2. 1. 26. **11** 6. 1. 23. 5, interp. **12** 6. 1. 23. 4. It is said on the strength of 6. 1. 23. 5 that there was an *actio ad exhibendum* in some of these cases. **13** G. 2. 78; Inst. 2. 1. 34; D. 41. 1 9. 2.

he did not pay the value of the tablet. This no doubt means, though it is not said, if he was in good faith. If the painter possessed, the old owner had an *actio utilis* for the tablet subject to his paying *impensam* (or *pretium*) *picturae*, whatever that means, if the maker was in good faith. If not he had an *actio furti*. This *actio utilis* was presumably a *vindicatio utilis* and it was odd enough. If *impensa* means the value of the picture he had no remedy except on purchase of the picture which he might not want. If it means merely the cost of the materials, then he got what might be a valuable picture for practically nothing. And, on the rules as stated, each could recover it from the other[1].

The next case of *accessio* to consider is to land apart from buildings. The rules can be briefly stated. Imperceptible deposit of soil on a man's boundaries by the action, *e.g.* of a river, belonged to him[2]. An island arising in the middle of a river belonged to the owners on each side, to the middle line[3]. Apart from temporary inundation, if a river changed its bed, the old bed belonged to the owners on each side and the new bed became public, reverting if the river reverted[4]. If a solid identifiable piece of land was carried on to *A*'s borders by the force of the river, the ownership was unchanged, until trees rooted in it struck root in *A*'s land, when it became his[5]. In the same way anything sown or planted in a man's land was his[6].

In the case of *alluvio* we hear nothing of compensation, for obvious reasons. In the case of plants rooted in land, the little we are told[7] suggests that, as we should expect, the rules were as in the case of moveables.

The rules of *alluvio*, etc., harmonise with the doctrine that the owners of land on the banks owned the soil to the middle line, and this is strengthened by the fact that they did not apply if the land concerned was *ager limitatus*, *i.e.* defined by straight lines by authority, having no necessary relation to natural features, as was commonly the case with lands granted by the State[8]. The same is true of the rule as to *insula nata*, which was on the same level as *alluvio* (while an island in the sea, the bottom of which certainly belonged to no one, was *res nullius*[9]) and cannot be thought of as accessory to the land or ceding to it, unless the right extended to the middle line. It was laid down by Celsus that the

1 These rules do not deal with the possible case in which the fusion is effected by one who owned neither the principal thing nor the accessory. This case might easily be very complicated. 2 G. 2. 70; Inst. 2. 1. 20; D. 41. 1. 7. 1. 3 G. 2. 72; Inst. 2. 1. 22; D. 41. 1. 7. 3, 4. 4 41. 1. 7. 5; Inst. 2. 1. 23. 5 G. 2. 71; Inst. 2. 1. 21; D. 41. 1. 7. 1, 2. The Institutes speak of the *tree* only. See also 6. 1. 5. 3. 6 Common, if rooted in two estates, G. 2. 74, 75; Inst. 2. 1. 31, 32; D. 41. 1. 7. 13. 7 G. 2. 76; Greg. Wis. 6. 1; Inst. 2. 1. 32. 8 41. 1. 16. As to practical difficulties and temporary departure from these principles, see Cuq, *Manuel*, 261, and literature there cited. See also Costa, *Le Acque nel dir. R.* 4 sqq. 9 Inst. 2. 1. 22.

soil belonged to owners on each side and was public only *quoad usum*[1]. On the other hand there are texts which make the bed public[2], and Girard points out that even so late as Labeo there were controversies as to riparian owners' rights to islands[3]. There are, as we have seen, other traces of differences of opinion on many of these points[4]. The better opinion seems to be that the classical lawyers were reaching the doctrine that the bed belonged to the riparians[5].

LXXVIII. Passing to the case of buildings, the texts discuss two hypotheses:

(*a*) *A* built on his own land with *B*'s materials. The house belonged to the builder: *superficies solo cedit*[6]. But the Romans were here capable of a rather metaphysical distinction. Though the house was *A*'s, *B*'s materials were still his[7], subject to the limitation, based on the XII Tables, that so long as they were absorbed into the house, even though separable, he could not reclaim them[8]. His ownership was inoperative, but capable of renewed effect. If, however, they had been used in bad faith, the old owner had an *actio de tigno iniuncto*, also based on the XII Tables, for double their value[9], and even after bringing this action he could still recover the materials if the house fell or was pulled down[10]. The act would seem to be *furtum*, but if the *actio furti* were brought, no doubt that *de tigno iniuncto* was barred. If, though the builder was in good faith, the materials had been actually stolen by someone, the old owner could either bring the *actio de tigno iniuncto* or reclaim the materials when the house came down, but not both[11]. If there was no theft, but all was in good faith, he had the same right to reclaim when the house was pulled down. The Institutes, and an interpolated text in the Digest[12], give him the alternative of *de tigno iniuncto*, but most of the texts, the nature of the action itself, and the language of the relevant title in the Digest[13] leave little doubt that, at least for classical law[14], this action never lay unless the materials had been stolen by someone. This leaves no remedy, in case of good faith, beyond the very poor one of eventual reclaim. It has therefore been suggested, on

1 41. 1. 30. 1. **2** See p. 212, n. 4. **3** *Manuel*, 332; D. 41. 1. 65. 4. **4** 41. 1. 7. 5; In 7. 1. 9. 4 Ulp. gives usufructuary the usufruct of *alluvio*, but denies him any right in *insula nata*, though he agrees that it belonged to the owner of the land. He rests his view on Pegasus but seems to give his own reason which is that such a thing is not within the intention of the original grant. **5** The rule stated by Paul (41. 1. 65. 3) is somewhat adverse. **6** G. 2. 73; Inst. 2. 1. 29. **7** Thus *usucapio* of the house was not *usucapio* of the materials, 6. 1. 23. 7; 41. 1. 7. 11. **8** 41. 1. 7. 10; Inst. 2. 1. 29. **9** 47. 3; 24. 1. 63. **10** 41. 1. 7. 10. **11** 24. 1. 63; 47. 3. 1. pr., h. t. 2. **12** Inst. 2. 1. 29; D. 6. 1. 23. 6. **13** D. 47. 3. **14** It may be doubted, in view of the other texts, whether the two texts (see n. 12) which can be so interpreted really intend to extend the *actio de tigno iniuncto* to cases of good faith, throughout. In 46. 3. 98. 8 Paul says (there is nothing about theft) that the *pretium* can be recovered; cf. 47. 3. 1. 1.

the authority of a text which appears to be interpolated[1], that, as in the corresponding case in moveables, there was an *actio in factum* for the value of the materials[2].

The possible case in which the building passed into the possession of the owner of the materials before any of these proceedings were taken is not discussed. Presumably the builder (owner of the land) could recover only on paying for the materials, without prejudice to his liability for theft in case of bad faith.

(*b*) *B* built with his own materials on *A*'s land. There are many difficulties in this case. There are indeed several possible cases, but no analysis of them will provide a coherent story from the texts. There was evidently evolution and difference of opinion among the jurists themselves.

(i) *B* still in possession was in good faith, *i.e.* reasonable error, all through. If the owner vindicated, *B* could by an *exceptio doli* get reimbursement of his expenses[3]. If the place came down while still in *B*'s possession the materials reverted[4]. But here difficulties begin. Celsus says that if the work was what the owner would have done, he must refund either cost or value, whichever was the less[5]. This is rather favourable to him, though it is stated as a concession to the builder. Celsus adds that if he was too poor to pay this, he might let the builder take away the material, so far as this could be done without damage. To this is added a clause, certainly of Justinian, that he might instead pay what the matter would be worth to the builder when removed, so that the latter was prevented from destroying for mere malice, *e.g.* by erasing frescoes. Words are added which seem to mean that these various alternatives did not apply if the owner had a customer for the house: here he must pay the added value. This *ius tollendi* has caused much difficulty. Three other texts mention it, but they look interpolated[6]. It is in conflict with the principle so often laid down that it was forbidden to pull down houses. But it looks genuine in this text and it occurs in other branches of the law[7]. In any case it was clearly law under Justinian[8].

1 Arg. 6. 1. 23. 5. 2 Under Justinian the owner of the materials seems to have been allowed to bring *vindicatio* and *ad exhibendum* at once. But the texts are in conflict (47. 3. 1. 2, 2; 6. 1. 23. 6; 41. 1. 7. 10; Inst. 2. 1. 29) and the rule, which conflicts with the principle laid down by the XII Tables, can hardly be classical. 3 41. 1. 7. 12; 44. 4. 14; Inst. 2. 1. 30; *ius retentionis.* 4 C. 3. 32. 2. 5 6. 1. 38. 6 6. 1. 27. 5; h. t. 37; C. 3. 32. 5. 7 See Pernice, *Labeo*, 2. 1. 384. 8 Celsus tells us, or is made to tell us, that "without damage" means that the premises are left no worse than they were before the matter was added. Some writers harmonise the texts by holding that, in classical law, the *ius tollendi* applied only to additions to a house, not to complete buildings; see Pernice, *Labeo*, 2. 1. 386. It is sometimes held that the whole notion of *ius tollendi* is Byzantine. See Beseler, *Beiträge*, 2. 39 and reff. One text says that any fruits received while the builder was *in bona fide* are set off against the *ius retentionis*, 6. 1. 48.

(ii) *B*, still in possession, was in bad faith. There was no question of *furtum*, for there is no *furtum* of land. Here we are told that he had no *ius retentionis*, for which the reason is assigned that he was construed as having given it[1]. And he had no *ius tollendi* in classical law, though two interpolated texts give this right[2]. The same principle would exclude any right in him if the place fell down. But it must be supposed that though he built knowingly on another's land, if he did it as an act of *gestio* for the owner, reasonably, this would be a case of *negotiorum gestio*[3].

(iii) The owner of the land has recovered possession. Here, in no case, apart from *negotiorum gestio*, had the builder any action, a rule set down to the fact that there had been no *negotium*[4]. From this point of view good or bad faith was immaterial, though we are told that if he had bought the land in good faith these expenses would come into account in his claim on eviction[5]. Nor had he, as it seems, any *ius tollendi*, even under Justinian. If however he was in good faith, since he could not be supposed to have intended a gift, the materials reverted when the house came down[6]. If he built in knowledge that the land was not his, the Institutes and Digest say that it was construed as a gift and he had no such claim[7]. But a text in the Code modifies this by saying that, whether it was in good or in bad faith, the materials reverted if the house came down, unless it appeared that the erection was *donandi animo*[8]. That is a very different proposition: in general he did not intend a gift, and the rule about *donandi animus* was a legal fiction to penalise a wilful wrongdoer. The form of the provision in the Code suggests interpolation.

The texts do not consider the very possible case of a building by *A* on *B*'s land with *C*'s materials[9]. If the house was still in the builder's possession it was, as between him and the owner of the materials, as if it were his own land, and, as between him and the owner of the land, as if they were his own materials. If the land was in its owner's possession, the owner of the materials was not affected by the good or bad

1 Greg. Wis. 6. 2; Inst. 2. 1. 30; C. 8. 10. 5. 2 C. 3. 32. 5, if *impensae* were *utiles*. Another text of Ulpian (6. 1. 37), but probably interpolated, gives him the *ius tollendi* if he acquired possession in good faith, but built after he knew the truth. 3 *Post*, § CLXXXV. 4 12. 6. 33. 5 C. 8. 44. 9. But 19. 1. 45. 1 says that as he need not have given up possession without receiving "*impensam aedificiorum*" he has no claim in respect of this against his vendor. 6 C. 3. 32. 2. 7 41. 1. 7. 12; Inst. 2. 1. 30. 8 C. 3. 32. 2. 9 The case occurs. The squatters in Epping Forest built huts on land not their own out of materials taken from the forest, the property of the Lord of the Manor. A builder erecting a stable in his yard builds the back wall by accident or design beyond his proper boundary. In taking materials from his yard he used some which were in fact the property of a customer. Such facts as these might give rise to difficulty in applying the rules. If the owner of the land on which the back wall is built uses it to support a roof, which of the parties is in possession of the wall?

faith of the builder, but was bound by the rule that the house might not be pulled down. His only right against the landowner was, apparently, to vindicate if the house came down. If the builder had used them in bad faith there would be *de tigno iniuncto* against him (for possession is not necessary, so far as appears), as an alternative to *actio furti*, and *condictio furtiva* if there had been no *vindicatio*. If the builder had used them innocently, there was no remedy against him, any more than in the case of any other *bona fide possessor* who had ceased to possess, *sine dolo malo*. But if, on handing over, he exercised his *ius retentionis* there are indications that an *actio negotiorum gestorum utilis* would lie, for in claiming the *ius retentionis* he managed the owner's affair thinking it his[1]. If he did not claim it, and was in good faith, there was no claim against him.

LXXIX. *SPECIFICATIO*. This can be described as the acquisition of a new thing by making it out of materials wholly or partly another's. The name is a medieval invention, and, as we shall see the institution had close affinities with *accessio*, with which it is very much entangled in the Sources. The general notion is simple. Where *A* made a definitely new thing out of material of *B*'s the Sabinians held that there was no change of ownership: the ownership of the materials was decisive. The Proculians held that a new thing, having come into existence, had a distinct identity and belonged to the maker[2]. But Justinian tells us that there had been many opinions and that he adopts the *media sententia* of those who had held that the *nova species* (where *species* means specific thing) should belong to the maker if not capable of reduction to its original form, but, if so capable, should still belong to the owner of the materials. It is clear that this *media sententia* is not due to the compilers themselves[3].

The first question is: what is a *nova species*? This is independent of the question whether it can be restored: a statuette cast out of another's bronze was a *nova species*, but being reducible, did not go to the maker[4]. A *nova species* is nowhere defined, but instances are given from which modern definitions have been framed. There were cases in which the Romans had difficulties. Some imported the idea of irreducibility. Ears of corn, they said, could not be restored after threshing, and thus grain was a *nova species*. But the view which prevailed, according to the Digest, though the Institutes give the other, is the rational one that it was the same thing taken out of its wrappings[5]. Grapes plucked were not new things, but wine was. To kill a pig, and even to cut him into joints, does not make a *nova species*. But sausage would be a *nova*

1 See 3. 5. 48, *post*, § CLXXXV. 2 G. 2. 79. 3 Inst. 2. 1. 25; D. 41. 1. 7. 7.
4 *Ibid.* 5 Inst. 2. 1. 25; D. 41. 1. 7. 7 in f.

species. A broken egg would not, an omelette would, be a *nova species*. What then is the test? The matter is discussed at length by Czyhlarz[1] and Windscheid[2], who cite various opinions[3]. Perhaps it is best to accept Windscheid's view that there is no juristic answer: it would never give great difficulty in practice.

There is difference of opinion on another requirement. It is sometimes said that there was no acquisition unless the act of manufacture was done in good faith. No text expressly concerned with the law of this topic says anything to suggest this. There was no such requirement in *accessio*, where good faith was material only on the question of compensation. *Specificatio* has close affinity with *accessio*. Where the maker used his own and another's materials it might be difficult to say which it was. If, as some hold, it was essentially a case of *occupatio* (a point discussed below), good faith ought to have been immaterial, since it was none the less a *res nullius*. And though no text says that good faith was not necessary, the concluding words of the principal text in Gaius[4] allow of *specificatio*, where the matter was stolen, but are not conclusive, as it is not said that the maker was the thief. What the view of Gaius himself was does not appear. On the whole the better view seems to be that *bona fides* was not needed, though modern opinion is much divided[5].

What was the basis of this right of acquisition? According to a view

1 *Op. cit.* 248 sqq. 2 *Lehrbuch*, § 187. 3 Fitting (*Archiv f. c. Pr.* 48. 6) holds that the question is whether the product is of a new kind, comes under a new "*begriff*." C. rightly rejects this, as, if I take your vase and melt it and cast it into a new one exactly similar, it is yet a *nova species*. He, himself, holds that the test is whether the work has resulted in a new creation which did not before exist, but this seems little more than saying that a new thing is a new thing. Fischer says (Bresl. *Festg. für Ihering*, 2. 70, cited Windscheid, *loc. cit.*) that the labour expended on the thing must be economically more important than the material since the whole rule is intended as a reward for labour. Platinum worked from the form of a dipping rod to a *spatula* is unquestionably a new thing but the material is worth tenfold the labour. And this view confuses *nova species* and acquisition, which are distinct points. And a *nova species* is not necessarily the reward of labour. Vinegar from wine is a *nova species* and the acetic fermentation often occurs without any labour. 4 G. 2. 79. 5 The chief texts cited in favour of the view that *bona fides* was needed are the following: 13. 1. 13 (but here there is no *specificatio* on the *media sententia*, the *condictio furtiva* would be available in any case, and the inclusion of the added value is only the usual rule against a thief. The position of Paul and his authority Fulcinius on the subject of *specificatio* is not clear); 13. 1. 14. 3 (where there is no *nova species*, and the author is a Sabinian): 47. 2. 52. 14 (same case, the old owner has *condictio furtiva*, but that he would have in any case. No doubt "*soli domino competit*," but that is the old ownership. He would still have it if the thing had ceased to exist): 10. 4. 12. 3 (Paul, who may be a Sabinian on the matter. The text has been suspected of interpolation, and apart from this the language is such as to shew disputes and as stated is much too wide for the truth. Windscheid, a supporter of this view, says (*Lehrb.* Sec. 187, n. 3) that it gives no certain result); 41. 3. 4. 20 (Paul again, and it really makes against this view, for in order to give *condictio furtiva* where the thing has been made into a new *species*, he says: *verius est ut substantiam spectemus et ideo vestis furtiva erit*).

widely held. it was *occupatio*[1]. A new thing which had no owner was "occupied" by the maker. This is more or less supported by the language of the Digest in expressing the Proculian view: "*quia quod factum est antea nullius fuit*[2]." There is also the fact that, both in the Digest and the Institutes, the case of *occupatio* is followed by the cases of *alluvio* and the like and then by this topic. Czyhlarz[3], with others, rejects this view. He says that, though the Proculian view speaks of *res nullius*, it says nothing of *occupatio*, but as the fact is given as the reason of the acquisition, the inference to *occupatio* is the only one which suggests itself[4]. On any other basis the absence of ownership would be not the reason but the occasion. He adds that, if it were open to *occupatio*, someone else could so acquire it and the maker would not get it, and that is not so. But the creation and the *occupatio* occurred at the same moment. There was no measureable time in which it was a *res nullius*: even if the maker was not on the spot at the moment of completion, he was in possession and became owner. If he waived his right shortly before completion, no doubt, any one could "occupy" it. The competing view is that the act of making sufficed: the acquisition was by *creatio*. This is held by most of those who require good faith. The distinction is not unimportant. If the acquisition rested on the fact that it was a *res nullius*, this must be equally true even if the material was the maker's. But *creatio* is an arbitrary notion on which it is possible to set limits, as Czyhlarz does, and to say that acquisition by *creatio* did not apply if the material was the maker's[5].

On the question of compensation we have little information. Gaius says that if the thing had been stolen, there was *condictio furtiva* against the thief and some others[6]. As this could not lie against an innocent maker it has been suggested that in this case there was *condictio sine causa*[7], but this is without textual support. Another text gives a *vindicatio utilis*, like that in the case of the picture, where a woman made clothes out of wool which her husband had given her[8]. But gifts between husband and wife being void, this, even if genuine, may be no more than a means of enforcing that special rule[9]. That the old owner should have no remedy seems so unfair that many writers appeal to the general

1 See Czyhlarz, *op. cit.* 315. 2 41. 1. 7. 7. 3 *Op. cit.* 314 sqq. 4 Express reference to *occupatio* as such is unusual. We get "*occupantis fit*" and the like sometimes (41. 1. 3. pr.; 43. 12. 1. 6, etc.). Most of the texts actually dealing with *occupatio* do not use this word, or *occupare*. 5 Fitting, cited Windscheid, *Lehrb.* § 187, n. 2, holds the singular view that it was *occupatio* in classical law but *creatio* under Justinian. It is difficult to see in *creatio*, which cannot be extended to other cases, anything more than a label. 6 G. 2. 79. He may mean only the *heredes*. 7 Witte, *Bereicherungsklage*, 329, cited Czyhlarz, *op. cit.* 380. 8 24. 1. 30; it is probably interpolated. 9 Girard, *Manuel*, 326.

notion of enrichment and *condictio* for the remedy. But there is no evidence for this application of that principle. In a case of bad faith there were the *actio furti* and *condictio furtiva*, but it may be that in cases of good faith there was no more remedy than where a *bona fide possessor* had ceased to possess, *sine dolo malo*.

The ownership of the new thing in a new person must be a new ownership. How far was it affected by rights in third persons which attached to the material in the hands of the old owner? It is clear that a usufruct of the material was destroyed[1], and we have no evidence as to the position of the usufructuary in matter of compensation. We know however that he had no *condicto furtiva*, though he could sue for the theft[2]. A legacy of the material was not a legacy of the thing, but this does not turn on the rules of *specificatio*, but on construction of the probable intent of the testator[3]. We are told[4] that a pledge of the material was ended by *specificatio*[5].

LXXX. *Thesauri Inventio*. This is a principle under which treasure found by anyone goes to him in whole or part under a number of conditions. Treasure means valuables that have been deposited for so long that all trace of their present ownership is lost. As to what are valuables, Paul speaks merely of *pecunia*[6]. The *C. Theodosianus* calls them *monilia*, which is understood to mean precious metals and stones and the like[7]. Justinian incorporating the enactment calls them *mobilia*[8], which may be a mere slip or may be intended to widen the class: in any case it means things of very special value. Deposited seems to mean intentionally placed there, which would exclude an ornament accidentally dropped and dug up long after[9]. The purpose of the deposit is immaterial. Concealment was a common case, but a pious offering may have been on the same footing. How ancient it must be cannot be said: what was needed was that there should be no means of determining to whom it now belonged. It was none the less treasure because, in the deposit, the name of the depositor was found, if it could not be said who represented him to-day. Most of the texts speak of it as found in land[10], and none suggests that there could be a right, as treasure, to what was found in a moveable[11].

There is much controversy as to the juristic ground of the acquisition. A thing which has no traceable owner is much like one which has none,

1 7. 4. 10. 5, 6. **2** 47. 2. 46. 1, etc.; 13. 1. 1. **3** 32. 88. pr.; cf. h. t. 5. **4** 13. 7. 18. 3. **5** There are many other questions arising out of *specificatio*, especially where the material was that of the maker. See Czyhlarz, *op. cit.* 266 sqq. **6** 41. 1. 31. 1. **7** C. Th. 10. 18. 2. **8** C. 10. 15. 1, included in another statute. **9** The whole point was elaborately discussed from the point of view of modern law in the case of *Attorney General* v. *British Museum Trustees* (1903), 2. Ch. 598. **10** See the reff. in Czyhlarz, *op. cit.* 212. **11** Some writers hold that the rule applied there.

and this suggests *occupatio*. It was certainly acquisition by taking, and it can hardly be doubted that the notion of *occupatio* played some part in it. But if it is *occupatio* it is *occupatio* with special characteristics. It is confined to one person (the finder) like *specificatio*. The share that the landowner took cannot have been acquired by *occupatio*, for he acquired though he knew nothing about it. His share vested in him at once: it was not a case of a duty in the finder to hand over a share to the owner[1]. It rested entirely on imperial enactment, based we are told on natural equity[2], where it is difficult to believe but that *occupatio* was present to the mind of the legislator. It hardly seems worth while to seek a juristic idea behind that, but Czyhlarz holds that as to the finder's half it rested on *inventio*, just as in *specificatio* he makes the acquisition rest on *creatio*[3]. The landowner's half was acquired, he holds by *accessio*[4], but as he was regarded as acquiring only at the moment of finding, it was a peculiar case of *accessio*. *Accessio* rested on the addition of something to a unit of property: its basis was merger or absorption. But this acquisition occurred at, and by the act of, separation. As to what was meant by finding, the general effect of the texts is that the acquirer was not the person who first saw it, but he who first got effective control[5], which recalls *occupatio*. But it does not seem necessary that he should intend to acquire it, which differs from the rule in that case[6].

Justinian's history of the matter begins with Hadrian, and the earlier state of things is uncertain. A text in the Digest[7] suggests that in the republic treasure belonged to the owner of the land, not as treasure, but as part of the land, and a passage in Plautus[8] makes slightly in the same direction, but other views are held. A story about Nero is supposed to shew that in principle all treasure was the property of the *Fiscus*, but it really proves nothing[9], though such a rule would be quite in accordance with the financial policy of the time. Finally, we are told that the Emperor Nerva decreed that treasure should in all cases go to the owner of the land[10].

1 41. 1. 63. pr., Inst. 2. 1. 39. See Czyhlarz, *op. cit.* 221 sqq. 2 Inst. 2. 1. 39. 3 These are of course reasons which led to the introduction of the rule, but there seems little purpose in erecting them into juristic bases unless there is evidence that the Romans so conceived the matter, and that they can be utilised to explain any other institution: neither appears to be the case. 4 *Loc. cit.* 5 Czyhlarz, *op. cit.* 229 sqq. 6 The placing of this method under those *iure naturali*, though it rests on enactment, is justified by the repeated allusion to *naturalis aequitas* (C. Th. 10. 18. 2. 1; Inst. 2. 1. 39) coupled with the fact that it is not part of the ancient formal law. 7 41. 2. 3. 3. 8 Plautus, *Trin.* 150 (Goetz and Schoell), see Girard, *Manuel*, 324. 9 Sueton. *Nero*, 31; Tacit. *Ann.* 16. 1. The story involves the assignment of the treasure to a known past owner, whose rights had vested in the Roman State. The present owner was therefore known. Bonfante shews (*Mél. Girard*, 1. 123) that the claim of the *fiscus* is not due to Nero, but is older, and suggests that the finder's half is a bribe to informers. 10 Zonaras, 440, cited Gothofredus ad C. Th. 10. 18. 1.

Hadrian legislated comprehensively. According to the Institutes[1] he provided that if a man found treasure on his own land it was his. So too if he found it, by chance, on *solum sacrum* or *religiosum*. If he found it on another's land, by chance, he shared with the owner, with Caesar if the land were Caesar's. And Justinian continues that it is consistent with this that if he found it on land of a city or the *fiscus*, half should go in the same way to these[2]. We learn from other sources that if the finding was the result of search the finder had no right, but the owner of the land took all[3], and, presumably in such a case, if the land had no owner, the *fiscus* took all. M. Aurelius and Verus provided that where treasure was found on public or religious or Caesar's land, or *in monumentis*, half should go to the *fiscus*, half to the finder, provided he duly reported it, otherwise all to the *fiscus*. But there was no duty to report where the *fiscus* would not have any claim[4].

An enactment of Constantine[5] lays down the same rule as that of M. Aurelius and Verus, but does not expressly say anything about the place of discovery. Presumably it means any land in respect of discovery on which the *fiscus* had a claim under existing legislation. Late in the fourth century there was further legislation apparently lessening the rights both of the *fiscus* and of the landowner, but Justinian does not preserve this[6].

A constitution of A.D. 480 (Leo) preserved in Justinian's Code[7], dealing only with private lands, allows a finder to keep all he finds on his own lands, even on search, provided he used no sacrifices or forbidden arts, and a half of what he finds, by chance, on another's land. What he finds there on search goes wholly to the landowner. This agrees with Hadrian's rule, stated in the Institutes, so that, as to private lands, Justinian's rule is that of Hadrian. But as to what may be loosely called public land, he preserves both Hadrian's rule and that of M. Aurelius and Verus[8], and they do not agree. Where the discovery is on land which has no owner, Hadrian gives all to the finder, while the other rule gives half to the *fiscus*, and where it is on land belonging to cities (*publica loca*) Hadrian gives half to the city, as to other owners,

1 Inst. 2. 1. 39. 2 This does not seem to have been expressly stated in the enactment. Spartian, *Hadr.* 18, gives a slightly different account. 3 C. 10. 15. 1. 3. 4 49. 14. 3. 11. Alexander Severus made an enactment (*vita Alexandri*, 46) which is hardly intelligible, but seems to have benefited the finder at the expense of the fisc. At some unknown time in the third century this was reversed (Gothofredus, *loc. cit.*) and towards the end of the century it was restored: the finder kept the treasure (Arg. C. Th. 10. 18. 1, Gothof.). But these vague literary allusions do not tell us whether he took it all, and whether the rights of private landowners were affected. 5 C. Th. 10. 18. 1. Not preserved by Justinian. 6 C. Th. 10. 18. 2, 3. The owner has only a quarter, and apparently the *fiscus* has no claim where treasure is found by chance on fiscal lands. 7 C. 10. 15. 1. 8 49. 14. 3. 10; Inst. 2. 1. 39.

while the other rule suppresses the right of the city and gives half to the *fiscus*[1].

A usufructuary was not owner, and thus if he found treasure on the land he got only the finder's half and had not even a usufruct in the other half[2], as it was not part of the land. So also a pledge creditor in possession had only the finder's half. But if he had, before the finding, taken the proceedings established by Severus for having the property declared his, (foreclosure)[3], the rule was that if the property had been definitely assigned to him, and the time within which the debtor could get the foreclosure set aside had elapsed, he was owner and took the whole. If it was after he had begun to hold as owner, but while the debtor had still a right to redeem, he would have only the finder's half if the debtor ultimately did redeem, otherwise the whole[4].

LXXXI. ACQUISITION OF FRUITS BY ONE NOT OWNER OF THE THING.

These cases break into two groups. In one the acquisition was by gaining actual control of the fruits, *fructuum perceptio*. In the other it was by the separation of them from the fruit-bearing thing, no matter by whom effected, *fructuum separatio*. The most likely explanation of the distinction is that in the two cases of *perceptio* (*conductor* and usufructuary) the person who was to acquire had not *possessio* of the thing itself, while in the cases of *separatio* (*emphyteuta* and *bona fide possessor*) he had.

Fructuum perceptio. The *conductor*. The exact moment at which fruits were "gathered" was a question of fact: reaping without stacking was enough[5]. The principle was that the acquisition rested on the assent of the *dominus*[6]. By their separation, which first gave them a separate existence, they vested in the owner of the soil. He allowed the tenant to take them—in effect a case of *traditio brevi manu*[7]. As assent was the essence of the matter, if the landlord revoked his assent, the property would not vest in the tenant[8], though the revocation might be a breach of contract, *e.g.* where the land was let for a certain time. It was the consent of the person entitled which was material, so that, if the land was sold, the new owner must assent, either tacitly or by an express *relocatio*[9]. The assent must have existed at the time of the *perceptio*,

1 It is to be noted that one account of Hadrian's legislation in a non-legal work (Spartian, *Vita Hadriani*, 18) says that if treasure is found in any public place (which seems by the context to mean any place not privately owned) half goes to the *Fiscus*, *i.e.*, the owner's half, agreeing on this point with the rule of M. Aurelius and Verus, but not with the Institutes. Spartian's account is however inaccurate: he speaks of a duty in the finder to give a share to the landowner, but, as we have seen, the share vests in the landowner by the finding. In systems of law which have had to apply these rules in practice, it seems to have been generally held that the rule of M. Aurelius and Verus, being the later, must be applied. 2 Arg. 41. 1. 63. 3. 3 *Post*, § CLXVII. 4 41. 1. 63. 4. 5 7. 4. 13. 6 47. 2. 62. 8. 7 *Post*, § LXXXIII. 8 39. 5. 6. 9 Arg. 19. 2. 32.

which logically leads to the conclusion that if the *locator* became insane, or died, there could be no such acquisition[1]. The texts do not say this, or the contrary, but convenience seems to require that, where the tenancy continued, the assent should be held to continue till there was someone who could give or revoke it[2].

As to what are fruits for this purpose, there is no great difficulty in the case of land: they would be the ordinary agricultural produce[3]. If the tenant sublet the land the rent was his: there was no question of *perceptio*[4]. Where slaves were hired there would usually be no question. Their children were not *fructus*[5]. If the hirer sublet, any money he received was his but was not *fructus*, and if the slave sublet himself and received the wage, it may be that a kind of *fructuum perceptio* would apply[6].

The usufructuary. He too acquired *fructus* only by *perceptio*[7]. But there is much difference between this case and the last. Here the right did not rest in any way on the assent of the owner, and there was thus no question of a *traditio brevi manu*. It rested on his *ius in rem*. If the fruits were separated by someone else, and carried off, the fructuary, not being owner, could not vindicate or bring *condictio furtiva*[8].

What amounted to *perceptio* was, here too, a question of fact: it was some act amounting to exercise of the right of ownership. Gathering them is the typical case[9]. It is a disputed question whether any such act was needed in the case of young of animals[10].

As to what were fruits, this is matter for the law of usufruct: a few words here will suffice. The young of animals were fruits: the children

1 So Czyhlarz, *op. cit.* 462. **2** Other cases in which the principle of continuance of assent is applied, and acquisition based on a sort of *traditio brevi manu*, *e.g.*, digging from a chalkpit, 39. 5. 6. **3** As all depends on agreement there may be variations, a question of fact in each case. There may be agreement that the tenant will not remove the straw, or some of the crop may be reserved as rent, 47. 2. 83. 1; 19. 2. 19. 3. **4** 19 2. 7. Ownership will depend on delivery. **5** 6. 1. 16. pr.; 7. 1. 68. Disputes. **6** If subletting was forbidden in the original agreement the crops would not go to the subtenant, and any *fructus civiles* through the slave would go to his owner, Arg. C. 4. 65. 6. **7** 7. 4. 13; Inst. 2. 1. 36. **8** 7. 1. 12. 5; 13. 1. 1; probably he had *actio furti*, for what was stolen was part of the thing in usufruct. Why *perceptio* is needed is disputed. What the rule expresses is a need for reduction into possession, as fructuary does not possess, but this does not seem to be logically required, as there is no question of assent or *traditio*. Girard (*Man.* 328) treats it as a sort of *occupatio*, but as, between *separatio* and *perceptio*, it is the property of the *dominus* (7. 1. 12. 5), not a *res nullius*, it is not easy to apply this notion. Czyhlarz (*op. cit.* 423) holds that as the right rests on his *ius*, it accrues only by an exercise of it, but this would be equally true of *emphyteuta* or of owner himself. The point does not seem to be proved by shewing that *usufructus in fruendo consistit* (7. 3. 1. pr.). It is not a usufruct that he is acquiring. **9** Reaping is enough, 7. 4. 13. **10** The material texts seem to be Inst. 2. 1. 37 and the slightly different rendering in 22. 1. 28 which puts *bona fide possessor* and usufructuary together as acquiring "*statim*." As the former variant does not mention fructuary, the text is not conclusive for classical law. Czyhlarz holds (*op. cit.* 42) that no act is necessary.

of *ancillae* were not[1]. One ordinarily thinks of fruits as taken in kind, and if the fructuary sold the crops, in the land, these still were the fruits and would or would not be available for the buyer according as they were or were not *percepti* when the usufruct ended. But if he leased the usufruct then we get what are sometimes called *fructus civiles*, the rent, and there were special rules, which have nothing to do with *fructuum perceptio*. If all the crops of the year had been gathered, the fructuary was entitled to all the rent, though the year might not have ended. If none, then he got nothing: if part, then proportionately[2]. If it was a slave whom he had let out on hire, he was entitled to the hire for so many days as had expired when the usufruct ended[3]. All this has nothing to do with acquisition of ownership. The money was due under contract, and if he or his *heres* received more than he ought, it was none the less acquired, by *traditio*, not by *perceptio*, and the rights of those to whom it ought to go must be enforced by *actio in personam*.

The rule that the young of animals were fruits and went to the fructuary was modified in one common case. Where a usufruct was of a *universitas*, *e.g.* a flock of sheep, the fructuary must keep up its numbers, so as to be able to hand over the flock undiminished at the expiry of the usufruct. He was bound to replace those which died, from the young or otherwise—the usual course was to do it from the young[4]. This obligation *summittere* might be construed in either of two ways. It might have been looked at as matter of obligation: the young were his, and if he did not use them to replace the missing, this was merely a breach of his duty as a usufructuary, against which the owner normally held security[5]. This view is indeed taken in one text, which says that if there was a case for *summissio*, the lambs from which the substitutes were to be taken were the fructuary's, but when he had effected the *summissio*, the lambs concerned ceased to be his and vested in the *dominus*[6]. This may be regarded as a *traditio*, the *summissio* being some act of incorporation into the flock. But according to another rule elsewhere laid down and declared to be the correct rule, if there was a shortage in the flock, and there were lambs, the ownership of these lambs was in suspense till it was certain which were *summissi*. The act would determine the ownership of these and of the others[7]. The rule, which does not look convenient, gives the duty of *summissio* a real and

1 7. 1. 68; P. 3. 6. 19. 2 7. 1. 58. pr. 3 7. 1. 25. 2; h. t. 26; 45. 3. 18. 3. Here the slave made the contract: it was acquired *pro rata* by fructuary and *dominus*. If fructuary had made it, the right, so far as he was concerned, would be the same. But, apart from *relocatio*, nothing would vest in the *dominus*. 4 P. 3. 6. 20; D. 7. 1. 68. 2, 69. Those members of the flock which die are thus at the risk of the fructuary and become his property, though of course they are not fruits, *ib.* 7. 1. 18. 5 *Post*, § XCV. 6 7. 1. 69. 7 7. 1. 70. 1.

not merely obligatory effect. There was however a limitation. A lamb born before the vacancy occurred was not subject to the rule: it was only those born after of which the ownership was in suspense[1].

If the fructuary gathered fruits before they ought to be gathered, which does not mean before they were ripe, since some fruits ought to be gathered unripe, they were none the less fruits and they were his[2]. But this was not acting like a *bonus paterfamilias* and, presumably, if the usufruct ended before the proper time of plucking, the owner would have a claim for damages, though no text says this[3].

LXXXII. *Fructuum separatio. Emphyteuta.* Of this case we are merely told that a holder of *agri vectigales*, which in Justinian's time is understood to cover *emphyteusis*[4], acquired fruits by *separatio*[5]. The acquisition rested on his *ius*, but here he had possession, and was much like an owner, since he commonly held in perpetuity[6].

Bona fide possessor. This is the most important case, and the most discussed. The general rule is simple: a *bona fide possessor* of property became entitled to the fruits, by *separatio*, by whomsoever effected[7]. Apart from theory, a practical reason why, if he was to have the fruits, he should have them by *separatio*, is that, the owner not being known, any other rule would benefit a malefactor who knew that the *possessor* was not owner.

It is not so obvious why he should have them at all, and it was indeed formerly held that he acquired not *dominium* but usucapion possession, the same "right" in fact that he had in the thing itself. But the texts are clear that he acquired ownership[8], and it has been sought to make this a legal consequence, on the view that he was a kind of bonitary owner and took the fruits accordingly[9]. But no text so states the matter or equalises him with the bonitary owner. His right to the fruits was of a different kind[10]; he acquired in certain events, but he could not complain if the owner prevented him from having them. Moreover he would have them in some cases in which he could not usucapt, and thus would not have the *actio Publiciana*, *e.g.*

1 7. 1. 70. 4. If none are born afterwards the gaps will of course have to be filled up either from earlier lambs or from outside sources (Czyhlarz, *op. cit.* 442), but we are dealing only with ownership. 2 7. 1. 48. 1. See Roby, *De Usufructu*, 98, 216. 3 See 7. 1. 62. 4 See Czyhlarz, *op. cit.* 613. As to *emphyteusis*, *post*, § XCVII. 5 22. 1. 25. 1 in fin. 6 And thus, like owner, acquires the fruits as soon as they come into existence separately. Though possession and no possession is probably the deciding point in the distinction, it must not be forgotten that this is not logically pushed home. The owner acquires the fruits, even though at the moment he is not in possession, unless there is some adverse claim such as that of a *bona fide possessor*. 7 41. 1. 48. One who receives a *res mancipi* from a woman without tutor's *auctoritas* is a *b. f. p.* as she can alienate possession without *auctoritas*. Vat. Fr. 1. 8 *E.g.* Inst. 2. 1. 35, etc. 9 Brinz, *B. F. Possessio*, 1. 548, cit. Czyhlarz, *op. cit.* 506. 10 Czyhlarz, *ib.*

where the *res* was incapable of being usucapted[1]. The Institutes suggest a better explanation[2]: the fruits went to him because they were the result of his labour. This is true in general, though not of those which were maturing when his possession began or of those, *fructus naturales*, grass as opposed to corn, which need little cultivation, and there is indeed a text of Pomponius which limits the acquisition to those fruits which were the result of labour[3]. That view did not prevail, but its existence is confirmation of this opinion as to the origin of the rule[4].

Fructus properly so called are the natural, and, usually, periodic products of the thing. But property is capable of giving other forms of profit, and these are sometimes described as *fructus civiles*. We have had occasion to mention these in connexion with usufruct. The same questions arise in the present case. If the *bona fide possessor* let the land, or *e.g.* a horse, and received hire, there was no question of *fructuum separatio*: if he received the rents it was by way of *traditio*. They were his, and it may be added that he was under no obligation to account for them: the owner was entitled, in general, to what he would have had if the thing had been handed over at the moment of joinder of issue[5]. These points and others of a similar type arose especially in the case of *bona fide possessio* of a slave and will be considered later[6].

A person who obtained possession in good faith would ordinarily acquire the thing by *usucapio*, even though he learnt that he was not entitled[7]. The question arises whether he still acquired the *fructus*

1 *Post*, § LXXXV; 41. 1. 48. 1. 2 Inst. 2. 1. 35. 3 22. 1. 45. See however for a narrower interpretation of this *lex*, Pernice, *Labeo*, 2. 1. 358, n. 2. 4 This opinion is cited from Ferrini (*Bull.* 2. 218) by Girard (*Manuel*, 329) who however adds another possible explanation. He suggests that the possessor has naturally been living as if these things were among his resources, and that it would be a hardship to make him account for them. But this is rather like robbing Peter to pay Paul, and it is noteworthy that, where a similar point arose in connexion with *b. f. possessio* of a *hereditas*, this view was expressly rejected. 5. 3. 25. 12. Czyhlarz (*loc. cit.*) cites other utilitarian explanations. For Ihering (*Jahrb.* 12. 320) it is with a view to trade: men can buy fruits with the same confidence that their title will not be disturbed as they feel when they buy ordinary manufactured goods. It is pointed out by Czyhlarz that this is inconsistent with the emphasis laid on good faith. From the point of view of the purchaser from him, whom, on this hypothesis, the rule is intended to protect, the state of knowledge of the vendor is immaterial. In modern systems, specially protected market purchases do not depend in general on the good faith of the vendor. It has also been said that it is to protect the possessor who has sold the fruits in good faith, and there are texts which limit his acquisition to *fructus consumpti*. But, as we shall shortly see, classical law gave him all, and it is objected by Czyhlarz that such a rule is too wide for the purpose. This is perhaps hardly conclusive: a rule making his ownership begin only at the moment when it also ceased is extremely artificial; indeed the whole conception is rather artificial and there is no textual evidence in its favour, for classical law, in which the principle of the rule must be sought. As to a later view of Ihering, see Czyhlarz, *op. cit.* 509. 5 6. 1. 20. 6 *Post*, § XCI. 7 *Post*, § LXXXVII.

received after he knew that he was not entitled. Julian held that he did, not only from the point of view of *fructus* properly so called, but also with regard to acquisitions *ex re et operis* of a slave so possessed[1]. Ulpian denied this, with special reference to the latter case[2], and Paul, citing Pomponius, denied it for *fructus*[3]. This was therefore, presumably, the doctrine of later law[4].

The acquisition of fruits is complicated by another point. Some texts speak of the acquisition to the *bona fide possessor* as definitive: they were his and there the matter ended[5]. Others say that though they were his he must account for them to the *dominus*, so far as they were unconsumed, or, what seems to mean the same thing, say that "*fructus consumptos suos facit*[6]." Strictly it is absurd to say they became his by ceasing to exist: the meaning is that the economic advantage was his only on consumption, as, till then, he might be called on to account for them. The effect was not to make an exception to the rule of acquisition, but to create an obligation to restore, or compensate for, those still existing[7]. The fact, that some of the texts which mention this duty of restoration have clearly been altered, long since caused the general adoption of the view that the rule was not classical, but it was still supposed to be not much later, since an enactment of Diocletian[8], in the Code, which has no sign of alteration, states it as settled law. But it has been shewn[9] that an enactment of 366, in the Theodosian Code, explicitly gives the *bona fide possessor* all fruits received before *litis contestatio*, in the *vindicatio* by the owner[10], and that there is a text in the Digest which states explicitly the same doctrine[11]. The result is that the rule requiring restoration of unconsumed fruits was very late, possibly as late as Justinian[12]. It may be that it was an extension to *rei vindicatio* of a rule already existing in the *hereditatis petitio*[13].

The question then arises: what is *consumptio*? If the corn was eaten,

1 22. 1. 25. 2. **2** 41. 1. 23. 1. **3** 41. 1. 48. 1. **4** It gives however a very remarkable result. If the knowledge supervened soon after the taking, and the period of *usucapio* elapsed, the old owner will have no claim to the property itself but will be entitled to claim compensation in respect of fruits accrued after the date at which the possessor knew he was not entitled. This does not look very practical. It would presumably be a *condictio*, and the plaintiff would have to prove the date of supervening knowledge. **5** 22. 1. 25; 22. 1. 28, etc. **6** 41. 1. 40; 41. 3. 4. 19, etc. **7** These are the texts which led to the old view, already mentioned, according to which there was no real acquisition of *fructus*, but only *bona fide possessio* with a resulting right of *usucapio*. **8** C. 3. 32. 22. **9** Alibrandi, cited Herzen, *Mél. Girard*, 1. 523; see also Czyhlarz, *op. cit.* 559 sqq. **10** C. Th. 4. 18. 1. **11** 6. 1. 48. **12** Albertario (*Bull.* 26. 250 sqq.) treats the new rule as an expression of the tendency of Justinian to legislate against causeless enrichment. **13** See *post*, §cx. It is generally held that under the *sc. Iuventianum* the *bona fide possessor* of a *hereditas* had to restore all existing fruits. It has however recently been maintained by Albertario (*loc. cit.* p. 275) that in this case also the *possessor* was not bound in classical law to restore fruits received before *litis contestatio*.

that was of course *consumptio*. But, if it was sold, was the price the fruits in a new form or was sale *consumptio*? The question is not directly answered[1]. The little evidence which exists is in favour of the view that sale was *consumptio*, and that even under Justinian the owner could not claim the proceeds[2]. Any other view leads indeed to inextricable difficulties, since the fate of the price would have to be investigated[3].

LXXXIII. *TRADITIO*. This is the only mode of the *iure naturali* class which is clearly derivative and voluntary. It is described as the proper method of transfer for *res nec mancipi*[4], but as it is definitely assigned to the *ius naturale* or *gentium* by the texts[5], it is said by some writers that it did not give civil law ownership, even in *res nec mancipi*, till the recognition of *ius gentium*. On the question how, if at all, civil ownership was acquired in such things in early days various answers have been given[6].

Traditio was the transfer of ownership by transfer of the thing itself[7]. In general it may be said to be transfer of possession, but there were cases in which the ownership was transferred though the transferee had not yet technically acquired possession. Thus a man acquired ownership of a thing given to his slave for him, at once, though he did not possess till he knew the fact[8]. Where, as might be the case in later law, the acquisition was through an *extraneus*[9], the texts appear to presuppose either authorisation or knowledge[10].

Since *traditio* was, in effect, the giving of control, it might take other forms than that of simple delivery. Other acts had the same effect, *e.g.* putting the thing in the transferee's house or a place indicated by him, or handing it to his nominee[11]. *Traditio longa manu* was pointing out the thing to the transferee, and authorising him to take it, in such conditions that it was in his immediate power to do so[12]. *Traditio brevi*

1 This itself is strong evidence that the rule of restitution did not exist in the classical law. 2 See Czyhlarz, *op. cit.* 565. 3 Texts dealing with *hereditatis petitio* do face a similar difficulty, but do not surmount it very satisfactorily, 5. 3. 23 and 25. 4 G. 2. 19; Ulp. 19. 7. 5 G. 2. 65; Inst. 2. 1. 40; D. 41. 1. 9. 3. 6 *Cessio in iure* has been suggested (so Poste, in earlier editions of his Gaius). But this was still more formal than *mancipatio* and cannot have been applied to small matters. Nor is there evidence of its extreme antiquity as a mode of conveyance of property. It is also said that there was no civil ownership, but such things were vindicated in a form without the words: "*ex iure quiritium.*" This is not evidenced. On another view the only protection was the law of theft, this being then wide enough to cover the case of one who refused to return a thing when it was shewn that he had no right to it (Poste, *Gaius*, ed. Whittuck, 137; Muirhead, *Roman Law*, § 10). This is the primitive state of things in many systems, but it belongs to a stage much earlier than any possible date for the recognition of *ius gentium* in Rome. See Clark, *Hist. of Rom. Law*, iii. p. 547. 7 Delivery of the thing by one who had only an undivided share was delivery of his share, 21. 2. 64. 4. 8 Inst. 2. 9. 3; *ante*, § LXXIII. 9 *Post*, § XCIX. 10 *Ib.* 11 41. 2. 1. 21. 12 *Ib.*

manu was effected by a declaration allowing the transferee to hold as his own a thing which was already physically in his control[1]. *Constitutum possessorium* was the converse of this. Where the vendor was, as part of the bargain, to retain the thing, *e.g.* as a hirer, it might be agreed that in future he was to hold it as a mere *detentor*, avoiding the absurdity of handing the thing over and taking it back again[2]. Approximate delivery was giving the transferee the means of control, *e.g.* the key of the place where the thing was. This was formerly called symbolic delivery, but the key was more than a symbol: it was the actual means of control. It was not a real means of control, if the act was in one place and the store in another, and some texts say that it must be on the spot[3]. Probably the rule was that the circumstances must be such that the key did give actual and practically immediate control. The common element in all these cases was the actual putting of the transferee in control of the thing.

Since mere delivery may mean many things, there was no transfer of *dominium* unless there was on both sides the intent that it should have that effect. This might present itself at a different time from that of delivery, as in the case of *traditio brevi manu*. Intent being a mental matter, a *furiosus* could neither make nor take a *traditio*[4], and there could be no acquisition by a *traditio* either by or to an insane slave[5].

There must also be *iusta causa*[6]. This however was not a requirement independent of intent: it was the motive or the evidence which accounted for the intent. It was the external fact shewing the existence of the intent. To describe the *iusta causa* as the primary notion, and as covering the conception of intent is to reverse the order of significance. What was material was the intent: the *causa* was the only evidence of it which was wanted or indeed could ordinarily be had. Hence it is that a putative or imaginary *iusta causa* was enough. If the parties thought the thing was due on a sale, and so made *traditio*, this was valid: the ownership passed, even though there was no such sale and the value could therefore be recovered by *condictio indebiti*[7]. The belief that there was a sale accounted for, and indicated, intent to transfer ownership. So too if one handed over the thing as a gift, the other taking it under the impression that he was to give something in return, the *traditio* was valid, though there was no real transaction at all[8]. Ulpian indeed ex-

1 41. 1. 9. 5. 2 41. 2. 18. pr. 3 18. 1. 74; 41. 1. 9. 6. Cf. Inst. 2. 1. 45. 4 G. 3. 106. 5 41. 2. 1. 9, 10. No doubt if the slave were merely a messenger his insanity would be immaterial. 6 G. 2. 20; Ulp. 19. 7. 7 41. 1. 36. 8 *Ib.* If *A* hands *B* a book and a guinea, intending a gift and *B* takes them as a loan, the ownership of the guinea passes, since in loan of money the property passes, and thus *B* intended to acquire. But that in the book does not, for in such loans ownership does not

presses a contrary view in cases where the parties had different *causae* in view[1]. He seems to regard it as material that the *iusta causa*, considered as the basis, should really exist, whereas, on the view which clearly prevailed, it was just as good evidence of intent, whether it really existed or not[2].

Intent to transfer ownership being enough, the question arises what was to happen if, while *A* did in fact intend to transfer ownership to *C*, and was acting as representative of *B*, the state of facts was such that the alienation if valid would transfer the ownership of *A* and not of *B*. For instance, *B* authorised *A* to transfer a thing for him: *A* delivered it: it was in fact *A*'s. Did ownership pass? A *tutor* delivered, thinking it the ward's, what was really his own. It is said in two texts of Ulpian and of Paul, citing Pomponius, that on such facts the ownership did not pass[3]. The contradiction in a text attributed to Marcellus may be only apparent[4], but Africanus seems to declare such an alienation valid[5].

There must be intention to transfer *dominium* in the actual thing handed over. If our respective agents had agreed for the sale of a certain thing, and we met and I handed over to you a thing which we wrongly supposed to be what was sold, the ownership passed: it was a case of putative *causa*. But it is different if there was error as to the identity of what was delivered. Where *A* agreed to sell Stichus to *B* and by mistake delivered Eros, if this was in the wrong belief that he had sold Eros, the *traditio* was good. But if *A* thought Eros was Stichus, it would appear

pass, and thus *B* did not intend to acquire ownership. The same would be true if the error was the other way, but there would be a *condictio* for recovery of the money.

1 12. 1. 18. pr. The texts are suspected of interpolation, see, *e.g.*, Beseler, *Beiträge*, 3. 56, 57. 2 The same is true even if the transaction were not merely void or non-existent, but for an illegal purpose. If *A* gives *B* money to commit a crime, the ownership passes. D. 12. 5 *passim*. Not if the act of transfer itself is forbidden. 24. 1. 3. 10. 3 41. 1. 35; 18. 1. 15. 2; cf. 12. 4. 3. 8. 4 17. 1. 49. If acting as *procurator* for *A*, *B* sells a thing which is in fact his own and delivers it, he cannot afterwards vindicate it. The most generally accepted view of the matter is that the rule is as stated by Paul and Ulpian. It does not in strictness turn on error, but on the fact that a person, acting under authority to transfer the property of *A*, cannot transfer the property of *B* and that this is not less true if he himself happens to be *B*. If he knew the facts, he would not be acting under the authority and the property would pass. The text of Marcellus does not say that the ownership passes, but that the selling *procurator*, whose property it in fact was, cannot vindicate it. The point of this is that in contract there was no agency. In conveyance one could act for another, but his contract was his own, and therefore bound him personally. He cannot therefore be allowed to recover the thing in defiance of his own obligation to deliver the thing under his contract of sale, and therefore the *vindicatio* will be refused to him, no doubt by an *exceptio rei venditae et traditae*. If in handing it over he had not been under any such contractual liability he could have recovered it by *vindicatio*. But the text has been much altered. See Schulz, *Z.S.S.* 38. 137 sqq. 5 12. 1. 41 med. See Ulp. in 12. 4. 3. 8 fin., which may not be genuine. Cf. 22. 6. 8.

to be bad. But on these questions of error the texts are far from clear[1].

There might be error as to the identity of the other party. There might indeed be no specific person at all: *traditio* to an *incerta persona* was valid, as in the case of coins thrown to a mob[2]. But the case is different if a specific person was intended and another received. If, having sold to *A* by correspondence, I handed the thing to *B*, thinking he was *A*, there was no *traditio*[3].

As *traditio* was an informal transaction, and not an *actus legitimus*, it might be subject to condition and *dies*[4], and in that case the ownership would not pass till the condition was satisfied, or the day had arrived. If the *traditio* was the result of a sale, ownership did not, at least in later law, pass on delivery, unless the price was paid or credit agreed on, or security given[5]. This rule is declared to rest on the XII Tables[6], but if so it must have originally referred only to *mancipatio*, and its wider application must be a juristic extension, a view which is suggested by the fact that Justinian, after stating the origin of the rule in the XII Tables, adds that it is a rule of the *ius gentium* or *naturale*[7].

If the thing sold was a *res mancipi*, *traditio* did not pass *dominium* in classical law, but only bonitary ownership[8]. Although in general this was effective, there were disadvantages. The bonitary owner of a slave could not free him so as to make him a *civis*[9], till *usucapio* had ripened his ownership. It was only if there was *mancipatio* that the *actio auctoritatis* lay for a defect in title[10]. It was not possible to attach a *fiducia* to a conveyance by *traditio*[11]. It was not possible to create a usufruct by *deductio* in a conveyance by *traditio*[12] in classical law.

1 See 41. 2. 34. pr. 2 41. 1. 9. 7; Inst. 2. 1. 46. We have seen that *derelictio* was sometimes explained in the same way. 3 Arg. 47. 2. 52. 21, 67. 4. As we have seen, if a thing is handed to a *procurator* for his principal, or to a common slave for one owner and he takes it for another, there is no *traditio*. 41. 1. 37. 6. The contrary text, 39. 5. 13, is probably interpolated. *Ante*, § LXXIII. 4 7. 9. 9. 2; 41. 2. 38. 1. But not, at least in classical law, what are called resolutive conditions, under which the *dominium* was to revert in certain events, *ante*, § LXVIII. 5 Inst. 2. 1. 41; D. 18. 1. 19; h. t. 53; C. 4. 54. 3. It does not seem to be stated that part payment transferred ownership in an undivided part. It has recently been maintained (Pringsheim, *Z.S.S.* 35. 328 sqq.; *Kauf mit fremdem Geld*, 1916, see the review by Mitteis, *Z.S.S.* 37. 369 sqq.) that, so far as *traditio* is concerned, the notion is post-classical, that payment of price was first made a condition at some post-classical time, and that Justinian puts surety, agreement for credit, etc., on the same footing. The language of Gaius is inconsistent with the rule (G. 2. 19–20) and the author shews that many rules inconsistent with it are retained in the Digest. Others consistent with it, he shews to be interpolated. As to P. 2. 17. 1, *post*, § LXXXVI. 6 Inst. 2. 1. 41. 7 The rule is not applied, even in the Digest, to cases under the Publician. 6. 2. 8. As to *mancipatio*, *post*, § LXXXVI. 8 G. 2. 41; Ulp. 1. 16; 19. 7; *ante*, § LXX. 9 *Ante*, § XXVII. 10 Girard, *Manuel*, 565; *post*, § CLXXI. 11 G. 2. 59. 12 Vat. Fr. 47. Some of these points could not arise under Justinian. The *actio auctoritatis* was

On the other hand, *traditio*, being informal, could be carried out by representative. That possession could be acquired through authorised persons was recognised in classical law, and the inference that if possession could be so acquired, ownership would pass also, if the necessary intents were present, was soon drawn[1].

When *traditio* superseded *mancipatio* in the sale of lands, the absence of any requirement of witnesses seems to have led to frauds. Constantine required a public announcement to the neighbours, and later there appears, whether legally necessary or not, an *introductio*, a solemn *perambulatio* of the bounds in the presence of witnesses, all this and the fact of delivery being recorded in the *acta*[2].

These written evidences of transactions served another purpose. A sale of land is not usually quite a simple matter. Besides the well-known warranties, it would often be necessary to embody all sorts of subsidiary arrangements, restrictions on user, reservation of servitudes and so forth, which it would not be safe to trust to memory.

It must, finally, be noted that in the Byzantine empire the use of written documents led to a further development. Delivery of the document tended to replace physical transfer of the property, and we get conveyance by *epistola traditionis*, *traditio cartae*, etc. How far it proceeded is not clear but it seems to have applied to *donatio*[3].

obsolete (*post*, § CLXXI). *Fiducia* also had gone (*post*, § CLI). As to *deductio*, the rule excluding it in *traditio* no longer existed, 7. 1. 32; 8. 4. 3.

1 See *post*, § XCIX. 2 Vat. Fr. 35; C. Th. 3. 1. 2; Costa, *Storia del Dir. priv. Rom.* 226. As to special rules in cases of *donatio*, see *post*, §§ LXXXVI, XCI. 3 The matter is discussed by Riccobono, *Z.S.S.* 33. 259; 34. 159. The history of the limitation may be that *mancipatio* was compulsory for *donatio* of land, after 355 (*post*, § LXXXVI), that *mancipatio* degenerated to a written form and that thus there was no great change in the new rule. Riccobono's thesis is that in Justinian's Law, but not before, tacit or fictitious *traditio* replaces the actual *traditio* of the older law in many cases. Besides delivery of title-deeds he cites, *e.g.*, *traditio clavium*, not on the spot, *instrumentum dotis*, the transfer of the property of the *socii* in *societas omn. bon.*, etc., and he adverts to other cases such as *appositio custodis* (41. 2. 51) in which though the rule is classical the point of view is altered, and it is valid not because it is in effect taking control, but as a symbol of delivery—*traditio ficta*.

CHAPTER VI

THE LAW OF PROPERTY (*cont.*). *IURE CIVILI* MODES OF ACQUISITION. SERVITUDES. AGENCY

LXXXIV. *Cessio in iure*, p. 233; LXXXV. *Mancipatio*, 236; LXXXVI. *Res Mancipi*, 239; Later history of *Mancipatio*, 240; LXXXVII. *Usucapio*, 242; *usurpatio*, 243; *bona fides*, *ib.*; LXXXVIII. *iusta causa*, 246; Non-usucaptible property, 248; LXXXIX. *Longi temporis praescriptio*, 249; XC. *Adiudicatio*, 252; *Ius accrescendi*, *ib.*; XCI. *Donatio inter vivos*, 253; *Lex Cincia*, 254; *Donatio mortis causa*, 256; XCII. Servitudes, 258; XCIII. Praedial servitudes, 260; XCIV. Acquisition and Loss, 264; XCV. Personal servitudes, 267; Usufruct, *ib.*; XCVI. Acquisition and Loss, 271; *Usus*, etc., 272; XCVII. *Emphyteusis* and *Superficies*, 274; XCVIII. Restrictions on alienation, 276; Alienation by non-owner, *ib.*; XCIX. Acquisition through the act of another, 277; *Peculium castrense*, *quasi-castrense*, *bona adventitia*, 279.

LXXXIV. The *iure civili* modes of acquisition, as stated by Gaius, were all part of the ancient law, and are, indeed, more or less directly referred to the XII Tables[1]. The two most important voluntary modes were intensely formal, not only in the sense that their ceremonial was elaborate, but in the sense that form was the essential binding element: consent (and therefore error) was in strictness not material, a principle of which, as might be expected, the praetorian law destroyed most of the significance[2].

Cessio in iure. The form of this transaction was modelled on that of a "real action" (*vindicatio*) under the ancient system of *legis actio*, *i.e. sacramentum.* The intended transferee claimed the thing, using the words which would be employed in an actual *vindicatio*: "I declare this thing to be mine by Quiritian Law." In an actual claim the other party would now make a *contravindicatio*, but, here, on the praetor's enquiry whether he made any claim, he said, "No," or was silent. If he did this in a *vindicatio*, there would be no judgment: the plaintiff would take the thing, but there would be no *res iudicata* to bar a later claim by the defendant: it was essential to the effective *legis actio* that both parties should claim. But in *cessio in iure* a step now occurred which was not found in a *vindicatio.* The praetor "addicted" the thing to the claimant[3]. We are not told that there was an actual touching of the thing with a wand[4] (*festuca*, *vindicta*) as there would be in an actual claim. Thus there are essential differences, and though we speak of the proceeding as a case of fictitious litigation, it has been contended[5] with some force

1 As to *donatio*, *post*, § XCI. 2 See P. 1. 7. 6–9. The essence of a "formal" transaction is stated by Leist (*Mancipatio*, p. 25) as being that it operates without reference to any *causa*. 3 G. 2. 24; Ulp. 19. 9–11. 4 It appeared however in manumission *vindicta*. 5 Wlassak, *Z.S.S.* 25. 102.

that these variations have precisely the purpose of shewing that it is not litigation. On that view it may be construed as conveyance by State authority, using the machinery of the court, or possibly, as a confirmation by the court of a conveyance by the parties, the *addictio* being an official confirmation of the conveyance, and not itself the operative act. But the actual rules of *cessio in iure* cannot well be harmonised with any single conception of the nature of the transaction. Manumission *vindicta*[1] was a case of *cessio in iure*, but it was not a conveyance: what the owner had was *dominium*, what the slave acquired was *civitas*. The forfeiture of *tutela cessicia*[2], from an attempt to cede it again, gave the attempted *cessio* an effect different from that of a mere void conveyance. *Cessio in iure* had effects which a judgment would not have. If an agnate ceded the inheritance, after acceptance, he lost, *inter alia*, his rights against debtors to the estate[3], but these were not parties to the judgment and a judgment had no force with regard to third parties[4]. It was not an abandonment, for manumission *vindicta* left rights in the manumitter, and the Proculians, who held that all rights were lost in some cases of *cessio* to which the Sabinians did not apply the rule[5], held that *derelictio* was not complete till a third person had taken possession[6]. These and other cases of difference of view as to the effect of *cessio in iure* indicate differences of view and probably changes of view, as to the nature of the transaction, with a tendency, on the whole, to treat the matter more and more as one of conveyance. But, especially in the matter of capacity, the fact that it was done before the court led to the retention of rules belonging to the conception of it as litigation. Thus it was open only to those who could be parties to a *legis actio*, not, *e.g.*, to slaves or *filiifamilias*[7].

As to its antiquity we know little. We are told indeed that it is confirmed by the XII Tables, but this need mean no more than that the *legis actio* is there dealt with[8]. Apart from this, we hear nothing of it till the last century of the republic[9], but it must be much older. Manumission *vindicta*, a case of *cessio in iure*, is unquestionably a very ancient institution[10].

Ulpian tells us that *cessio in iure* could be used for both *res mancipi* and *res nec mancipi*[11]. But except for this general proposition there is little indication of its use for single things. Gaius tells us that it was very rarely used for *res mancipi*[12], in view of the more convenient

1 *Ante*, § XXVI. 2 *Ante*, § LX. 3 G. 2. 35. 4 44. 1. 10; C. 7. 60. 1. It does not however follow that this had always been so, see Esmein, *Mél. Gerardin*, 229. 5 *Post*, § CXLI. 6 *Ante*, § LXXVI; D. 41. 7. 2. 1. 7 G. 2. 96; Schol. Sin. 49. 8 Vat. Fr. 50. Late and corrupt. 9 Varro, *R.R.* 2. 10. 4, which may refer to *cessio in iure hereditatis*, and does not prove its use for single things so early. 10 Livy, 2. 5, traces it to the beginning of the republic. 11 Ulp. 19. 9. 12 G. 2. 24, 25.

mancipatio, and this applies with still more force to *res nec mancipi*, in view of *traditio*. In fact it can have been but little used for transfer of property. Its field of usefulness was clearly for transfers which could not be effected by direct means, of *res incorporales*[1], of *hereditates*[2], of *tutelae*[3], of children in the case of adoption[4], etc. The form of the *cessio* cannot have been the same in all cases. No doubt the words of the claimant would be modelled on those used in the claim which was simulated.

A *cessio in iure* could not be conditional, not merely because it was an *actus legitimus*, but because a *vindicatio* necessarily asserted a present right[5]. On the other hand it was possible to introduce a *deductio*[6]. Since it was possible to vindicate *dominium* without the usufruct it was possible to make this fictitious claim, *deducto usufructu*: the effect would be a transfer of the *proprietas* leaving a usufruct to the other party. Whether the *deductio* itself could be conditional was debated[7]. It is also clear that there might be a *fiducia*[8], but this was no part of the transaction. It was a separate agreement[9]. It does not seem that any special terms (*leges*) could be embodied in the transfer[10].

Like *vindicatio per sacramentum*, *cessio in iure* of ownership required presence of the thing[11], but probably here too it became sufficient in the case of land to have a symbolic turf instead of going to the spot. There was probably some of the progressive simplification which we find in *manumissio vindicta*. We do not know how *tutela* was represented.

We are told nothing of the effect of error, but the probability is that the form was everything, and that, so far as the transfer of the right was concerned, error was immaterial[12].

Cessio in iure seems to have been quite obsolete as a mode of transfer of property or other *res* under Justinian: it was not abolished, but simply ignored, and it cannot be surely traced later than the end of the third century[13]. But the fate of some of its applications in the law of persons is different. Manumission *vindicta* continued in a much simpli-

1 G. 2. 29; Ulp. 19. 11. **2** G. 2. 34. Here it operates in certain cases as a release of debts. *Post*, § CXLI. **3** *Ante*, § LXXVI. **4** *Ante*, § XLIV. **5** It might be *ad tempus*, Vat. Fr. 48. We are told in 50. 17. 77 that there might be implicit conditions in such a case. It might be suggested that a *cessio in iure* made by a non-owner would be operative if he became owner. But a number of texts originally written of *mancipatio* shew that in that case this was not so. 6. 1. 72; 21. 3. 2; 44. 4. 4. 32 (see also 21. 2. 17). Bonitary ownership would pass if the *res* had been delivered but no more. Mere *c. i. i.* must have been on such facts a nullity. But as in case of *acceptilatio* (50. 17. 77) it may have been operative if the transferor had received a conveyance under a still pending condition. **6** Vat. Fr. 47. **7** Vat. Fr. 50. **8** G. 2. 59. **9** *Post*, § CLI. **10** Even if the *uti lingua nuncupassit* clause of the XII Tables had this effect in *mancipatio*, which is unlikely, there is no ground for extending the notion to *c. i. i.* See Girard, *Manuel*, 295. **11** G. 4. 16. **12** 40. 2. 4. 1. **13** Cons. 6. 10.

fied form[1]. And in *adoptio* and *emancipatio* the old form was only abolished by Justinian[2]. It is to be noted however that the *constitutio* in which he abolishes the old form, while speaking contemptuously of the sales, etc., does not mention the final *cessio in iure*[3].

LXXXV. *Mancipatio.* This was the most important of the direct modes of transfer of property in classical law. It is older than the XII Tables[4], and it was the appropriate mode of transfer for precisely those things which are the chief belongings of a pastoral and agricultural people such as were the Romans of the republic. The form of it is described by Gaius[5]. There were present not less than five adult *cives* as witnesses[6], and a sixth, a *libripens* carrying a balance. The transferee, *e.g.* of a slave, holding a piece of metal (*aes*), said: "*Hunc ego hominem ex iure Quiritium meum esse aio, isque mihi emptus esto hoc aere aeneaque libra.*" Then he struck the *aes* on the balance and gave it to the transferor by way of price.

The declaration was in two separable parts, first, an assertion of ownership, and then one of purchase by copper and scales, the assertion of ownership being identical in form with that used in *vindicatio* and *cessio in iure.*

The form would not be quite the same in all cases. It was varied for the purpose of *coemptio*, and, in the *familiae emptio* for the purpose of testation, it did not, as recorded by Gaius, contain the first member[7].

So far as Gaius tells us the transferor said nothing, but there is literary evidence that he did say something[8]. We know, however, that a *mancipatio* was formally valid even though effected by force[9], which suggests that the transferor took only a passive part. In a release of debt *per aes et libram*, it does not appear that the creditor said anything[10]. In fact in nearly every case of formal transaction it was the person benefiting who took the prominent part. In *stipulatio* the promisor need only assent with a word. In the contract *literis* it was in the creditor's book that the entry was made[11]. From the recorded instances of *mancipatio* it would seem that the actual price was mentioned (no doubt

1 *Ante*, § XXVI. 2 *Ante*, §§ XLIV, XLVII. 3 C. 8. 47. 11. This had probably long since taken the form which he prescribes for the whole process, entry on the *acta*. 4 Bruns, 1. 25; Girard, *Textes*, 15. 5 G. 1. 119; see G. 2. 22, 23; Ulp. 19. 3. 6 The *antestatus* occasionally mentioned is merely the first witness (Will of Longinus Castor, Girard, *Textes*, 804). See Mitteis, *Rom. Prr.* 1. 295. He figures however as a separate person on some late texts in which the practice of using seven witnesses is illustrated. Gai. Ep. 1. 6. 3. 7 Most modern editors however reconstruct the text so as to introduce such a clause. 8 Varro, *L.L.* 5. 163, and Festus s.v. *Rodus* attribute to the vendor the words "*Rauduscule libram ferito.*" Some legal texts dealing with *deductio* say that the vendor "*dicit*" the *deductio*, *e.g.* 19. 1. 7. In the *emptio familiae* he makes a *nuncupatio*, but this is no part of the *mancipatio*, Ulp. 20. 9. See however Pernice, *Labeo*, 3. 97 sqq. 9 P. 1. 7. 6, 8. 10 G. 3. 174. 11 *Dictio dotis* seems to be an exception.

in view of the *actio auctoritatis* in case of sale)[1], though Gaius does not mention it[2].

The purpose of the first phrase has been variously explained. On one view it was the essential part, the other being a later accretion[3]. But this is not easy to reconcile with the facts that it did not occur in *emptio familiae* as recorded by Gaius[4], that the Vatican Fragments[5] omit it in an ordinary *mancipatio*, and that, where this was subject to a *deductio*, that appeared in the *emptio* clause[6]. The more probable view seems to be that the purpose of the first clause was to attach the liability for double damages under the *actio auctoritatis*[7].

There is some, at least apparent, illogicality in the form. The assertion of ownership is made at a time when it is not true, and never may be true, for the price may not be paid[8]. This is met by the argument that the form must be treated as a whole not separating its parts[9]. Further there is late authority for reading *est* instead of *esto*[10], which however contradicts our MS. of Gaius, and introduces a new illogicality. The striking of the balance comes after the words, an order which suits *esto*, but is wholly irreconcileable with *emptus est*.

The form as recorded[11] calls for the presence of the *res*, but there might be *mancipatio* of land not on the spot and even, it seems, of land not in the possession of the *mancipio dans*[12]. *Traditio* is no part of *mancipatio*: the conveyance is complete whether the thing is handed over or not[13], though the vendor is of course bound to deliver—*tradere possessionem*.

It has been suggested[14] that even in classical law the *mancipatio* had ceased to be real, and was practically replaced by the written document of which we have instances[15]. It is said that by the time of Gaius the mancipatory will was merely a written instrument, and the case of the written stipulation is cited in support. But for stipulation we have an express text and an express enactment[16]. Gaius tells us the form of the mancipatory will[17] and sharply differentiates the praetorian will as less effective[18]: it is unlikely that if so great effect resulted from a

1 *Post*, § CLXXI. 2 Girard, *Textes*, 819 sqq.; Bruns, 1. 329 sqq.; Vat. Fr. 50. 3 See, *e.g.*, Ihering, *Evolution of the Aryan*, transl. Drucker, p. 204. 4 G. 2. 104. 5 Vat. Fr. 50. 6 Vat. Fr. 50. 7 *Post*, § CLXXI. It may be said that the precaution of selling *nummo uno*, where the sale was fictitious or gratuitous, so that the guarantee would not be needed, would not have been required if this clause could be omitted. But forms become stereotyped and the simple precaution would be very natural. 8 But see *post*, p. 240. 9 See for discussion, Schlossmann, *In iure cessio and mancipatio*, 13, and Stintzing, *Mancipatio*, 10. 10 Boethius, *ad Top.* 5. 28. 11 G. 1. 121; Ulp. 19. 6 (whether in l. 119 G. says *aes tenens* or *rem tenens*). 12 *Ib.*; arg. G. 4. 117 a, where the action must be an *actio in rem*. 13 G. 2. 204; Vat. Fr. 311. 14 Collinet, *Études Historiques sur le Droit de Justinien*, 1. 257. 15 Bruns, 1. 329 sqq.; Girard, *Textes*, 819 sqq. 16 P. 5. 7. 2; C. 8. 37. 1, *post*, § C. 17 G. 2. 104. 18 G. 2. 119.

mere difference of wording praetorian wills would have been important in practice. There seems no reason to doubt that throughout the classical age *mancipatio* retained its ceremonial, though it is possible that this was at times neglected and people were content not to go behind the written document[1].

Before leaving the form we must speak of the clause in the XII Tables: "*cum nexum faciet mancipiumque, uti lingua nuncupasset, ita ius esto*[2]." It has been generally held that they authorise the insertion of subordinate clauses in the *mancipatio*, to which the name *leges mancipii* was given. Thus Gaius, speaking of civil bondage, says: "*quem pater ea lege mancipio dedit ut sibi remancipetur*[3]." But there is no reason for holding that this agreement was part of the *mancipatio*: it was an agreement under which the *mancipatio* was made. There is no sign of subordinate clauses except such as defined what was conveyed, *e.g.* the *deductio*[4]. The *pactum fiduciae* affords a strong argument against this view: it is an agreement as to what is to be done with the *res* in certain events, an exact parallel to the *lex* in Gaius, and it is clear that the *fiducia* was not a part of the *mancipatio*, but a separate transaction[5]. And we know that there could be no express conditions in *mancipatio*[6]. It is not clear that the words of the XII Tables mean more than that servitudes, etc., could be validly created for and over the land sold, by inclusion in the statement[7].

The witnesses (whom, in the mancipatory will, the testator's *nuncupatio* describes as *Quirites*)[8] no doubt in some sense represent the people. It is sometimes said that the number 5 shews that they represent the five Servian classes, since the *mancipatio*, altering the wealth of the parties, might affect their class. But there is very small evidence for or against this view[9]. In later law, in the decay of *mancipatio*, there

1 The ritual in a copyhold admission is probably sometimes neglected, though legally necessary. 2 Bruns, 1. 25; Girard, *Textes*, 15. 3 G. 1. 140. 4 Girard, *Man.* 295. 5 Bruns, 1. 332; Girard, *Textes*, 821. 6 Vat. Fr. 329; D. 50. 17. 77. As to error, *ante*, § LXXXIV; Wlassak, *Z.S.S.* 26. 403. 7 Girard, *Man.* 293, suggests that they recognise *mancipatio* in the fictitious form in which alone we know it, *i.e.* with a pretended weighing. But, unless details of *legis actio* are so regarded, the XII Tables do not deal with forms. 8 G. 2. 104. 9 Apart from the above "*quirites*" the only evidence for it is that Festus calls them *classici testes* (s.v.) in the mancipatory will. Girard suggests (*Man.* 293) that the unit would have been the century, the voting unit. But that is derivative: the *census* is not primarily concerned with voting, but with wealth, the *classes*. He also says that it would have been a fixed number, not a minimum "*non minus quam quinque*." So G. elsewhere describes it (*e.g.* 2. 104). The other form means that surplusage is no error. The objection would indeed apply to any basis. The source of the seven *testes* of the praetorian will is clear. Gaius (2. 14) speaks of them as seven, Ulp. as "*non minus quam septem*" (28. 6). Girard also suggests that it was known to communities with Latin right who had not this division of the people (*l. Salpensana* XXII). But a *lex* in the time of Domitian no doubt contained many long since borrowed notions. The *lex* is.

seem to have been sometimes seven witnesses[1], this being the number required in many transactions. The additional two were the *libripens* and an extra person to whom the name *antestator* was transferred[2]. But there is no reason to suppose that seven were legally required.

As being within *commercium*, *mancipatio* was open only to those who shared in this. *Filiifamilias* and slave could thus acquire for the *paterfamilias*[3], and, with authority, a *filiusfamilias* could so alienate. On what appears to be the better view a slave could also, but this is disputed[4].

LXXXVI. *Mancipatio* was the appropriate mode of conveyance for the most important elements of wealth in early Rome—*res mancipi*[5]. If moveable they must be on the spot and only so much could be mancipated at once as could be held or grasped[6]. On the question whether the process could be used for *res nec mancipi* it is generally held on the authority of Cicero[7] that it could not be so applied. Literary texts shew it so employed, but it is likely that there was delivery as well and the form was mere surplusage[8]. We know that it was used for transfer of the *familia* in the mancipatory will, and a *hereditas* would ordinarily include *res nec mancipi*, and is not itself given under the list of *res mancipi*[9]. But this is an exceptional institution from which it is not possible to argue. It could be used for transfer of rights other than ownership, *e.g.* for transfers of persons in *potestas*. But these were treated as *servorum loco*, and slaves were *res mancipi*. Rustic praedial servitudes could be so created but these are expressly stated to be *res mancipi*[10], and we know the urban servitudes could not be so created[11]. A woman *sui iuris* cannot be a *res*, but *coemptio*, in which she sold herself, was a much modified form, and throws no light on the question. On the whole the better view seems to be that *res nec mancipi* could not be mancipated.

Res mancipi, as we know them, were *solum italicum*, slaves, beasts of draught and burden and rustic servitudes[12]. This did not cover ele-

moreover, far from shewing that the civil bondage was in fact created in the same way, and we do not really know how widespread was the notion of classification by wealth.

1 Ep. Gai. 1. 6. 3. **2** Kniep, *Gai. Inst.* 1. p. 207. **3** Ulp. 19. 4. 18. **4** See for discussion and reff. Buckland, *L.Q.R.* 34. 372; Mitteis, *R.Pr.* 1. 208. He holds that a slave could not mancipate even with authority, but he does not appear to lay this down for a *filiusfamilias*. **5** G. 2. 14 a, 22; Ulp. 19. 1. **6** G. 1. 121; Ulp. 19. 6. Of land, several pieces in different places could be mancipated at once. **7** Top. 10. 45; Ulp. 19. 3 is hardly conclusive. **8** Pliny gives a *mancipatio* of pearls (*H. N.* 69. 9. 35). The apparent case in Bruns, 1. 335; Girard, *Textes*, 825, seems rather to be a gift of right of access to, and use of, what is contemplated as part of the land. **9** In the case of transfer of the *hereditas* to *fideicommissarius* G. says nothing of *mancipatio*, though the Autun Gaius does (67). See Consult. 6. 11 which shews that in the time of Diocletian there was no way of transferring a mass as a unit. **10** G. 2. 17. **11** G. 2. 29. **12** G. 2. 14 a, 17; Ulp. 19. 1.

phants and camels, which were not in use when this list was first drawn up[1]. But the list given is not as it stood at first. There was no separate property in land in early Rome except for the *heredium*, or houseplace, which was not alienable[2]. And it is probable that till the Empire, only the four primitive rustic servitudes were *res mancipi*, *i.e.*, *iter*, *actus*, *via* and *aquaeductus*[3]. There was dispute between the schools on the question when a farm beast became a *res mancipi*, the Proculians holding that it became such only when trained or in training, the Sabinians holding that it was such from birth[4]. We do not know which view prevailed. As to the reason why these things and no others were included, it is generally held[5] that they were the things essential to the maintenance of the household in a régime passing from the pastoral to the agricultural stage[6].

The rule that, in case of sale, ownership passed only when the price was paid or security taken or credit given, which is stated by Justinian, no doubt with accretions, as a rule of the XII Tables[7], is applied in later law to *traditio*, but is commonly thought to have applied primarily to *mancipatio*: it would constitute one of those tacit conditions which can exist in *actus legitimi*[8].

The later history of *mancipatio* is obscure. The distinction between *res mancipi* and *nec mancipi* was formally abolished by Justinian[9], but,

1 G. 2. 16; Ulp. 19. 1. 2 Girard, *Manuel*, 292, n. 2. 3 *Post*, § XCIII. 4 See n. 1. 5 Cuq, *op. cit.* 1. 92; Karlowa, *R.Rg.* 2. 354; Maine, *Anc. Law*, 277, etc. 6 The fact that a *peregrinus* can have only one kind of ownership raises difficulties where a *res mancipi* is delivered to him. If, after holding it some years, he alienates it to a *civis*, is the latter *dominus* or is the old owner? If *accessio possessionum* applies (*post*, § LXXXVII) the new owner is at once *dominus*. Apart from the question of *usucapio* an acquirer of a *res mancipi* from a peregrine could not become *dominus*. This kind of difficulty has suggested the view that a *res mancipi* loses its special character in the hands of a peregrine. Two texts indeed suggest this (Ulp. 1. 16; Vat. Fr. 47 a), but they are not conclusive, and the rule would give the unlikely result that the forms of *mancipatio* could be evaded by using a peregrine as an *interposita persona*. There would be no difficulty in arranging, by *stipulatio*, for the same obligations as to defect of title, and so on, as would have arisen automatically if there had been a *mancipatio*. 7 Inst. 2. 1. 41; D. 18. 1. 19, 53. 8 50. 17. 77. It seems reasonable to accept so much of Justinian's statement as indicates that there was some rule about payment in the XII Tables. Its content is a different matter. As the process involves a (fictitious) payment it has been said that the rule had no real operation, and that this accounts for the fact that Gaius does not mention it. But it is difficult to reconcile this with P. 2. 17. 1. The text dealt with *mancipatio* and the allusion to price may be compared with the next passage where the contrast with *res simpliciter traditae* is obvious, and there price is not mentioned. In P. 2. 17. 7 (as to which see Schulz, *Z.S.S.* 38. 123) the allusion is probably to sale of a *fundus instructus*, a *res mancipi*. It is said by Pringsheim (*ante*, p. 231, n. 5) that "*pretio accepto*" is interpolated by a later hand. The Sententiae nowhere apply the notion to *traditio*—the *interpretatio* does, but that is a different matter (1. 13. 4; 2. 17. 14). It may be that the rule of the XII Tables was that the *actio auctoritatis* did not lie unless the price was paid. Gaius does not discuss this action. 9 C. 7. 31. 1. 5.

for moveables, *mancipatio* seems to have been out of use in the fourth century[1]. The relevant texts deal with *donatio*, and may mean only that delivery is needed without implying that it is always enough, but the most obvious interpretation is that *traditio* is as good as *mancipatio*. The survival of *mancipatio* for adoption and emancipation, till Justinian, means nothing for the *ius rerum—cessio in iure* continued even under Justinian for manumission *vindicta*[2]. But the Epitome of Gaius says of *emancipatio*: "*mancipat—hoc est manu tradit*[3]." For Italic land *mancipatio* had the advantage that it need not be on the spot. It existed in A.D. 355[4], but it probably was not usual even then. The provisions of Constantine, for *traditio*, seem designed to meet the fact that land was commonly conveyed by this method[5]. As *fiducia* is mentioned later and, so far as our traditions go, this involved *cessio in iure* or *mancipatio*, this may seem to imply the survival of one and more probably the latter. But in most, if not in all, of these texts, *fiducia* means no more than pledge[6], and it is not certain that it remained impossible to attach a *fiducia* to *traditio*[7]. On the whole the better view seems to be that *mancipatio* had practically disappeared from commercial dealings even before 355[8].

But in the West at least the enactment of 355 seems to have been treated as creating a special need of *mancipatio* in *donatio* of land, and the documents collected by Marini[9], even from the sixth and seventh centuries, shew a simulacrum of *mancipatio*, but only in *donatio*[10]. In any case there is no real *mancipatio*: the word is put in the present tense, *mancipo*, *mancipamus*, not as in genuine forms "*mancipio accepit*[11]."

1 Vat. Fr. 263; C. Th. 8. 12. 1; C. 8. 53. 25. Naber, *Mnemosyne*, 1889, 394 sqq., shews that *mancipatio* was still the proper form of conveyance for *res mancipi* in the time of Diocletian. 2 *Ante*, §§ XXVI, XXX. 3 Ep. Gai. 1. 6. 3. 4 C. Th. 8. 12. 7. 5 Vat. Fr. 35; C. Th. 3. 1. 2. 6 See the reff. in Girard, *Manuel*, 535, n. 4. 7 Girard holds (*op. cit.* 531) that, if it had been possible in *traditio*, *fiducia* would have been retained by Justinian. But it had long been used only in mortgage and perhaps in gifts *ut manumittatur*. In his desire for simplicity and solicitude for debtors he would hardly retain what, so far as it differed from pledge, was severer, and the other institution is provided for by the *actio praescriptis verbis* and the *condictio ex poenitentia* (*post*, § CLXXXVII). See besides the above texts (n. 6) C. Th. 2. 29. 2; C. 4. 3. 1; Naber, *Mnemos.* 17. 349; Collinet, *Études Historiques*, 1. 225; Girard, *Manuel*, 298. 8 C. Th. 8. 12. 7. The enactment of 394 (C. Th. 2. 29. 2) has on the face of it nothing to do with *mancipatio*. In saying that delivery is essential it is adding to its rule that in a gift of the kind it mentions, *suffragium* (Dirksen, *Manuale*, s.v.), *traditio* does for moveables, but a writing is necessary for land, a warning that it must not be supposed that writing alone will do. Justinian's *lex*, cited by Collinet (C. 8. 53. 37) to shew the survival of *mancipatio*, shews only, as indeed it says, that old forms of words were still in use in documents in which they had no meaning. 9 See Collinet, 254, 255. 10 Marini's collection contains many conveyances on sale in sixth and seventh centuries. These are always by *traditio* or *epistola traditionis* (*ante*, § LXXXIII). Two of them mention *mancipatio* (120, 123?) but only in the traditional clause against *dolus*, a survival of common form. Thus two of the sales (114, 118) record the payment of "*nummus unus*," quite out of place in a sale. 11 Collinet (255)

LXXXVII. *Usucapio.* *Usucapio* was the acquisition of *dominium* by possession for a certain time[1]. As we know it, it was based on a rule of the XII Tables: "*usus auctoritas fundi biennium est . . . ceterarum rerum omnium . . . annuus est usus*[2]," in which expression *usus* means acquisition by use, and *auctoritas* no doubt means liability to the *actio auctoritatis* on eviction in case of sale, a liability which would end at the moment of *usucapio*[3]. The rules as we know them were no doubt gradually evolved on the basis of this general proposition. It was a civil law mode of acquisition and of course gave *dominium*[4]. The acquisition rested on mere lapse of time, not on the fiction which appears in some systems, under which time is evidence of a lost grant[5]. Gaius tells us that its purpose was to enable us to acquire what had been transferred by a non-owner[6], but it had other applications, *e.g.* where a *res mancipi* had been transferred by mere *traditio*[7], and in some cases of *missio in possessionem* under praetorian law[8].

The first requirement was uninterrupted possession for two years of land, one year of moveables[9]. The brevity of the time is explained by the fact that when it was introduced the whole State was very small, and the control of property therefore much closer than it would be in modern conditions[10]. The possession required is in general the technical possession which is needed for interdictal protection[11]. The exact meaning of *usus*, the form employed in the XII Tables, is not known, but it was probably much the same. As the acquisition depended on actual possession, and not on mere non-possession by the owner, it must have continued through the whole period[12], and it must be one uninterrupted continuous possession. Thus if a man lost possession and regained it later he could not add the two durations together: he must begin afresh[13]. This point is illustrated by the rules of *accessio possessionum*. If one *in via usucapiendi* died, and his *heres* entered in the ordinary way, he

cites a Lombard sale of later date with the old words, "*emit, mancipio accepit.*" But it is the word, not the thing: it must be read in the light of G. Ep. 1. 6. 3, *mancipat, hoc est manu tradit.*

1 This has nothing to do with the barring of action for recovery: it is a definite mode of acquisition. The acquirer becomes *dominus*, and though his right may in some cases be set aside, there is no question of his having become owner against *A* and not against *B*. 2 Cicero, *Top.* 4. 23. Probably only an approximation to the original. 3 *Post*, § CLXXI. See Girard, *Manuel*, 305. 4 Not identical propositions: *iure gentium* modes may do this. 5 Faint suggestion of a lost grant in 39. 3. 1. 23 which, however, is concerned with *l. temp. praescriptio.* 6 G. 2. 43. 7 *Ante*, § LXX. 8 *Post*, § CCXLV. 9 G. 2. 42; Ulp. 19. 8. Land in the XII Tables, buildings by interpretation. 10 G. 2. 44. 11 Thus if I rented land, I did not possess and could not usucapt though I thought privately that it was my own. We have seen however that if a *procurator* has taken possession the principal may have interdict possession before he has usucapion possession (*ante*, § LXXIII). And, conversely, the *heres* will be usucapting before he has interdict possession (*post*, p. 243, n. 1). 12 41. 3. 3; h. t. 25. 13 41. 3. 15. 2.

stepped into the legal shoes of the deceased and could complete the *usucapio*[1]. It was regarded as one continuous possession. There was no new *initium* and thus the *bona fides* of the *heres* was immaterial. But if one *in via usucapiendi* sold or gave the *res*, the receiver did not represent the old holder as a *heres* did, and thus the possession was a new one. But there had been no interruption (*usurpatio*) or interference with possession, and thus the two possessions could be added together, if the new holder himself satisfied the other conditions of *usucapio*[2]. But if the second holder came into possession without the consent of the first, either by ejecting him, or taking possession without his consent, then there had been interruption, and even if the new holder was capable of usucapting, he could not count the earlier time[3]. This *accessio possessionum*, for buyers and the like, is not found till late in the classical age. It applied at first to *praescriptio*[4], was extended to *usucapio* by a buyer by Severus and Caracalla[5], and was perhaps not generalised till Justinian[6].

Usurpatio might be either natural, mere loss of possession, or civil, a claim at law. It is not always easy to say what amounts to loss of possession, *e.g.* where physical possession was held by a subordinate holder[7], *e.g.* a *colonus*, and where a holder in good faith leased the *res* to the true owner. In this last case it was held that the possession was lost, on the ground that the contract was a nullity[8]. In the case of *usurpatio civilis*, the difficulty on the texts is to say at what moment the *usurpatio* occurred. Apparently in the republic any formal claim, even short of litigation, was *usurpatio*[9]. But in classical law, even joinder of issue (*litis contestatio*) was not, for we are told that *usucapio* might still be completed between this and judgment[10]. But this meant little. The *iudex* decided by the state of things at *litis contestatio*[11]. He would therefore give judgment for the plaintiff, and the defendant must transfer or pay the value[12]. Civil *usurpatio* did not need actual disturbance of possession. If a possessor was sued and judgment given against him, but his *de facto* possession was undisturbed, he could not now usucapt, for it was a new possession, and it did not begin in good faith[13].

The next requirement is *bona fides*[14], difficult to define. It did not

1 4. 6. 30. pr.; 41. 2. 23. pr.; 41. 3. 40; 41. 4. 2. 19. 2 41. 3. 14; 41. 4. 2. 17. 3 41. 3. 5; 44. 3. 14, 15. 4 C. 7. 31. 1. 3; see P. 5. 2. 5. 5 Inst. 2. 6. 13. 6 In one way the buyer is better off than *heres*, who is barred by defect in the *possessio* of the ancestor, immaterial to buyer. 44. 3. 11; C. 3. 32. 4. 7 *Ante*, § LXXIV. 8 41. 3. 21. See also h. t. 33. 5. 9 Cicero, *de Or.* 3. 28. 110. 10 6. 1. 17–21. 11 The rule *omnia iudicia absolutoria* (*post*, § CCXVII) does not apply. G. 4. 114. 12 6. 1. 18. The rule may have been otherwise in *l. t. praescriptio*, *post*, § LXXXIX. 13 Arg. C. 7. 33. 1. 1. As to Justinian, *post*, § LXXXIX. 14 G. 2. 43, 93; Inst. 2. 6. pr.

consist in thinking one was *dominus*, for one who received a *res mancipi* by *traditio* knew he was not this. It was not enough to think he was in rightful possession: a pledge creditor thought that. It was not necessarily a belief that no one had a right to take it from him, for a *missus in possessionem* for *damnum infectum* could usucapt though he knew the owner could redeem on putting matters right[1]. Most of the difficult cases are disposed of by the maxim: "*qui auctore Praetore possidet, iuste possidet*[2]." Subject to this, *bona fides* may be described as belief that the holder had a right to hold it as his[3]. Apart from the praetorian cases and that of the bonitary owner, it is at bottom a case of mistake. The error must be reasonable and of fact[4]. Indeed, in many cases, where there was an error of law, the transaction was void, and *usucapio* was excluded for absence of *iusta causa*, *e.g.* where one bought from a *pupillus* thinking that *auctoritas* was not necessary, or could be by ratification[5]. Here the transaction was void and there was only a putative *causa*, which fact barred *usucapio*[6].

Where the acquisition was through a slave (or *procurator*[7]), the rule, apart from *peculium*[8], seems to have been that both must have been in good faith, the slave when he took, the master when he knew. Pomponius indeed says that, where the acquisition was *domini nomine*, the master's state of mind was the material one[9]. This may refer to acquisition under express instructions, for the other rule is laid down for sons[10], and *bona fide servientes*[11].

In classical law *bona fides* must exist at the *initium*, the moment when possession began, but there were some exceptional cases.

(i) In sale, *bona fides* was needed at the time of the contract and at that of delivery[12]. This probably dates from the time when the two were contemporaneous and was carried over to the new state of things owing to the double meaning of the word *emere*, which means both to buy and to acquire. The Digest, purporting to give the edict on the Publician, says: "*qui bona fide emit*[13]." The rule remained in Justinian's law.

(ii) In the case of *lucrativa usucapio*, resulting from gift of a *res aliena*, there are three texts which shew that here *bona fides* must persist throughout the possession, and that Justinian abolished this rule[14].

1 39. 2. 5. pr. **2** 41. 2. 11; 50. 17. 137. **3** Some texts shew a wider conception. Where a man in collusion with an authorised *procurator* buys at an absurdly low price he is not a buyer in good faith. 41. 4. 7. 6; h. t. 8; C. 7. 33. 6 (*praescriptio*). It is of course not necessarily bad faith to buy through a nominee. See Greg. Wis. 7. **4** 22. 6. 4, 6; 41. 3. 31. pr. **5** 41. 3. 31; 41. 4. 2. 15. **6** So the matter is stated in an adjoining text by the same writer. 41. 4. 2. 16. **7** Arg. 41. 4. 7. 2. **8** Here, *utilitatis causa*, the slave can usucapt without the master's knowledge, 41. 2. 1. 5; h. t. 44. 1; 6. 2. 7. 10. **9** 41. 4. 2. 11, 12. **10** 41. 3. 43. **11** 41. 4. 7. 8. **12** 41. 4. 2. pr. **13** 6. 2. 2. 7. 11. **14** 6. 2. 11. 3; C. 7. 31. 1. 3; Bas. 15. 2. 11 (Heimbach, 2. 171).

Gaius gives several cases in which *bona fides* was not needed. The case of *usucapio lucrativa pro herede* is ancient, no doubt older than the rule requiring *bona fides*. Where the content of a *hereditas* was not yet actually held by the *heres* (there being no *heres suus* or *necessarius*, who was in without acceptance), anyone might, by taking the property or part of it not yet possessed by the *heres*, become owner by holding it (even land) for one year without good faith[1]. The rule that one year sufficed even for land was a perversion of the rule of the Tables that for "*ceterae res*" one year sufficed. A *hereditas* was *cetera res*, and therefore, said the Pontiffs, a part of it was, even if it were land. According to Gaius the reason for this "*tam improba usucapio*" was that it compelled the *heres* to enter promptly so that debts and *sacra* might be attended to. He says also that originally the *usucapio* was of the *hereditas* itself, though in historic times it was only of the specific things[2]. But the real reason and early history of the institution are obscure and disputed[3]. Hadrian destroyed the importance of the rule by providing that the *heres* could set aside the *usucapio*. It was treated as extinct in the time of Caracalla, and probably earlier[4].

Another case was *usureceptio ex fiducia*[5]. A *res* conveyed subject to *fiducia* could be reacquired by getting possession without good faith and holding for a year. Where this was *cum amico*, *e.g.* a *res* was handed over to be looked after (superseded in classical law by *depositum*), this is reasonable. So too, where it was *cum creditore*, by way of mortgage[6], if the debt had been paid. Where it had not, the rule applied only if it was held otherwise than by hiring or *precarium* from the creditor, but it is difficult to see why it was allowed at all, or rather, as no doubt it antedates the rule of *bona fides*, why it was allowed to survive in a time when, unlike *usucapio pro herede*, it served no useful purpose, but was a mere injustice. Presumably the rule was originally general and the limitation in mortgage is an equitable restriction.

There is the same difficulty about *usureceptio ex praediatura*[7]. Where property had been lawfully seized and sold by the State to a *praediator*, the old owner could reacquire, without good faith, but here the ordinary times of *usucapio* must have expired. Unless the *praediator* must have been recouped, which is not said, the rule seems a gross injustice[8].

Another case, *usucapio ex Rutiliana constitutione*[9], where a man bought *res mancipi* of a woman without *auctoritas tutoris* (to which the ordinary times applied), did no injustice, for he had paid, and the usucapion could be rescinded on repayment.

1 G. 2. 52 sqq. 2 Cicero, *ad Att.* 1. 5. 6, probably does not mean *hereditas* in a strict sense, but *res hereditariae*. 3 See Sohm (Ledlie), § 110. 4 C. 7. 29, 1. 5 G. 2. 59, 60. 6 *Post*, § CLXVI. 7 G. 2. 61. 8 Perhaps merely to compel the buyer to take possession promptly, Poste, *ad G* 2. 61. 9 Vat. Fr. 1. See G. 2. 47 for the older law.

Bona fides was presumed, *i.e.* need not be proved[1], but could of course be disproved[2]. The rule means less than it seems to, for *iusta causa* must be proved, and a valid form of conveyance is all that could ordinarily be given as proof of *bona fides*. To prove *bona fides* is to prove that certain facts were not known, and a negative can hardly be proved[3].

LXXXVIII. *Iusta causa.* This means that the taking must have been based on some fact which is ordinarily a basis of acquisition. In general this is a fact having legal effect, *e.g.* legacy or sale, but it need not be—a pact to give sufficed[4]. The *iussum* of the praetor was enough. This *iusta causa*, or *iustus titulus* must be proved. The chief rule, over and over again laid down, is that the *causa* must be real[5]: a putative *causa* did not serve. This distinguishes it from the *iusta causa* of *traditio*. If a thing was handed to one in the belief that there was a legacy to him, but there was none in fact, the property passed if it belonged to the transferor[6], but if it did not he would not usucapt, for there was no *iusta causa*[7]. There are however evident signs of either differences of opinion or exceptions. Neratius is quoted as saying that putative *causa* should suffice, because it did in *traditio*, and Pomponius approves this[8], thus identifying the two cases of *causa*. No other text goes so far, and there are many inconsistent with it. Each *causa* may have had its own rules, but it is probable that these writers are here expressing a personal view, based on a false analogy, and that, in general, a real *causa* was needed, but that in sale, on grounds of commercial convenience, some held that putative *causa* served, and that the ultimate rule was that, in sale, it sufficed if there were reasonable grounds for the belief[9]. It is not quite easy to say what is a putative *causa*. There might have been a sale, but it did not cover this thing. There might have been a legacy, revoked by

1 C. 8. 44. 30. *Mala fides* never presumed. **2** *Ib.* **3** A buyer from a *pupillus* without *auctoritas*, in knowledge of the facts, is not a *b. f. emptor* (18. 1. 27). But in what may be the original of this text we learn that, if it was a woman, he is a *b. f. emptor* even though it is a *res mancipi*, as a woman can alienate possession without *auctoritas*, and if he has paid he will usucapt (Vat. Fr. 1). This raises the question whether, in general, good faith required payment. If the *traditio* was conditional on payment before a certain day, and it was not so paid, there was no sale and thus no *iusta causa*, but if credit was agreed on, *usucapio* might proceed: this was not a conditional sale, though it might be a resoluble one (41. 4. 2. 3. *Post*, § CLXXIII). But this says nothing about *bona fides*, or about a sale in which nothing was said about credit, but the price was simply unpaid. The praetor did not name payment of the price as a requirement of the *actio Publiciana* (6. 2. 7. 16, h. t. 8). And Vat. Fr. 12 clearly contemplates *usucapio* though the price is due. This seems to imply that it was not essential. But other views are held. See Karlowa, *R.Rg.* 2. 396, 7. **4** 41. 6. 1. **5** 41. 3. 27; Inst. 2. 6. 11. **6** 12. 6. 3; h. t. 46. **7** 41. 8. 2. **8** 41. 10. 3. Esmein (*Mélanges*, 204) adds 41. 3. 48, and 41. 4. 2. pr., in both of which there may have been a *causa*, not referable to that *res*. His other text, 41. 3. 46, is not in point. **9** 41. 3. 33. 1; 41. 4. 11; 41. 10. 5. 1. A purchase from a *furiosus* was void, but *usucapio* was allowed, *utilitatis causa*, 41. 3. 13. 1; 41. 4. 2. 16.

a codicil unknown at the time. Some of these cases are actually discussed[1].

Justinian discusses some of the *causae* under separate titles: his list is not complete, but on some of them there is something to be said.

U. pro derelicto. This would occur where a thing was abandoned, but by one not in fact owner. If only supposed to be abandoned there was no *usucapio* for lack of *causa*[2]. This differs from other cases in that there is no mutual act[3].

U. pro emptore was subject to special rules as to *bona fides* and *iusta causa.* It included at least one case which was not sale: payment of damages in an action for the thing[4]. There was some difference of opinion whether it covered anything but what was actually bought, *e.g.* the child of an *ancilla* born after the sale[5].

U. pro donato had special rules as to *bona fides* till Justinian[6]. There must have been a real *donatio.* If a father gave to his son in *potestas* there was no *usucapio*: if after the father's death the *heredes* assented, time would then run[7]. A gift to the donor's wife was null: there was no *usucapio*, unless, it was suggested, on the facts the donor was not impoverished[8].

U. pro herede was unimportant in later law: it applied only where a true *heres* took possession of what did not in fact belong to the deceased: it did not apply to one who thought he was *heres* but was not[9].

U. pro soluto does not mean merely what was handed over in discharge of an *obligatio*, which would be, *e.g.*, *pro empto.* It would apply where a thing was handed over in lieu of the price, or under a *stipulatio*[10]. But in fact it overlaps the other *causae.*

U. pro suo has two senses. In one sense it covered nearly all[11]. But it had a narrower sense. If *dos* was handed over before the marriage there was no *usucapio pro dote*, till the marriage, but Ulpian says there could be *usucapio* in the meantime, *pro suo*[12]. If an *ancilla furtiva* had a child, *apud bona fide possessorem*, some texts make this *pro empto*, others *pro suo*[13]. If the father divided his property *inter vivos*, and on his death the heirs agreed to abide by the division, any *usucapio* would be *pro suo*[14].

As *usucapio* was a civil institution, it did not exist in favour of

1 41. 2. 34. pr.; 41. 4. 2. 6; 41. 5. 3; 41. 8. 2–4; 41. 10. 4. 2; 41. 3. 27. **2** 41. 7. 2. pr., h. t. 6. **3** If it be regarded as *traditio* to an *incerta persona*, it would be *pro donato.* There is of course no *pro occupato*; that is not the *titulus*, but the act of acquisition. **4** 41. 4. 3. **5** Buckland, *Slavery*, 25. **6** *Ante*, § LXXXVII. **7** 41. 6. 1. 1; h. t. 4. **8** 41. 6. 1. 2; h. t. 3. **9** 41. 5. 3. **10** 41. 3. 46. It is not expressly included in Justinian's series, 41. 4–10. But in early editions of the Digest the last four *leges* of 41. 3 are treated as a separate title *pro soluto.* **11** 41. 10. 1. pr. It would not cover praetorian *missio in possessionem.* **12** 41. 9. 1, 2; cf. h. t. 2, "*aestimata res.*" **13** 6. 2. 11. 4; 41. 3. 33. pr.; 41. 10. 2; h. t. 4. **14** 41. 10. 4. 1.

peregrines, or over provincial land, or things not capable of private ownership (*res sacrae, sanctae, religiosae*[1]). But it applied to everything else, unless it had a *vitium* or defect which barred *usucapio*, or the owner was specially protected by law. The *vitia* were few. The most important was that *res furtivae* or *vi possessae* could not be usucapted till they had returned to the owner with his knowledge[2]. The XII Tables and an early *l. Atinia* forbid it in the case of *res furtivae*[3], and the *l. Iulia et Plautia* in that of *res vi possessae*[4], the last piece of legislation reflecting the fact that there was no theft of land. The return which purged the *vitium*, was complete if the owner knew where the thing was and there was no obstacle to his vindication of it[5]. But he must know. To put it secretly in his house was not enough, unless he had never known of the theft[6]. It must be to the *dominus*, who is not necessarily the person from whom it was stolen[7], though there were complications if it was stolen from a slave or a *conductor* or a pledge creditor[8]. Restoration to a vendee of the *dominus*, or payment of the value would equally purge the *vitium*[9]. The child of an *ancilla furtiva* was *furtivus* if conceived *apud furem*[10], and, notwithstanding the rules of *specificatio*, it seems that not only wool of a stolen sheep was *furtiva*, but also a garment made of it[11]. As land could not be *furtiva*, *usucapio* of land was more common than that of moveables, for if moveables are in the wrong hands there will frequently be a theft in the background. But Gaius gives as instances, in moveables, the *heres* dealing with things he wrongly believes to be part of the estate, or sale by a man who by error of law thinks a

1 G. 2. 46, 48. 2 G. 2. 45, 49; D. 41. 3. 41. 3 *Ib.*; Inst. 2. 6. 2. See, however, Huvelin, *Études sur le Furtum*, 1. ch. vi, who holds that the XII Tables contained no such rule and that the *l. Atinia* dealt only with cases of "*subreptio*," *i.e.* actual direct taking by the thief, the application of the rule to all forms of theft being a later development. 4 Inst. 2. 6. 2. 5 41. 3. 4. 6; h. t. 33. 2; 47. 2. 57. 4; 50. 16. 215. Or his *tutor* unless the *tutor* was the thief, 41. 4. 7. 3. It is not enough that it gets back to a *procurator*, 41. 3. 41. 6 41. 3. 4. 7 sqq. 7 41. 3. 4. 6. 8 If my slave steals and replaces my article, I knowing nothing of the matter, the *vitium* is purged (41. 3. 4. 7), but it is not enough if he holds it as *peculium*, unless it was before, or I assent (h. t. 9). Paul seems to add that *vitium* is purged even if I knew of the theft, if the *res* was *peculiaris* with my consent, but the text is confused (h. t. 7). See also Julian (47. 2. 57. 2). Same rule applies where depositee sells and gets it back: whether owner knew or not the *vitium* is purged (41. 3. 4. 10). Where stolen from pledgee or *commodatarius*, it must return to *dominus* if thief a third party (41. 3. 4. 6). The case of theft by debtor from pledgee was one of difficulty: the texts record doubts. The rule reached is, probably because the rule is statutory, and the statute speaks of return to *dominus*, that where a *res* is stolen by the owner from a *bona fide* buyer or usufructuary, or a pledge creditor, it does not become *furtiva* (41. 4. 5; 47. 2. 20. 1, Paul). But 41. 3. 49, also Paul, says that it is a *res furtiva* and the *vitium* is purged by return to creditor. Vangerow holds (Pand. t. 586) that here the debtor was a non-owner: in the others owner. This does not shew why return to creditor purges the *vitium*, nor is it indicated. In C. 7. 26. 6 the debtor sells a *res hypothecata*: this is *furtiva*. 9 41. 3. 32; h. t. 4. 13, 14; 47. 2. 85. 10 41. 3. 10. 2; 47. 2. 48. 5. Buckland, *Slavery*, 26. 11 41. 3. 4. 20.

thing is his[1]. Another case of *vitium* is that of a gift to a practor or proconsul, these being forbidden. There was no *usucapio* till the gift returned to the donor[2].

The chief cases of specially protected property were:

(*a*) The property of the fisc or the Emperor, but this did not apply to the property of a vacant *hereditas* not yet reported to the authorities[3].

(*b*) *Res mancipi* of a woman in agnatic *tutela*, subject to the Rutilian rule[4].

(*c*) Land of a pupil or (later) one under *cura*: perhaps in later law any property of a *pupillus*[5].

(*d*) Dotal land, a result of the *l. Iulia* which made it inalienable[6]

(*e*) In late law, land devoted to religious or charitable purposes[7].

Probably anything inalienable was incapable of *usucapio*[8], but it is impossible to be sure that the rules covered *usucapio* or only *praescriptio*.

A completed *usucapio* could, in certain circumstances, be rescinded, by a rescissory action brought within one year of the time when it was first possible, *i.e.* where the *usucapio* had run against one who, from absence on State service, imprisonment or the like, could not sue, or in favour of one who, from some similar cause, could not be sued[9].

LXXXIX. *LONGI TEMPORIS PRAESCRIPTIO*[10]. *Usucapio* was essentially *iuris civilis*. *Longi temporis praescriptio* was a system based, not on the Edict, but on imperial enactments, to give protection in cases which *usucapio* did not cover, especially, and at first probably exclusively, the holding of provincial lands[11]. The principles were to a great extent the same, but there are differences to be noted.

(*a*) The method of protection was different, and less effective. *Usucapio* was a mode of acquisition: it was not merely a bar, but made the usucaptor owner. It was positive or acquisitive. *Praescriptio* was in principle merely negative or extinctive[12]. It gave the holder a defence

1 G. 2. 50, 51; Inst. 2. 6. 3–6. 2 48. 11. 8. 3 41. 3. 18. 4 G. 2. 47. 5 41. 1. 48; *usucapio* of *res mobiles pupilli*, 27. 5. 2; no *usucapio* of *res pupilli* (? *immobiles*), 41. 1. 48. pr. A minor could get *restitutio in integrum*. C. 7. 35. 3. C. 2. 40. 5. 1. Restrictions on alienation of *res pupilli* (*ante*, § LV), and probably nothing inalienable was usucaptible. 6 23. 5. 16; see 50. 16. 28. pr. 7 Nov. 111. 1; 131. 6; Girard, *Manuel*, 314. 8 See 50. 16. 28. pr. 9 Inst. 4. 6. 5; D. 4. 6. 21 sqq. The edictal grounds seem to have been (Lenel, *E.P.* 116) absence compelled by *metus*, or in good faith on public service, *vincula*, including imprisonment, lawful or unlawful (4. 6. 9), apparent slavery and captivity (4. 6. 1) and such absence of defendant as made action against him impossible. 10 Partsch, *Longi Temporis praescriptio*. 11 Introduced it seems about the end of the second century. See C. 7. 33. 1, and the rescript of which two copies are given in Girard, *Textes*, 201, 901. Partsch, *cit.* 105 sqq. 12 Partsch, *cit.* 100, considers that it is, properly, not a mere bar, but positive evidence of title, though available only in defence (see 39. 3. 1. 23, "*veluti iure imposita*"), based on Greek practice in which such facts were persuasive but not conclusive evidence.

if sued for the *res*, but did not make him owner, though no doubt there was, besides the defence, the not very effective protection of the possessory interdicts[1]. At some time before Justinian, however, probably long before, it became acquisitive[2].

(*b*) The time was much longer: ten years if the parties were "present" in the same district, twenty if they were not[3]. Presence is explained by Justinian to mean being domiciled in the same province, but he does not discuss the effect of change of domicile. In the longer period there was of course much more likelihood of the thing being temporarily incapable of such acquisition, *e.g.* belonging to a *pupillus*[4].

(*c*) Its field was different: it applied primarily to things capable of *iure gentium*, but not of *iure civili*, ownership, though the rules as to *vitium*, etc., seem to have been the same[5]. As its effects were not quite the same as those of *usucapio*, it might be useful in *iure civili* cases, *e.g.* it barred pledge, which *usucapio* did not, and there is evidence of its application before Justinian to Italic land[6], and to moveables from the time of Caracalla[7], though most of these latter texts may have applied originally to peregrines and *res mancipi*.

(*d*) The better view seems to be, though the matter is disputed, that *litis contestatio* interrupted *praescriptio*[8].

(*e*) The rules as to *accessio possessionum* in the case of buyers, etc., were applied first to *praescriptio*, and gradually extended to *usucapio*[9].

(*f*) *Usucapio* did not destroy servitudes over the land, except so far as they expired from non-use[10], and did not affect hypothecs[11]. *Praescriptio* had the same rule as to servitudes, but a hypothec might be destroyed by lapse of time, if, when possession began, the possessor did not know of its existence[12].

1 *Ante*, § LXXII; *post*, § CCXLIX. 2 Justinian says (C. 7. 39. 8) that "*veteres leges*" if properly looked into gave a *vindicatio*, which looks like a juristic perversion of a *lex*, perhaps an *actio fictitia*. We are told that there was a modified Publician (6. 2. 12. 2), but the text is thought to be interpolated. On the face of it this would refer to interim protection, which would indicate, *a fortiori*, protection after the time had expired. No difficulty under Justinian: all ownership is alike. 3 P. 5. 2. 3; C. 7. 33. 9; C. 7. 33. 12, which settles other points: domicile is matter of province, not of town: the position of the property is not material. For presence, the document cited p. 249, n. 11, uses the indefinite word "διατρείβοντας." 4 On these cases of suspended *praescriptio*, *post*, § CXCII. As to *res* becoming *dotales*, 23. 5. 16. 5 C. 7. 33. 2, 4. 6 Partsch, *cit.* 151. 7 44. 3. 3; h. t. 9; C. 7. 36. 1. 8 P. 5. 2. 4, 5; C. 3. 19. 2; C. 7. 33. 10. Partsch, *cit.* 32 sqq. Cuq, *Manuel*, 288, holds that it was interrupted by mere protest, citing C. 7. 33. 2; C. 7. 35. 4, but they are far from conclusive. Under Justinian, protest to the *praeses* or certain other public authorities sufficed. See C. 7. 40. 2. 9 See Krueger, *Z.S.S.* 26. 144. 10 41. 3. 44. 5; 7. 4. 19. 11 41. 3. 44. 5. 12 44. 3. 5. 1. It would be useful for moveables in this case, for *usucapio* did not bar pledges.

(*g*) *Bona fides* (as opposed to *iusta causa*) is not mentioned in the earliest evidence we have, but seems soon to have been required[1].

Under Justinian the two systems were more or less fused, an obvious result of the abolition of differences in ownership and civil status. The new system appears to have followed the rules of *praescriptio*, but the period for moveables was fixed at three years, it was directly acquisitive[2], and probably, though this is disputed, it was interrupted by *litis contestatio*[3].

Apart from this regular system there was introduced in the later empire a system which acquired the name of *longissimi temporis praescriptio*. Two unsatisfactory texts[4] tell us that in the reign of Constantine, or his sons, it was enacted that 40 years' possession should give extinctive protection, whatever the origin of the possession. The enactment of Theodosius[5], which cut down *actiones perpetuae* to 30 years, gave, in effect, an extinctive protection after 30 years, and expressly said that there was no further protection for women or *absentes*, but only for *impuberes*. There was no question of *fides* or *causa* or *vitium*. It is clear that in some cases[6] 40 years were required, but not what these were. Justinian further provided that if the possession had been *bona fide*, the protection was acquisitive and gave a *vindicatio*, whatever defects or *vitia* there might be[7].

In A.D. 544 Justinian laid down a new rule[8]. If a *bona fide* buyer from a *mala fide* holder held the *res* for 10 (or 20) years, and the person who thought he was entitled took no steps, the thing was acquired by *usucapio*. It is not clear what is new here, for if he knew and could vindicate, this would have purged the furtivity in older law[9]. He adds that if the old owner did not know, it would be acquired only by 30 years, which was the existing law for moveables, but new for land, which could not be *furtiva*[10].

There were special rules as to sales by the *fiscus*[11]. Where the *fiscus* lawfully sold an estate, but wrongly included property not part of it,

1 The rescript of Severus and Caracalla, *ante*, p. 249, n. 11, speaks only of *iustum initium*, but a document of a few years later uses words which, though obscure, are supposed to shew that *bona fides* was needed (Girard, *Textes*, 901). In any case a rescript of not much later requires it. C. 5. 73. 1. 2 Inst. 2. 6. pr.; C. 7. 31. 1. 3 It is less probable for the praetorian scheme. Inst. 4. 17. 3. In the fusing enactment he retains the name *usucapio* for moveables, and does not say that the rules are to be the same (C. 7. 33. 1). In the Inst. (4. 17. 3) his language suggests that in *usucapio*, *litis contestatio* was still not a *usurpatio*. This may be a survival from the original source, but may indicate a difference between moveables and land. C. 7. 40. 2 seems to put both cases on the same footing. 4 C. Th. 4. 11. 2; C. 7. 39. 2. 5 C. Th. 4. 14. 1; C. 7. 39. 3. 6 C. 7. 39; Rubr. 5. 6. 7. 7, etc. 7 C. 7. 39. 8. Very little is known of the details of these schemes. There were exceptions which may have been numerous. 8 Nov. 119. 7. 9 *Ante*, § LXXXVIII. 10 It might mean that, now, mere knowledge where the thing was, purged the *vitium*, but this is unlikely. 11 Inst. 2. 6. 14; C. 7. 37. 2, 3.

M. Aurelius provided that if the buyer held for five years he should have an *exceptio* against a claim by the owner. This is longer than the period of *usucapio*, and thus seems to apply only where there was *vitium*, or bad faith in the buyer. It left the *fiscus* still liable for five years to claims for defect in title. Zeno provided that any acquirer, by sale or otherwise, from the *fisc*, should have a good title at once, free of all charges, but owners or pledgees who suffered might claim from the *fisc* for four years. Justinian applied this to all alienations by officials of his, or the Empress's, household.

XC. *ADIUDICATIO*[1]. In three actions (commonly called divisory actions), *communi dividundo*, for dividing property held in common: *familiae erciscundae*, for dividing a *hereditas*: and *finium regundorum*, for regulating boundaries, the *iudex* had a function beyond giving a judgment. He had to make an *adiudicatio*. In the first two he had to distribute what was held in common among the claimants, in proportion to their rights, so that each would now own a part separately, instead of an undivided share. His decree vested the property and was thus a mode of acquisition. He might have to do more. It might be necessary to create easements, *e.g.* rights of way over one part, in favour of another, or to give one a life interest over a part and another the *dominium* subject to it, but he could not create such rights except over the property submitted to him[2]. It might be impossible to make a completely fair adjustment by division, and thus he might have to order equalising payments. This was no part of the *adiudicatio*: it was a *condemnatio* and created only obligations[3]. In the third case he might have to shift some boundaries from the present position, where the object was to make them more convenient, giving here and taking there, with the same need of *adiudicatio*[4]. As an *adiudicatio* could not affect those not parties to it, if one of the common owners had given a pledge of his undivided share, this would still burden every part of the property[5]. If the action was a *iudicium legitimum*[6], the *adiudicatio* created civil ownership[7], otherwise it gave only praetorian ownership which would ripen by *usucapio*[8].

IUS ACCRESCENDI. This expression, found in many connexions, here refers to a rule, obsolete under Justinian, to the effect that where a slave was owned in common by two or more, an act of formal manumission, by one, merely destroyed his right and increased that of his co-owners, without making the man free[9]. If it was done informally the

1 Inst. 4. 17. 6, 7; Ulp. 19. 16. 2 10. 3. 7. 1; h. t. 18. 3 *Post*, § CLXXXVI. 4 10. 1. 2. 1. 5 10. 3. 6. 8. 6 *Post*, § CCXXXII. 7 Vat. Fr. 47 a. 8 See 10. 2. 44. 1. 9 Fr. Dos. 10; Ulp. 1. 18; P. 4. 12. 1. If a common owner makes a *fc.* of liberty to the slave, the co-owner is compelled by the praetor to sell his share to the fiduciary. C. 7. 7. 1. 1 a; D. 40. 5. 47. 1. As to the difficulties where it is a direct gift, see Buckland, *Slavery*, 575 sqq.

act was a nullity, because the accrual was a civil law mode of acquisition and thus did not occur unless all the civil law requirements of manumission were satisfied.

Lex. This is a general term used by commentators to group together a number of cases in the sources, which are not expressly classed. We even find *accessio* placed here, though it is certainly not the creation of any express enactment. More reasonably the conception is applied to a number of cases in which a statute has regulated the matter[1]. But even this is not the language of the Sources[2]. In fact *lex* as an express mode of acquisition plays a very small part in the texts. It seems to be given only by Ulpian. He mentions legacy, as based on the XII Tables, and "*caducum vel ereptorium*" under the *l. Papia Poppaea*[3]. He is dealing *ex professo* with acquisition of single things, and seems to be finding a basis for dealing with those cases of acquisition of single things which are illogically but conveniently treated under acquisition *per universitatem*, and there seems no purpose in giving it a wider scope. In the Digest he carries, or is made to carry, the matter a little further, but in the same field, where he says that *hereditas* itself may be said "*non improprie*" to be acquired *lege*[4].

XCI. *Donatio.* This is in general not a mode of acquisition: it is a *iusta causa.* If *A* gives *B* a book it becomes his by *traditio*: if he promises a book, there may be a "right" to it, but ownership will not pass without delivery[5]. It is not certain why Justinian treats it as a mode of acquisition[6]. It may be because in certain cases in later law property did pass, as we shall see, without delivery, but it is probable that he had no logical reason, but found it a convenient way for grouping the special rules affecting gratuitous transfers[7]. It is to be noted that a *donatio* was not necessarily a transfer of a *ius in rem.* It might be a promise, or a release (*acceptilatio*)[8], or a *delegatio*, *i.e.* the acceptance by the donor, by formal agreement between all parties, of a liability of the donee to a third party, or a similar undertaking by a third party to pay to donee instead of donor[9].

Donatio inter vivos[10]. The first point to notice is revocation. Where a gift was made *sub modo*, *i.e.* to be applied in certain ways, and was not so applied, it could be recovered by *condictio*, on ordinary

1 Girard, *Manuel*, 321; Cuq, *Manuel*, 279. 2 Cuq includes *Thesauri inventio*, which is a statutory creation. But this is to make it a civil mode of acquisition, while Justinian (Inst. 2. 1. 39) treats it as *iure gentium.* 3 Ulp. 19. 17. 4 50. 16. 130. 5 He is not under the same obligations as one delivering under a sale. He need give no warranty against eviction. If he does, Paul says it is not binding (P. 5. 11. 5), C. 8. 44. 2 says it is. Some correct P.; some limit the *lex.* 6 Inst. 2. 7. pr. 7 He does not treat it with modes of acquisition in the Code. 8 *Post*, § CXCV. 9 *Post*, § CXCIV. 10 As to the special rules affecting gifts between husband and wife, Ulp. 7; P. 2. 23, and *ante*, § XL.

principles[1], but from the third century onwards it seems to become possible to recover it by a *vindicatio utilis*, which looks very like a revocable ownership but does not go quite so far[2]. From the third century onwards there is much legislation dealing with revocation of gifts for ingratitude. Till Justinian, these rules appear to have been limited to cases of gift to children or grandchildren or *liberti*[3]. The revocation was allowed to the donor, but not to his successors, or against successors of the donee[4]. There was a judicial enquiry into the allegation of ingratitude[5], and it is not quite clear whether the effect was to revoke the gift *in rem* or to give a remedy *in personam*. The former is perhaps the more probable, but this is forfeiture, not *ipso iure* termination. Under Justinian the rules applied to gifts in favour of anyone[6]. An enactment of A.D. 355 introduces the remarkable rule that if a patron having no child made gifts to *liberti*, and afterwards had a child, these gifts were *ipso facto* revoked, and apparently, though the law is very vaguely expressed, the revocation directly restored the *dominium*[7].

Restrictions on the amount of *donationes* were imposed by the *l. Cincia* of about 200 B.C.[8], certain near relatives being exempted from its operation[9]. The rules under it were a creation of the jurists and gave a somewhat complicated result. There was a general overriding rule, perhaps a later growth, not in the *lex*, that only the donor himself, not his successors, could take advantage of the statute, *Cincia morte removetur*[10]. The governing principle was that the provision could be enforced only by way of defence. This was an *exceptio legis Cinciae*[11]. Broadly it was only where the claimant must come into court, if he wanted his gift, that the *lex* was effective. If it was a gift of land and it had been mancipated and handed over, there was no more to be said,

1 In a promise, revocation would be by *exceptio doli*. In other cases it would presumably be *rest. in integ.* from a release, and *condictio* for payment or release where there had been acceptance of liability to a third person. Similar machinery, Inst. 2. 20. 13; D. 17. 1. 45. 2; C. 8. 55. 7. Where it was *sub modo*, and the application was stipulated for, there was no need for revocation: it could be enforced. If not, there was a *condictio*, C. 4. 6. 3, 8 (but its classicality is disputed), and if the ultimate purpose was in any way for the benefit of the donor it was, in later law, an innominate contract (C. 8. 53. 9, 22. 1). 2 Making it *utilis* is a formal reservation of the principle. In the actual case the purpose was *alimenta* to donor (C. 8. 54. 1) and the rule is declared to have been laid down by earlier Emperors. See however Pringsheim, *Kauf mit fremdem Geld*, 123 sqq., who holds all *vindicatio utilis* to be Byzantine. 3 Vat. Fr. 272; C. Th. 8. 13 and C. 8. 55 pass.; the Vat. text though it speaks of ingratitude does not make this essential, in terms, but the later legislation does, and so does its reproduction in C. 8. 55. 1. 4 C. 8. 55. 1. 3, 7. 3. 5 In the action for revocation. 6 C. 8. 55. 10. 7 C. 8. 55. 8: as to revocation of excessive gifts in fraud of *querela inoff. testam., post*, § CXV. 8 Girard, *Man.* 951. 9 Cognates to first cousins, any female cognate for *dos, affines*, and acting *tutores*, Vat. Fr. 298–305, 310; other cases Vat. Fr. 307–9; it did not apply to rewards for service gratuitously rendered in emergency, P. 5. 11. 6. 10 Vat. Fr. 259. Perhaps Caracalla, Vat. Fr. 266. 11 Vat. Fr. 266.

but if, though mancipated, it was still in the possession of the donor, and the donee vindicated, he could be met by the *exceptio*[1]. If land had been handed over without *mancipatio*, as the ownership had not passed, the donor could vindicate, and if met with *exceptio rei donatae et traditae* would have *replicatio legis Cinciae*[2]. The donee being compelled to come into court to protect his interest the *lex* was available. If it was a gift of land, *deducto usufructu*, then, if there had been a *mancipatio* or *cessio in iure*, the conveyance was complete and no question arose. If there was even a valid contract this could be enforced against the *heres*, for he had not the *exceptio*[3]. If the thing given were a *res mobilis*, duly conveyed and handed over, the possibility of the *exceptio* was not extinct. For, by the interdict *utrubi*, a possessor could get the thing back if he had held it for a greater part of the last year than that for which the donee had held it. In such a case the donor could regain possession by the interdict, and meet the donee's *vindicatio* by the *exceptio legis Cinciae*[4].

These rules disappeared in the later Empire[5], having been replaced by a system of registration (*insinuatio*) for all gifts. Under Justinian a gift exceeding a certain amount, ultimately fixed at 500 *solidi*, was void, if unregistered, as to the excess[6], apart from certain excepted cases[7]. If the thing had been transferred the ownership passed only *pro parte*, the larger interest, whichever it was, having the right to buy out the other.

1 Vat. Fr. 311. 2 Vat. Fr. 313. C. Th. 8. 12. 7. 3 In Vat. Fr. 313 the case is complicated by the fact that donee is a *libertus*. 4 G. 4. 160; Vat. Fr. 293, 311. If the gift is perfect the *l. Cincia* does not affect it, and thus if it has been completed the fact that it has got back to the donor does not entitle him to use the *exceptio l. Cinciae* (arg. P. 5. 11. 2, 4). Presumably if it was a usufruct which was given and duly conveyed, and the donor then vindicated the thing, he could not reply to the *exceptio ususfructus* by a *replicatio legis Cinciae*. If the gift was a promise the *exceptio* would be available. A gift by way of *acceptilatio* is perfect, and the *exceptio* is barred (C. 8. 43. 2). But a mere informal release, enforceable only by an *exceptio*, could be met by a *replicatio legis Cinciae* (20. 6. 1. 1. interp.). Formal taking over of a debt is a completed gift (*delegatio*, 39. 5. 21. pr.). So too if in the same way a debt to donor is transferred to donee (h. t. 33. 3). But cases of this type create a difficulty. In 44. 4. 5. 5 a donor whose gift was the taking over of a liability has a *condictio* for return or release according as he has paid or not. In 39. 5. 21. 1 a similar right is given where the gift was the transfer of a claim against a third person. These texts are variously explained as a survival, on the assumption that the original remedy under the *lex* was an action, as an interpolation, and as a special remedy for these cases, rendered necessary by the fact that, though the gift is still in the stage of promise and therefore the *lex* ought to be applicable, it is in fact barred because in each case the promise by the *delegatus* is one of an existing debt (Gide, adopted by Duquesne, *Mél. Girard*, 1. 389, who discusses the various views). 5 The *lex* may have been in force in 355; C. Th. 8. 12. 7. 6 There was much legislation requiring registration, with variations as to conditions and effect; Vat. Fr. 249; C. Th. 8. 12. 1 sqq.; C. Th. 3. 5. 1; C. 8. 53. 34, 36; Nov. 162. 1, etc. 7 The excepted cases under Justinian seem to be *piae causae* up to a specially high limit, *donationes ante nuptias*, or for *dos*, gift by the Emperor (C. 8. 53. 34, 36), and some others.

Where the gift took an indirect form (*delegatio*) there was *condictio* for the excess[1].

Donatio inter vivos afforded some exceptions to the rule that ownership passed only by *traditio* or formal conveyance. A gift by *paterfamilias* to one in his *potestas* was a nullity[2]. But if he died in the same mind, without revoking the gift it was confirmed and operated as *donatio mortis causa*[3]. From Diocletian onwards the texts mostly require express confirmation on the will[4]. Justinian allowed non-revocation to suffice if the gift was below the amount requiring *insinuatio*, or was duly registered, in other cases he required express confirmation, with some further distinctions[5].

Gifts between parent and child, where there was no *potestas*, were in earlier classical law like other gifts. But there was confusing legislation about them of which the story may be as follows. From the time of Pius they were valid and enforceable however informally expressed[6], though, of course, mere declaration did not transfer ownership[7]. This remained in strictness the law even under Justinian. But he, perhaps following predecessors, made such informal *pacta donationis* binding even between *extranei*[8]. In both cases *traditio* remained necessary[9]. But by an evolution which may have begun under Constantine[10] for gifts between parents and children not in *potestas*, but was not generalised till Justinian, the delivery of *instrumenta* came to be regarded as a valid *traditio* of the thing itself, in cases of *donatio*[11].

Gifts for charity (*piae causae*) and to the church were the object of special provision under Justinian[12]. In one enactment[13] he laid down a rule which may mean that the mere promise to give gave a real action, indeed this is its most obvious meaning. But the enactment does not in fact say anything of the formalities needed, and its main purpose was the extension of the period of limitation. Its meaning has been disputed for centuries[14].

Donatio mortis causa. This was a gift made in expectation of death, either general or on a certain event[15], to be absolute only if and when

1 See p. 255, n. 4. 2 Vat. Fr. 295, 6; Greg. Wis. 8. 2, not a basis of *usucapio* (41. 5. 2. 2; 41. 6. 1. 1). It is confirmed by *emancipatio* without ademption of *peculium*. 39. 5. 31. 2; C. 8. 53. 17. 3 P. 5. 11. 3; Greg. Wis. 8; Vat. Fr. 274, 277, 278, 281, etc., subject therefore to *l. Falcidia* and *querela inofficiosi* (*post*, §§ CXIV, CXIX). 4 Vat. Fr. 292–296. But one of Pap. requires confirmation (Vat. Fr. 294; but see Vat. Fr. 250), one of 315 (Vat. Fr. 274) seems to treat non-revocation as enough. 5 C. 5. 16. 25. 6 P. 4. 1. 11; cf. C. Th. 8. 12. 4. 7 Vat. Fr. 263, 266 a, 268, 285, 287; cf. Vat. Fr. 265. 8 *Post*, § CLXXXIII. 9 C. 8. 53. 6. 10 C. Th. 8. 12. 4, 5. 11 See Riccobono, *Z.S.S.* 33. 259; 34. 159; *Mél. Girard*, 2. 415. C. 3. 29. 2 is in part Justinian. The development is probably connected with the fact that *mancipatio* was necessary for *donatio* of land and gradually degenerated into a mere memorandum. Thus no actual delivery was needed. *Ante*, § LXXXVI. 12 *Ante*, § LXV. 13 C. 1. 2. 23; cf. C. 8. 53. 36. 14 See Riccobono, *Z.S.S.* 34. 195. 15 39. 6. 1–6.

the expected death occurred. It might be a gift of property, a promise, a release or a *delegatio*[1]. It was essentially revocable, and was revoked *ipso facto* by insolvency of the donor, or predecease of the donee[2]. This revocation would operate differently in the two types of such gift, which are:

(i) Under a suspensive condition. Here in a gift of property the *res* was handed over but the ownership was not to pass unless and until the expected death occurred[3]. Here no difficulty arose. Whether the revocation was express or by insolvency, death of donee, or non-occurrence of the expected death, the ownership not having passed, the thing could be vindicated.

(ii) Under a resolutive condition. The property passed on delivery but on failure of the gift it was to be restored. The ownership did not revert *ipso facto*, in classical law, but there was an obligation to restore. Under Justinian the reversion operated *ipso facto*[4] and the thing could presumably be vindicated[5]. It is not clear that this was absolutely new, though it is post-classical[6].

The *l. Cincia* had no bearing on these gifts and, owing to their operation only on death, they were free from some of the restrictions on gifts *inter vivos*. Thus they could be made from father to son, between parties to a marriage, indeed to any person to whom it was lawful to give a legacy[7]. As to form we have no direct information for classical law, but an enactment of Constantine suggests that, then and later, the rules were the same as for gifts *inter vivos*[8]. Justinian however laid down a remarkable rule. He prescribed a certain form, with five witnesses, in fact the form he required for codicils[9], and provided that where such a gift was so made it should have the same effect as legacy, the point being that it would transfer property on the death, but not till then, without any transfer of possession[10]. It was transfer by mere agreement. This does not mean that such gifts were void unless made in this form: if the thing was actually handed over or created in the way appropriate to its nature the old rules would presumably apply.

This was a part of his general policy of bringing together legacy and

They probably originated in *mancipatio cum fiducia*. See Senn, *N.R.H.* 1913, pp. 169 sqq. He draws from this origin and from a distinction between gifts to be returned if the expected death does not occur, and gifts not to be returned unless the donee dies before the donor, some conjectural conclusions as to the evolution of the institution.

1 See for indirect forms, 39. 6. 18. 2, 24, 28, 34. 2 It has been suggested that the texts making it revocable at will are interpolated; see Cuq, *Manuel*, 800. There could be no difficulty in gifts of the first class. P. 3. 7. 1, 2; Inst. 2. 7. 1; D. 39. 6. 7, 13, 16, 17. 3 39. 6. 2. 4 39. 6. 18. 1; h. t. 37; C. 6. 37. 26. 1. 5 The point did not arise in "indirect" gifts, by *acceptilatio* or *delegatio*. The special remedy here, where one was necessary, was *condictio*. 39. 6. 18. 1; h. t. 24, etc. 6 See discussion, Girard, *Manuel*, 963. 7 39. 6. 9. 8 Vat. Fr. 249. 3. 9 C. 8. 56. 4. 10 D. 6. 2. 2 puts *donatio* on a level with legacy in this respect.

donatio mortis causa, of which we are told several times that it is similar to legacy[1]. The assimilation was no doubt progressive. A senatusconsult made such gifts subject to the *ll. caducariae*[2]. Severus made them subject to the *l. Falcidia*[3]. But even under Justinian there were many respects in which they differed from legacy. Thus they did not depend on a will[4], a *filiusfamilias* could make them, *consentiente patre*[5], the *regula Catoniana* did not bear on them[6], and they were not lost by unsuccessfully[7] attacking the will[8].

XCII. *JURA IN REM*, LESS THAN OWNERSHIP. Of these by far the most important class were servitudes.

A servitude[9] was essentially a right or group of rights forming part of *dominium*, but separated from it and vested in some person other than the *dominus*. From another point of view it was a burden on ownership, a *ius in rem* in another person, to which the owner must submit. This point of view suggests itself in connexion with praedial servitudes which are rights over one piece of land vested in one, not owner of that land, but of other adjacent land to which, rather than to him, it is attached, so that if he alienates the land the servitude goes with it[10]. The conception is reflected in the terminology. The land under servitude is spoken of as

1 Inst. 2. 7. 1; D. 39. 6. 17, 37, etc. **2** 39. 6. 35. pr. **3** C. 6. 50. 5. **4** 39. 6. 25 and thus did not wait for entry of *heres*. **5** 39. 6. 25. 1. **6** Arg. 39. 6. 22; *post*, § CXXI. **7** 34. 9. 5. 17, *post*, § CXXI. **8** As has been assumed in the course of the discussion of modes of acquisition, the action for the enforcement of the right is the *vindicatio*. The various forms and main characteristics of this action will be considered under the law of procedure (*post*, § CCXXVIII), but some points should be mentioned here. The plaintiff's claim is always that he is the *dominus*, the Quiritian owner, and in early law the defendant made a similar claim. This last point leaves a trace in the early classical law. The action does not in early classical law lie against a mere *detentor*: it should be brought against the person under whom he holds—the *possessor*, and if this is the plaintiff himself an action *in personam* based on the *negotium* between them is the proper remedy. Ulpian allows the real action (6. 1. 9). The *detentor* could avoid liability, under Constantine, by declaring of whom he held (C. 3. 19. 2). In later law, but probably not till Justinian (see Girard, *Manuel*, 348, and generally on the action, 342 sqq.), it lay against one who had fraudulently parted with possession (an extension from *hereditatis petitio*), and against one who falsely alleged that he possessed. The defendant, if defeated, must restore the thing, its accessories (*causa*) and the fruits received since *litis contestatio*: his further liabilities varied according as he was in good or bad faith and historically, *post*, § CCXXXVI. *Vindicatio utilis*, or *actio in rem utilis* is occasionally found. It is not an extension of the remedy to cases of inferior forms of ownership, but to cases in which a change of ownership which has taken effect is rescinded, and in most cases it appears to be due to Justinian, outside slave law (Inst. 4. 6. 6; D. 6. 1. 5. 3; 24. 1. 30, 55; 26. 9. 2; 39. 6. 30; 41. 1. 9. 2; C. 3. 32. 8; C. 8. 54. 1, etc.). **9** This name is probably not very ancient, even Gaius uses it (2. 14, 17) as a secondary name. Cicero uses it in this sense (*Ad Quint. fr.* 3. 1. 2 (3)). Primarily it is a *ius*. For early lawyers it is a right existing independently of ownership, with its own remedies. The analysis is the work of the classical lawyers. This old view led to the rule that it could be acquired by *usucapio*, and the *l. Scribonia* (*post*, § XCIV) which abolished this may mark the change of view. **10** 8. 4. 12.

praedium quod servit[1] and hence have been formed the expressions *praedium dominans* and *serviens*. It is indeed more correct to speak of it as a burden on the land than on the ownership, for a servitude might exist over land which had no owner. If a *praedium dominans* was abandoned by its owner, a right of way over it did not cease to exist[2]. But there could be no servitude on *res sacrae* or *religiosae*—that was inconsistent with religion[3].

The chief general principles of servitudes are these:

(i) *Servitus in faciendo consistere non potest.* It could not impose an active duty[4]. This results inevitably from its nature. It was a right *in rem* and all such rights are negative: there cannot be a right that everyone shall do something. There can only be a right that everyone shall abstain from doing something. It might be a right to prevent anyone from doing something—*ius prohibendi*[5]—a negative servitude, such as a right to ancient lights, or a right to do something without being interfered with—*ius faciendi*—a positive servitude, such as a right of way[6]. There was however one remarkable exception. The servitude *oneris ferendi* was a right to have one's wall supported by a neighbour's, and it imposed on him the duty of keeping the support in repair[7]. This is an active duty[8]. But it can hardly have been a part of the servitude, for it was not available against all: a third party could not be made to repair the wall. It is therefore sometimes explained as having originated in an agreement, at first express, and later implied[9]. But this agreement would bind only the promisor and his *heres*, while this duty lay on any owner for the time being. And it was enforced by the ordinary *actio confessoria* for enforcing a servitude[10]. And Labeo says that the servient owner could avoid the liability by abandoning the wall, as it was a duty on the land rather than on him[11]. It is in fact an anomaly, of which the explanation must be historical. It may conceivably have been an old customary institution, the lines of which were settled before the conception of servitude was fixed[12], but its existence was still matter of doubt at the end of the republic[13]. It may have been recognised on grounds of convenience: it was better that the owner should do it than that he should have to submit to entry of an outsider to do it[14].

(ii) *Nulli res sua servit*[15]—a man could not have a servitude on his

1 8. 2. 30, 32. 2 Arg. Ulp. 1. 19. A *servus sine domino* may be subject to usufruct. Fr. Dos. 10. 3 A *res* cannot be *religiosa* without consent of all having *iura in rem*, but there are difficulties in *res sacrae*, as to which we are not informed; see 8. 1. 14. 2. 4 8. 1. 15. 1. 5 8. 2. 15. 6 Active duties could of course be imposed on a transferee, but this is contract and would not bind third parties. 7 8. 5. 6. 2. 8 8. 5. 8. 2. 9 See Elvers, *Servitutenlehre*, 56. 10 8. 5. 6. 3. 11 8. 5. 6. 2. 12 Girard, *Manuel*, 365. 13 8. 5. 6. 2. 14 See also, Elvers, *op. cit.* 62. 15 8. 2. 26; 8. 6. 1.

own land. This is plain—servitude is essentially a right in a non-owner. A result was that if the two ownerships came together, the servitude was merged and did not, in general, revive if the ownerships again became separate[1]. There were apparent exceptions to the principle. If having two adjoining properties *A* gave *B* a usufruct over one, reserving a right of way, this was not really a servitude over *A*'s own property: it was part of his ownership, and the usufruct he had given was less than the normal to the extent of that right[2].

(iii) *Servitus servitutis esse non potest.* There could be no servitude on a servitude. Any servitude was a burden on the ownership. There might be two servitudes over the same land[3], and there was the same apparent exception as in the last case.

(iv) *Servitus civiliter exercenda est*—it must be so used as to cause as little inconvenience as possible[4]. Hence there was no servitude unless it was advantageous to the property. There could not be a servitude merely to annoy a neighbour, or for a personal advantage not affecting the land[5].

(v) A *servitus* was a *res incorporalis* and thus could not be possessed. This means less than it seems to, for enjoyment was much the same as possession and was protected by similar interdicts[6]. In later law it was "quasi-possessed[7]." The fact that some servitudes could originally be acquired by *usucapio* is not an application of the notion of quasi-possession. It is a rule framed on the notion of use, before the theory of possession had been evolved, and it disappeared before the classical age. And the references to quasi-possession of praedial servitudes are probably all interpolations[8].

Servitudes were divided into two broad classes: Praedial and Personal, so distinct in character that they scarcely seem to belong to the same branch of the law. Praedial servitudes applied only to land, were perpetual, were almost innumerable and gave only limited definite rights. Personal applied also to moveables, were limited in duration, were very few, and gave indefinite rights including physical possession of the property concerned. But the characteristic difference was that

1 8. 6. 1. As to exceptions in practice to this last rule, see Elvers, *op. cit.* 126; Windscheid, *Lehrb.* § 215, n. 10; D. 8. 1. 18, etc. 2 The distinction is not meaningless. It could not for instance be lost by non-use unless the land itself was lost by *usucapio.* 3 We are told that there cannot be a usufruct of a right of way, for the reason, probably due to Justinian, that there cannot be a servitude on a servitude. The text adds that effect can be given to it by praetorian remedies (33. 2. 1). See *post*, § XCVI. 4 8. 1. 9; 8. 5. 8. 6; 8. 1. 15. pr. The servitude in 8. 1. 19 (Labeo) may be a survival, or may be allowed as being of potential value to the land though useless for the time being. 5 8. 1. 8. 1; h. t. 9; h. t. 15, etc. Its enjoyment may be limited to certain times, 8. 1. 5. 1. 6 *E.g.* 43. 19. 7 See Albertario, *Bull.* 27. 275 sqq. 8 See Albertario, *loc. cit.* The quasi-possession of G. 4. 139 can hardly stand, on linguistic grounds.

praedial servitudes belonged to a man, only as owner of a *praedium* to which they attached, so that they were spoken of as belonging to the *praedium*: personal servitudes attached to a man personally.

XCIII. Praedial servitudes. These then were rights vested in a person as owner of one piece of land over another piece, effective not only against its owner, but against all: they were *iura in rem*. Land subject to such a servitude was said *servire*, a terminology which treats them as burdens. But in speaking of the servitudes themselves the other aspect was commonly looked at: they were called *iura praediorum*[1]. Their nature, coupled with the general principles of servitudes, accounts for most of their special rules. They were perpetual and could therefore exist only over what was capable of perpetual duration[2]. There was some discussion as to what was so capable, but it seems that if a thing was practically such, but not technically, the classical law admitted the servitude[3]. The principle of perpetuity had one modification. If the ownership was liable to resolution by law, any servitude imposed by the interim owner ceased when the ownership ended. The only recorded case is that of a *heres* where property had been left by a conditional legacy. If the condition occurred any servitude created by him was destroyed[4]. But it is to be noted that there were in this case doubts as to the interim ownership[5]. *Dos* affords a contrast. We are told that where a husband sought to create a servitude on dotal land, this was void, as, under the *l. Iulia*, he could alienate no interest in it[6]. If a vendor before delivery created a servitude it was good, but he was liable to his buyer[7]. On the other hand, a servitude could not be created conditionally or *ex die*[8], nor was it possible to create one, *ab initio*, to end at a certain time or in a certain event, at least in classical law. But if such an agreement were made, effect could be given to it, in praetorian law, by an *exceptio doli* or *pacti conventi*. Even in Justinian's law the principle was so far preserved that the servitude was not *ipso facto* ended by the arrival of the time or occurrence of the condition, but only by way of equitable defence[9].

From the principle that servitudes were allowed only so far as advantageous to the tenement came the rules that the *praedia* must be near together, though not necessarily adjoining[10], and that they must be

1 G. 2. 29. 2 8. 2. 28. See Perozzi, *Riv. It. p. l. Sc. Giur.* 14. 175. 3 8. 2. 28; 8. 3. 9; 8. 4. 2. 4 8. 6. 11. 1. 5 G. 2. 200. 6 23. 5. 5; C. 4. 51. 7; *ante*, § xl. 7 He must deliver it as it was at the time of the contract. 18. 1. 59. 8 *Cessio in iure* and *mancipatio*, the ordinary civil methods, could not be suspended, and the same is true of *adiudicatio*, Vat. Fr. 49. There might of course be *modus* in the sense of any limitation on the right. 8. 1. 4. 2, etc. As to creation by pact and stipulation, and *quasi traditio*, *post*, § xciv. 9 8. 1. 4. 10 There must not be intervening a piece of land over which there could not be such a servitude, 8. 1. 14. 2; 39. 3. 17. 4.; h. l. 3; a right of way blocked by an intervening *praedium* is null, 8. 3. 7. 1.

used only with that tenement[1]. Thus water drawn under a *ius aquae-haustus* might not be sold[2].

Praedial servitudes were indivisible. The chief results of this arose in connexion with loss of servitudes by *confusio*[3], but there were others. Thus if it extended over two *fundi* it was not lost by non-use over one, if it had been used over the other[4]. If one, of several persons entitled, sued in respect of it, he claimed the whole[5]. If, having a *fundus*, *A* assigned an undivided part, he could not deduct a servitude[6]. Many consequences followed from the fact that of common owners of a *fundus* all must assent, to produce any change in acquisition, abandonment, imposition or release of a servitude[7].

There were a great number of these servitudes. The oldest are the four rights, *iter*, *via*, *actus* and *aquaeductus*, which probably go back to the XII Tables[8]. Others were added from time to time, till in later law they were almost innumerable. Not everything could be a servitude[9]. It must be in the interest of the *fundus*, and actually beneficial to it.

Praedial servitudes were of two varieties, Rustic and Urban[10]. There is no certainty as to the exact principle of distinction. But as in Roman usage the epithet was attached to the *praedium dominans* and not to the servitude (*ius rustici praedii*[11]) it seems that the distinction turned on a characteristic of the dominant tenement. It is therefore commonly held that urban servitudes were those which primarily contemplated a building on the dominant land, while the others were rustic. But there are odd texts which raise difficulties. *Aquaeductus*, usually called rustic, is once called urban[12]. *Ius altius tollendi*, usually called urban, is called rustic by Neratius[13]. This has led to the view that a servitude, irrespective of its nature, was urban if it was in connexion with a building, and rustic if it was not[14]. But the general language of the texts is against this.

1 8. 4. 7. 1; 8. 1. 15; 8. 3. 5. 1; h. t. 24. **2** 8. 3. 5. 1. **3** *Post*, § XCIV. **4** 8. 3. 18; 8. 5. 9. 1. **5** 8. 1. 17; 8. 5. 4. 3, 4. **6** 8. 4. 5, 6. 1. **7** 8. 2. 30. 1; 8. 3. 34. **8** See Bruns, 1. 27; Girard, *Textes*, 16, 17; D. 8. 3. 1. pr.; cf. h. t. 1. 1. *Aquaeductus* originally only from the source, but later from any point in the stream. 43. 20. 1. 7, 8; h. 1. 38; 8. 3. 9. **9** Not for mere personal enjoyment 8. 1. 8. pr. **10** Inst. 2. 2. 3. **11** *Ib.*; Inst. 2. 3. pr.; D. 8. 2. 2. **12** 6. 2. 11. 1; cf. 8. 2. 18. **13** 8. 3. 2, with others that look urban. **14** See Girard, *Manuel*, 369; Cuq, *Manuel*, 329. But it is difficult so to understand such texts as 8. 2. 2 and 8. 3. 1. The difficulties are plain. If I acquire a right of way to land, and then build a house, does the servitude cease to be rustic and become urban? If I had previously pledged it, would the pledge cease to exist? The well-known text of Neratius (8. 3. 2) which is the main stumbling-block does not expressly suggest this view, nor apparently does any other text. For if 43. 19. 1. 1 is so interpreted it conflicts with the rubric and leaves no interdictal protection to a right of way leading to a house. And Ulpian, twice in the title, refers to use of the easement by a "*hospes*" (43. 19. 1. 7; h. t. 3. 4). Indeed the explanation does not account for the text of Neratius, who gives as other instances of rustic servitudes, *protectum habere*, and *cloacam habere*, which seem to assume buildings on the dominant tenement. Indeed his list is much more like a list of urban servitudes.

(There are indeed texts which raise a similar suggestion with regard to the relation between praedial and personal servitudes[1].)

It should be observed that the distinction already noted between positive and negative servitudes agrees nearly with that between rustic and urban, and that to some jurists the distinctions were apparently identical[2]. Servitudes have also been classed as continuous and discontinuous, those which do not, and those which do, require an act for their enjoyment, a distinction which also agrees somewhat nearly with those just mentioned.

The four original rustic servitudes were *iter*, *actus*, *via* and *aquaeductus*, the many others, *e.g.* the right to draw water, the right to burn lime, to dig sand, to pasture cattle, or to take cattle to water, were later additions[3], differing fundamentally in character. The original four were easements: they gave mere use of the land for specific purposes, taking nothing from it. Most of the rest were "commons" or "profits": they involved taking some of the produce of the land. Since a usufruct might be limited in extent it is easy to see that such a right as *pecoris pascendi* was very like usufruct, a point to which we shall recur[4]. All rustic servitudes seem to have been positive. They were *res mancipi*[5], which, as they could not be alienated, seems to mean that they could be created by *mancipatio*. It is possible that only the original four were *res mancipi*: indeed there is reason to think that, for the Sabinians, only the original four were rustic servitudes at all[6]. We learn also that they could be pledged[7], which no doubt originally meant that they could be mancipated *cum fiducia*[8] with the land to which they were attached. In classical law it meant more: it was possible to give a rustic servitude to a creditor who had a near *praedium*, on the terms that he was to enjoy it till the money was paid, and if it was not, might sell it to some other neighbouring owner[9]. Thus it ceased when the debt was paid, and was transferable, both, as Paul notes, anomalies. The text has been the subject of much discussion[10]. All that need be said now is that its express limitation to the four old rights is confirmation of the view that only these four were *res mancipi*, for some jurists.

The urban servitudes were even more numerous. Most of them were negative but a few look positive: all were apparently continuous. Some of them were much alike[11], and there is uncertainty in the texts, in some cases, as to their exact definitions and distinctions, into which it

1 *Post*, § XCVI. **2** *Post*, § XCIV. **3** 8. 3. 1. pr., 1. *Iter* is footway; *actus*, a right of way for animals and vehicles; *via*, a right to a made roadway. Inst. 2. 3. pr.; D. 8. 3. 8. **4** *Post*, § XCVI. **5** G. 2. 17. **6** 8. 3. 1. pr.; Inst. 2. 3. pr., 2; Karlowa. *R.Rg.* 2. 357. **7** 20. 1. 12. Only the original four are mentioned. Urban could not. **8** *Post*, § CLI. **9** *Ib.* **10** *Post*, § CLXVIII. **11** *Lumen* and *ne luminibus officiatur* (8. 2. 4). See Elvers, *Servitutenlehre*. 444. *Tigni immittendi* and *oneris ferendi*.

is not necessary to go[1]. There is no authority for holding that they could be pledged. Some of them present peculiarities. Of *oneris ferendi* mention has been made[2]. *Altius non tollendi*, obligation not to build higher, *ne luminibus officiatur*, not to obstruct your neighbour's light, and *stillicidium*, to receive your neighbour's drip, are all simple, but each of them had a peculiar looking counterservitude, *altius tollendi*[3], *luminibus officiendi*[4], and *stillicidii non recipiendi*[5]. All these seem to be rights which would exist apart from servitude. They have been explained in many ways. On one view they were modes of release from an existing servitude, but they were unnecessary for that[6]. Another is that they were releases from local laws concerning constructions[7], but the evidence for such laws in the three cases is slight, and that a private person should have a right to release from a law is unusual. There is evidence for such laws as to *altius tollendi*[8], and for such agreements. But it is post-classical and *altius tollendi* was known to Gaius[9]. Another view is that it was a partial release, *e.g.* a counterservitude to build five feet higher. For this too there is some evidence[10]. As servitudes were indivisible it is not easy to see how they could be partially released except by counterservitude[11].

XCIV. Acquisition of servitudes. Rustic, or some of them, could be created by *mancipatio*[12], and all praedial servitudes by *cessio in iure*[13], both of which were gone under Justinian, by *adiudicatio*[14], by legacy or the like[15], and they were acquired by acquisition of the *praedium* to which they attached. On alienation of the land, the servitudes must pass, or they would be extinct[16]. To this extent even urban servitudes could be acquired by *mancipatio*. Servitudes could also be acquired by reservation in *mancipatio* or *cessio in iure* of the land[17] to be servient, and, in Justinian's time, even in *traditio*[18]. They could be acquired by *usucapio* till a *l. Scribonia*, probably late in the republic, which forbade this[19]. Finally there were under Justinian certain other methods of the history of which something must be said.

1 The chief urban servitudes are set out in 8. 2. 2 and the neighbouring *leges*. 2 *Ante*, § XCII. 3 G. 2. 31; 4. 3; D. 8. 3. 2. 4 8. 2. 2. 5 *Ib.* 6 All are urban and release by *cessio in iure* is as simple as creation of a counterservitude in the same way. 7 Girard, *Manuel*, 367. 8 C. 8. 10. 12. See Accarias, *Précis*, 1. 676. 9 See n. 3. 10 44. 2. 26; 8. 2. 11. 1. 11 Cuq, *Man.* 330, citing 8. 2. 11. pr. and C. 34. 1, holds them to be releases by way of counterservitude from the rule requiring new buildings to conform to the ancient state of things, as to lights, etc. But the first text has been held to be due to Justinian and the other merely says that a servitude of light may be acquired by lapse of time. 12 G. 2. 29. 13 G. 2. 29, 31. 14 Arg. Vat. Fr. 47. 15 8. 2. 31. 16 41. 1. 20. 1. 17 8. 4. 3, 6. pr. Not called *deductio*. 18 8. 4. 3. Even before Justinian *deductio* of a usufruct might effect a *traditio* of the land. C. Th. 8. 12. 9 = C. 8. 53. 28. 19 Some texts suggest (P. 1. 17. 2; D. 8. 1. 14. pr.; 41. 3. 4. 28) that only the four original were usucaptible and that the *lex* did not destroy this for water rights. But the text (P. 1. 17. 2) does not shew that such a right could be so acquired *de novo*.

There were some servitudes or quasi-servitudes which were not admitted at civil law but yet existed. Such were the rights to water not from the *caput aquae*, but from an intermediate point[1], and also similar rights in public lands and rivers[2]: indeed these may be the only cases. Clearly they could not be created by civil law methods, and the question therefore arises by what methods they were created, and how far and with what effect these methods were applied to other servitudes in classical law. The relevant texts are largely interpolated and the matter is one on which there is a "chaos of opinions[3]." It must suffice to indicate the modes recorded in the Sources and to state what seem the more probable conclusions.

Quasi Traditio. There seems to be no evidence that *deductio in traditione* was available before the later empire, or that, conversely, a *lex* could be attached to a *traditio*, for the creation of a servitude over other land of the vendor, with praetorian remedies[4]. But several texts, taken at their face value, suggest that *traditio* and *patientia* of, *e.g.*, a right of way, did in fact give rise to praetorian protection. In classical law *res incorporales* were incapable of *traditio*[5] and the texts all shew signs of interpolation or have to do, not with the question of creation, but with the distinct question of enjoyment necessary to the interdicts[6]. But it is at least not impossible, and it is in the line of natural evolution that, as seems to have been the case in usufruct[7], the praetor did give a remedy in such cases, perhaps an *actio in factum*[8].

Pact and *stipulatio.* On a fair reading of Gaius[9], it is to be concluded that this method (which was presumably the Greek method of agreement, reinforced for Roman practice by *stipulatio*[10]) was applied only in provincial land, in his time. It does not follow that no change occurred before the end of the classical age, and though the texts which mention this method are disposed of as either interpolated or referring to provincial land, this is hardly proved in all cases[11]. It is however possible that it did not give a *ius in rem*, even praetorian, in classical law, since, on the view suggested above, *quasi traditio* sufficed. In the normal case the two would be combined, in positive servitudes. But it

1 8. 3. 9 (interp.); 43. 20. 1. 7; cf. 8. 4. 4. 2 (interp.). **2** 43. 13. 1. 1; h. 1. 9; Costa, *Le Acque*, 24 sqq., Elvers, *Servitutenlehre*, 267 sqq. **3** See especially Rabel, *Mél. Girard*, 2. 387 sqq.; Peters, *Z.S.S.* 33, 595. **4** See, however, Collinet, *Mél. Girard*, 1. 185 sqq. **5** G. 2. 28. **6** Chief texts: 6. 2. 11. 1; 7. 1. 3; h. t. 25. 7; 7. 6. 3; 8. 1. 20; 8. 3. 1. 2; 43. 19. 3. 8. Interdictal protection is usually admitted. **7** *Post*, § XCVI. **8** Girard, *Manuel*, 383. In Vat. Fr. 61 "*tuitione praetoris*" can hardly apply, as Rabel holds, to provincial lands. **9** G. 2. 31. **10** Probably originally a *stipulatio* for a penalty. **11** The texts are 7. 1. 3. pr.; h. t. 25. 7; h. t. 27. 4; 8. 3. 33. D. 7. 1. 27. 4 is not discussed by Rabel or by Collinet (*Ét. Hist.* 1. 161 sqq.) and is said by Peters to refer to provincial land. He gives no reason. It seems to give the *stip.* an effect *in rem*. But it is not conclusive: it may turn, like the text which follows it, on the duties of fructuary.

is difficult to apply the notion of *traditio* to negative servitudes, and there is nothing in the texts to exclude the possibility that in this case the *stipulatio* operated *in rem*. Pact and *stipulatio* were in any case recognised by Zeno in terms which imply that it was a known institution before the time of his predecessor Leo[1].

Longi temporis praescriptio. The notion of long enjoyment as a root of title to a servitude seems to have its basis in an old rule that no further proof of title was wanted than an immemorial enjoyment[2]. Ulpian supposes *aquaeductus* to be acquired by long continued enjoyment[3]. He does not specify the term, but the ordinary ten or twenty years term was applied by analogy, then or soon after[4]. From the fact that he merely requires that the enjoyment shall not have been *clam vi aut precario*, it is to be inferred[5] that the requirements of *iusta causa* and *bona fides* did not exist. It gave a *utilis actio*[6].

All these methods seem to have given full title in the law of Justinian and probably did before.

The ways in which a servitude could cease to exist were numerous. *Cessio in iure* extinguished it in classical law[7]. Renunciation, either express or by authorising acts inconsistent with it, did the same under Justinian[8].

It would end by *confusio*. But here there are distinctions to be drawn. If the *confusio* was itself set aside, by operation of law, the servitude might revive in practice, *e.g.* where the *heres* conveyed the dominant property to the owner of the servient, in the belief that there was a *fideicommissum* of it, or the transaction which caused the *confusio* was set aside by *restitutio in integrum*[9]. But a mere voluntary reconveyance did not revive it. And, as the servitude attached to the whole *praedium*, the acquisition of a particular part of the dominant by the owner of the servient did not affect it[10]. Where the dominant owner acquired part of the servient, if it was a defined right of way, the effect would depend on the question whether the whole of the way was included or not[11]. The acquisition of an undivided share in either, by the owner of the other, did not, it seems, affect the servitude[12].

It ended by the destruction of either *praedium*, or by such an alteration of the conditions of the servient that there could be no servitude

1 C. 8. 10. 12. 1, 4. **2** 39. 3. 1. 23. **3** 8. 5. 10. Rabel suggests that the rule may apply only to *aquaeductus*, but this seems arbitrary. **4** C. 3. 34. 2. **5** Girard, *Manuel*, 384. See also Partsch, *Longi temporis praescriptio*, 96. **6** 8. 5. 10. pr.; 39. 3. 1. 23. **7** Arg. G. 2. 30. A rustic servitude might no doubt be released by *remancipatio*. **8** 8. 2. 21; 8. 3. 20. Before him it would have given an *exceptio pacti conventi*. **9** 8. 1. 18; 8. 4. 9; 21. 1. 31. 3; 23. 5. 7. 1; 30. 116. 4. **10** 8. 2. 30. 1; 8. 6. 15, or the acquisition of a usufruct. **11** See 8. 6. 6. **12** *Ib.* and 8. 3. 31. The point is however disputed.

on it, or by the disappearance of the subject of the servitude[1]. Thus *aquaehaustus* ceased if the stream permanently dried up[2]. But in this case, if the original state of things was restored before expiry of the period of non-use, the right revived[3].

It was lost by non-use for two years before Justinian, ten or twenty under him[4]. For rustic servitudes, mere abstention from exercise of the servitude was enough, but for urban there must also have been something done (by the servient owner[5]) inconsistent with the servitude[6]. In purely negative servitudes there was in fact no non-use till something inconsistent was done. A right to light was not lost by not looking out of window. This is the main illustration of the point that for some purposes, and for some jurists, negative and urban meant the same thing. It is difficult to reconcile this with the view already mentioned that any servitude might, in appropriate circumstances, be rustic or urban[7]. The distinction, between those lost by non-use and those lost only by a contrary act, was expressed by the proposition that the former were lost by non-use, the latter by *usucapio libertatis*. This last name looks at the matter from the point of view of the servient tenement: a right detached had returned, a burden had been released[8]. As it was a case of *usucapio*, it had the characteristics of *usucapio*. Thus if the owner of the servient land ceased to possess it, time ceased to run in his favour[9]. *Bona fides* was not needed, not having been an original element in *usucapio*[10], but, if the adverse act was done *precario*, time did not run against the holder of the servitude[11]. The rule as to possession had no application to the case of non-use. It is a singular result of the rules as stated that a *ius tigni immittendi* was not lost by removing the beam. Time did not run till the servient owner plugged the hole in which it rested[12]. The same was no doubt true of the other similar servitudes.

XCV. Personal servitudes. These were servitudes belonging to a man personally, not as owner of anything else, applying to moveables as well as land, limited in duration, few in number, and giving indefinite rights, including physical possession of the property subject to the servitude. They were usufruct and two or three others derived from it. They did not originate in the needs of agricultural life, but in the much more advanced idea of provision for dependents, and the introduction of usufruct, the earliest, was probably associated with prevalence of

1 *E.g.* 7. 4. 24. 2 8. 3. 35. 3 8. 6. 14. Imperial relief if too late, 8. 3. 35. This seems to be the practical effect of the texts. 4 P. 1. 17. 1; C. 3. 34. 13. 5 So the texts say, but if done by a third party the effect would presumably be the same. If by the dominant it would presumably be abandonment. 6 8. 2. 6; h. t. 32. 7 *Ante*, § xciii. 8 P. 1. 17. 1; D. 8. 2. 6; 8. 6. 18. 2, etc. 9 8. 2. 32. 1. 10 *Ante*, § lxxxvii. 11 8. 2. 32. pr. 12 8. 2. 6.

marriage without *manus*. It was well recognised in the time of Cicero[1] and even earlier[2], but is not to be found in Plautus[3]: the others seem to be later. Much later than the introduction of these rights was their recognition as a class of servitudes. No legal text independent of Justinian calls them servitudes. Gaius sharply distinguishes them[4], and Justinian in the Institutes, following him, does the same[5]. So do the rubrics in the Digest[6]. The expression personal servitude is rare[7], and usufruct is called a servitude only about six times[8], and most of these texts are under suspicion of interpolation. It is therefore possible that the conception of usufruct as a servitude is due to Justinian[9]. But the texts which use the notion seem to be all from late jurists and it may be that the idea appeared late in the classical age. In any case the remedies for usufruct were the same in character. It was a *ius* and was claimed by *actio confessoria*[10].

Usufructus was the right to enjoy the property of another and to take the fruits, but not to destroy it[11], or fundamentally alter its character[12]. It was usually for life, never more, and, sometimes, for a fixed term[13]. Where it was given to a corporation its limit under Justinian was 100 years[14]. Even if a term was fixed, death of the holder ended it[15].

The fruits were the ordinary organic produce of the thing and did not include accidental acquisitions through it. The young of animals were fruits but, by an exception set down to respect for human dignity, the children of *ancillae* were not[16]. An *insula nata* was not *fructus* and the fructuary had not even a usufruct in it[17]. As to what were fruits, something depended on the nature of the estate. Trees were not ordinarily fruits, but they were in a "timber estate" where timber was the normal source of profit. The same was true of minerals, but new mines might be opened up, if this did not alter the character of the property[18]. The fructuary's right to rents, etc., the so-called *fructus civiles*, has already been considered[19]. He had the use of all tools, accessories, etc.[20]. He might improve the property, provided he did not alter its character[21], but

1 *Top.* 3. 15; *pro Caec.* 7. 19, etc. **2** Cicero, *de fin.* 1. 4. 12. **3** For various opinions as to its antiquity, see Costa, *Storia*, 264. **4** G. 2. 14; see G. Ep. 2. 1. 3. **5** Inst. 2. 2. 3. **6** D. 7 and 8. **7** 8. 1. 1; 34. 3. 8. 3. See also, 8. 1. 15. pr. **8** See Longo, *Bull.* 11. 281. The fragment supposed to be of the *Regulae* of Pomponius (*Coll. Lib. iur.* 2. 148; Girard, *Textes*, 220) uses *servitus* generally in a way which clearly excludes usufruct. **9** See Girard, *Manuel*, 363. **10** *Post*, § CCXXVIII. D. 7. 6. 5. 6. Vat. Fr. 47, 55, 56, etc., shew that at least the affinity with servitudes was recognised. **11** 7. 1. 1. **12** P. 3. 6. 21. **13** 7. 14. 3. pr. 3. **14** 7. 1. 56. **15** Arg. 7. 4. 3. pr., 3; 7. 1. 51. **16** 5. 3. 27. pr.; P. 3. 6. 19; D. 22. 1. 28. **17** 7. 1. 9. 4. *Alluvio* is not *fructus*, but the usufruct applies to it. P. 3. 6. 22. The difference is a question of probable intent. As to acquisitions through slaves, *post*, § XCIX. As to lambs in a flock, *summissio*, *ante* § LXXXI. **18** 7. 1. 9. 2, 13. 5, 13. 6. He must maintain woods and nursery gardens, 7. 1. 9. 6, 10. **19** *Ante*, § LXXXI. **20** 7. 1. 9. 7, 15. 6. **21** 7. 1. 13. 7.

he might not remove what he had erected[1]. He must keep the premises in repair[2]: he must cultivate the land and keep it in proper heart and condition[3]. As he took the profits he must pay the outgoings[4]. All these and similar requirements were summed up in the proposition that he must deal with the land as a *bonus paterfamilias* would. The praetor's edict required him to give security for this and for return on expiration of the right[5], a rule first established for the case of legacy, always the commonest type, but later applied to all cases[6]. It is disputed whether the obligations as specific duties of a fructuary were themselves created by the praetor, or existed at civil law and were merely better protected by him[7].

Usufruct was inalienable, but the effect of an attempted *cessio in iure* by the fructuary to a third party was disputed. On one view it was an admission that he had no right: it worked a forfeiture and the right lapsed to the *dominus*. On the other it was a nullity[8]. But though the right itself could not be transferred, there was no objection, in classical or later law, to letting or selling the actual enjoyment, the position and responsibilities of the usufructuary[9] being, however, retained.

Usufruct being, at least in appearance, limited ownership, there was room for differences of theory as to the true conception of its relation to *dominium*. The question was discussed whether it was a separate right, contrasted with ownership, or a fraction of ownership—a *pars dominii*. The point was of practical importance and was not always decided in the same way. A pact not to sue for an estate could be used in defence to a claim for the usufruct, as usufruct was *pars dominii*[10]. If an estate was due to me on contract and I released a claim to the usufruct this was a nullity as usufruct was not a part[11]. To some extent the divergence merely shews that words are being used in different senses. To say that it is *pars dominii* is to say that it is a group of rights which, with others, make up the bundle of rights constituting *dominium*. To say that it is not a *pars dominii* means that *dominium* is none the less *dominium* because rights are cut out of it. But there are real conflicts. Julian says that one who stipulated for land and then for a usufruct in it, or *vice versa*, was like one who stipulated for a whole and then for a part or

1 7. 1. 15. pr. 2 7. 1. 7. 2. But need not rebuild old buildings which fall. For repairs he may use materials from the estate, 7. 1. 12. pr. 3 7. 1. 13. 2. As to his right to punish slaves, Vat. Fr. 72. 4 7. 1. 7. 2. 5 P. 3. 6. 27; D. 7. 9. 1. pr. 6 7. 9. 1. 2. 7 Praetorian origin, Girard, *Manuel*, 376; civil origin, Karlowa, *R.Rg.* 2. 539. The distinction is less important than it might appear. Doing what he was not entitled to do with the property would usually be a delict. See Girard, *loc. cit.* 8 See *ante*, § LXXXIV. 9 7. 1. 12. 2; Vat. Fr. 41. 10 2. 14. 27. 8. 11 46. 4. 13. 2. For the principal texts, see Roby, *De usufructu*, 42.

vice versa, and holds the *stipulatio* for the usufruct to be void[1]. Ulpian says that one who, having stipulated for land, gave a release of the claim to usufruct produced no effect since the usufruct was not a part[2]. Julian could hardly have so held. If the stipulation for the usufruct was void because the usufruct was a part, the release must have been good for the same reason[3].

Usufruct being an incorporeal *ius in rem* could not be possessed. In later law the notion of quasi-possession was applied to it[4]. There was no special interdict for protection of enjoyment as there was in the cases of rights of way and water, but we are told that the interdict *uti possidetis* was available with the necessary modifications[5].

Unlike praedial servitudes, usufruct was divisible[6] (though the other personal servitudes were not), a rule with important results. There could be common ownership of a usufruct. A usufruct might be granted in an undivided share of property[7]. It might fail *pro parte*[8]. Where several held a usufruct in common there might be *ius accrescendi*, but not where two held each a usufruct of half by independent gifts[9]. This *ius accrescendi* was subject to special rules based on the proposition that in usufruct accrual was to the person, not to the *portio*[10].

As one of the obligations of the usufructuary was to return the thing in good condition, it follows that there was no usufruct of perishables[11]. The earliest usufructs were commonly over all a man's goods, which would usually include perishables, but as to these the gift seems to have been void[12] till early in the Empire, when a senatusconsult[13] provided that, where a usufruct created by will covered such things, they should belong absolutely to the legatee, who must give security for return of their value at the expiry of the usufruct[14]. Usufruct of money could be so left and by the end of the first century there might be quasi-usufruct even in a *ius in personam*. It was possible to leave a life interest in a debt due to the testator, to the debtor or to a third person, in effect, a loan for life of the money without interest[15].

1 45. 1. 58. **2** 46. 4. 13. 2. **3** Paul says a pact not to sue for land bars action for usufruct, and his comparisons shew that for him it is a part. 2. 14. 27. 8. **4** *Ante*, § XCIV. In classical law fructuary was "*in possessione*," cf. 41. 2. 12. pr. **5** 43. 17. 4; Vat. Fr. 90, 91; G. 4. 139. **6** 7. 1. 50. **7** Ulp. 24. 26. **8** 7. 1. 49, 50; 7. 4. 14; Elvers, *Servitutenlehre*, 542. **9** For accrual there must be a joint gift. A legacy of usufruct had many special rules, *post*, § CXXIII. **10** See 7. 2 *passim*; 7. 3. 1; 7. 4. 18; 33. 2. 13; 45. 3. 26; Vat. Fr. 75 sqq., and *post*, § CXXIII. **11** Ulp. 24. 26. **12** Arg. Cicero, *Top.* 3. 17. The text is however consistent with a right in the legatee to detain, *e.g.* the contents of a cellar of wine, though not to consume them. **13** Ulp. 24. 27. **14** Inst. 2. 4. 2; D. 7. 5 *passim*. **15** 7. 5. 3. In the first case it is a defence: in the second the *heres* must authorise the legatee to claim the debt or interest; *procuratio in rem suam*. It is only because these are in wills that they are thought of as *quasi-usufruct*. If I make a pact that I will not sue my debtor for interest or till his death, no one would call this a

XCVI. Originally usufruct was always by legacy, and this remained much the most usual mode, but, subject to some limitations, the methods for urban servitude were applicable. It could not be acquired by acquisition of the *praedium* to which it was attached, for it was not so attached. *Longi temporis praescriptio* was applicable to it under Justinian[1], and he is clearly regulating an existing institution. But we have no earlier evidence[2], and we do not know whether, like *praescriptio* for ownership, it required *bona fides* and *iusta causa*, or, like praedial servitudes, was free from these requirements[3]. There were also cases in which usufruct arose by law without express creation, *e.g.* the usufruct of the *paterfamilias*, in later law, in *bona adventitia*[4], the usufruct of the emancipating father under Justinian[5], and various cases in late law in connexion with second marriages[6].

It ended by *cessio in iure* to the owner[7], but not, though some lawyers disagreed, by attempted *cessio* to a third person[8]. In later law any voluntary release sufficed. It ended if the two interests came together in the same hands, here called *consolidatio*[9], not as in praedial servitudes, *confusio*. It ended by death or *capitis deminutio* of the holder, limited by Justinian to *maxima* or *media*[10], and by the expiry of time, where it was for a fixed period[11]. It was lost by non-use for the period of *usucapio*[12]. It was of course lost if the title of the owner who created it was invalidated in any way[13]. And, finally, it ended if the property was fundamentally altered[14]. On non-use and *capitis deminutio*, there is something to be said. It is sometimes said that for loss by non-use the owner must have been in possession, at least under Justinian, but the evidence is on the whole against this[15]. But non-use is not here quite a simple idea. If a third party had taken profit or done any act in relation to the thing, in the fructuary's name, this was use even though it was not authorised by him[16]. If the enjoyment of the right had been sold

quasi-usufruct, though the effect is the same. There is of course no question of *actio confessoria*, or care of *bonus paterfamilias*.

1 C. 7. 33. 12. 4. **2** The history is probably as in praedial servitudes. **3** *Ante*, § XCIV. Did *usucapio* apply to it in classical law? See Beseler, *Beiträge*, 3. 171, 4. 78. **4** C. Th. 8. 18. 1 = C. 6. 60. 1, see *post*, § XCIX. **5** Inst. 2. 9. 2; *post*, § XCIX. **6** *E.g.* C. 6. 61. 4. **7** P. 3. 6. 28 sqq. **8** G. 2. 30; Inst. 2. 4. 3; D. 2. 3. 3. 66. **9** P. 3. 6. 28; Vat. Fr. 83; D. 7. 2. 3. 2; h. t. 6. pr. (In 7. 4. 27 the word *confusa* is used.) The difference of terminology suggests that when it was framed, usufruct was not thought of as a servitude. **10** Vat. Fr. 61, 62; C. 3. 33. 16. 2. **11** 7. 4. 3; Vat. Fr. 52, by lapse of 100 years if to a corporate body, 7. 1. 56. **12** P. 3. 6. 30; under Justinian only by such lapse of time as would bar a claim to *dominium*; C. 3. 33. 16. 1. **13** 35. 1. 105. **14** P. 3. 6. 28 sqq. Where land was in usufruct and the *dominus* built a house on it, the usufruct ended, but he was liable to the fructuary, 7. 4. 5. 3; h. t. 10. **15** It is suggested by the term of two years, which hints at *usucapio libertatis*. But that notion does not seem to be applied: it is always non-use. See n. 12 and D. 7. 4. 25; C. 3. 34. 13; Inst. 2. 4. 3. But C. 3. 33. 16. 1 suggests the other view. **16** 7. 1. 12. 2 sqq.; 7. 4. 29.

for cash it was now impossible for it to be lost by non-use[1]. Destruction by *capitis deminutio*, especially *minima*, caused much inconvenience, and the lawyers found ways of evading it. One method was to give the usufruct with a provision for another gift to take effect if the first failed by *capitis deminutio*, and so on whenever it should happen[2]. Another was, since usufruct could be for a term, to give it "*in singulos annos*," *i.e.* a new one for each year, so that the *deminutio* would affect only the current year[3]. Traces of these safeguards appear in the Digest[4], but *capitis deminutio minima* no longer affected usufruct.

Usufruct could be acquired through a slave or a *filiusfamilias*: if *inter vivos*, there were in classical law no special rules, but if by legacy, though it was of course acquired by the *paterfamilias* and failed on his death, it failed also on the death, sale or manumission of the slave, death or *capitis minutio* of the *filius*[5]. This special rule is laid down only for *legatum per vindicationem*[6]: it would not cover *legatum per damnationem* or *fideicommissum*, as these were completed *inter vivos*. The rule was gone under Justinian, but he provided that a usufruct acquired through a *filius* who survived the father, should go to the son till his death[7]. These rules are applications of the principle of which there are many other traces, that, in gifts by will to a subordinate, his personality was primarily considered though the gift went to the *paterfamilias*[8].

Usus was essentially a fraction of usufruct. The rules as to modes of acquisition, destruction, security and remedies were the same, but the rights were less. It seems to have been of recent introduction in the time of Labeo[9]. It was looked at as usufruct without *fructus*. There could be no right of *fructus* without *usus*, so that, if *usus* was left to one and *fructus* to another, the latter shared the *usus* and had the *fructus*[10]. It was indivisible, so that it could not be created in undivided shares, or fail *pro parte*[11]. Its main rules express the principle that the right was to use, but not to take fruits, relaxed in various ways, starting from the proposition that there are things of which there is no use but by taking fruits. The usuary of a house might live in it, with his household and guests, but might not sell or let it, as this was in the nature of taking

1 7. 1. 12. 2. 2 Vat. Fr. 64. 3 Vat. Fr. 63. This led to very puzzling questions of accrual where there were joint fructuaries. *Post*, § CXXIII. 4 7. 4. 1. 3; h. t. 3. pr. (=Vat. Fr. 63); 33. 2. 23. 5 Vat. Fr. 57. 6 *Post*, § CXVII. 7 C. 3. 33. 17. At this time the *paterfamilias* had the usufruct in what the son acquired from outside, *post*, § XCIX. 8 31. 82. 2. In all legacy of usufruct, whether to a *paterfamilias* or subordinate, *dies cedit* only on entry of the *heres* (*post*, § CXX), so that if the actual donee is then dead the gift fails. 9 Its content was still matter of controversy. See 7. 8. 2; h. t. 4. 1. Q. Mucius is mentioned: he "*primus admisit*" a certain rule. 10 P. 3. 6. 24, 25; D. 7. 8. 14. 2. But see as to *fructus* without *usus*, Accarias, *Précis*, 1. 693. 11 7. 8. 19. It is difficult to reconcile the rule that *usus* cannot be created *pro parte indivisa* with that stated in the texts cited n. 10.

fruits, but from early times he might take paying guests, provided he did not himself vacate the house[1]. Of the produce of an estate he might sell nothing. At first he could take nothing, but this was gradually relaxed[2], and the rule of the Digest was that he could take produce for the needs of his household but no more[3]. *Usus* seems commonly to have been created by legacy[4].

The rights of usufructuary or usuary were not necessarily so wide as those stated: they might be limited by the instrument of creation[5]. If the right were very limited it might not be easy to say whether it was a personal servitude, extinguished by the death of the holder, or, if it was given to the owner of an adjoining *praedium*, a praedial servitude, extinguishable only *ope exceptionis* (*doli*)[6]. There is a group of texts all dealing with gifts by will which contemplate rights of this kind. Paul says there cannot be *usus* or usufruct of a praedial servitude, and adds that such a legacy will give an action to the legatee to compel the *heres* either to allow the enjoyment, which makes it a mere *ius in personam*, or to create the servitude, with security for surrender at death, making it a praedial servitude[7]. The first method is probably what is contemplated in another text of his, in which he says that where a man left the use of water to his brother, by name, this was personal and would not go to his heir[8]. This is probably the meaning of Papinian, who says that rights of pasture and watering were *prima facie* praedial, but if the beneficiary was named personally, they would not go to a *heres* or buyer[9]. If Paul is correct, Papinian cannot mean that it was *usus* of pasture or watering, nor is it easy to regard it as a very limited *usus* of the land. It was presumably a mere *ius in personam*. A text of Pomponius cites Proculus as saying that a building may be left in usufruct with a *servitus ne altius tollatur* imposed on it, for the benefit of another property in the *hereditas*[10]. Elvers offers much the same explanation of this[11], but the text makes it an actual servitude, and, apparently, over *res sua*[12]. Ulpian carries the matter further in a text which is self-contradictory, but is usually understood to mean that a *fideicommissum* may be made of a right to water, to one who has no *praedium dominans*, and that this will be a servitude[13], which must therefore be *usus* of a right of water. But the latter part of the text is supposed to be a gloss: if that is so, Ulpian makes it only a *ius in personam*[14].

1 7. 8. 2 sqq.; h. t. 8; 10. 3. 10. 1. 2 7. 8. 12. 2. 3 7. 8. 12; h. t. 15. We are told in an interpolated text (7. 8. 12. 1) that one could take the fruits of a *villa* of which he had *usus* for supply of his house in town. 4 All the instances are, but it need not be. 7. 8. 1. 5 7. 1. 15. 6. 6 *Ante*, § XCIII. 7 33. 2. 1. 8 8. 3. 37. 9 8. 3. 4. 10 7. 1. 19. pr. 11 *Servitutenlehre*, 704. 12 Roby, *de usufructu*, 144, is inclined to accept Elvers' view. The transaction is plain and rational: it is only the word *servitus* which makes difficulty. 13 34. 1. 14. 3. 14 In 43. 20. 1. 43, Ulpian

Habitatio was a modification of *usus* of a house or lodging, probably only temporary at first, and given with no intention to create a *ius in rem*, as where *habitatio* was given to a *libertus* by his patron's will. It dates from the republic: there was an old question whether it was for a year or for life[1]. It was gradually differentiated from *usus* and it may be that its recognition as a distinct servitude was due to Justinian. It could apparently be created only by will or codicil[2], and had more liberal rules, based on presumed intent of the testator. It was for life[3]. It was not lost by non-use or *capitis minutio*[4]. Justinian provided that the right might be let, but not sold or given away[5]. It is not clear how these rather unreasonable distinctions can be inferred, as the testator's intentions, from his saying *habitatio* rather than *usus*[6].

Operae servorum vel animalium had the same relation to *usus* of these as *habitatio* had to *usus* of a house. But there was a special reason why the right was not lost by *capitis deminutio*, or non-use[7]. An *opera* is a "daywork," and such a legacy can be regarded as a series of legacies of dayworks[8]. Thus these events would affect only the current day. The text tells us that it did not fail by death of legatee, as it was not usufruct, the later legacies being thus *ex die*. The whole interpretation is one of intent. The text adds[9] that it was destroyed by *usucapio* of the slave (or animal[10]).

XCVII. Of three rights usually treated as an appendix to the law of servitudes, *pignus* will be considered under the law of contract. It was logically a *ius in rem*, as it gave possessory rights, but the Romans did not so treat possession and the texts point out the importance of keeping distinct the notions of possession and property[11]. The others are *emphyteusis* and *superficies*. They resembled servitudes, as they were rights *in rem* over property of another, analogous to personal servitudes, but they differed in that while of unlimited duration, like praedial servitudes, they gave indefinite rights like personal servitudes. But the real reason why they were not treated as servitudes is probably that they belonged only to late law: they were not known to the civil law.

discusses a grant, by the Emperor, of right of water. It may be, he says, to a *praedium* or a person: in the latter case it dies with him. But such a grant is not a servitude.

1 7. 8. 10. 3. **2** Justinian says (Inst. 2. 5. 5): "*si habitatio legata sive aliquo alio modo constituta est*," which may refer to *fideicommissum* or the divisory actions. **3** Vat. Fr. 43. **4** 7. 8. 10. pr. **5** Inst. 2. 5. 5; D. 7. 8. 10. pr. **6** The classics were doubtful about these distinctions; Inst. 2. 5. 5; D. 7. 8. 10; C. 3. 33. 13. **7** 33. 2. 2. **8** *Ante*, § XXXII; *post*, § CLX. **9** A rule which probably applies, *mutatis mutandis*, to *habitatio* of a house. **10** As to the remedies in connexion with servitudes, by action and interdict, *post*, §§ CCXXVIII, CCXLVIII. **11** 41. 2. 12. 1, "*nihil commune habet proprietas cum possessione*"; 41. 2. 52. pr., "*nec possessio ac proprietas misceri debent*"; 43. 17. 1. 2, "*separata esse debet possessio a proprietate.*" Ihering (*Grund d. Besitzessch.* § VI) discusses these texts from the point of view of his theory of possession.

Emphyteusis originated in *ager vectigalis*, which, in the early Empire, meant land of the State or a city granted either in perpetuity or for a long term at a rent fixed in kind. It was thought of as *locatio*, but, before Hadrian, its long duration caused it to acquire the characteristics of a praetorian *ius in rem*, very like ownership, transferable by *traditio*, and protected by interdicts and *actiones fictitiae*. In the fourth century the name *emphyteusis* was applied to grants of imperial domains for long terms on like conditions. In the fifth century these institutions were fused and by its end the method was adopted by private owners. Zeno found it necessary to settle a dispute by deciding that it was not *locatio* or *emptio* but a contract *sui generis*[1]. Justinian settled its rules, largely by interpolations.

It could be created by any form of agreement (followed by entry), or by will. The holder (*emphyteuta*) might deal freely with the land provided it could be returned unimpaired if the interest ended. An existing *emphyteusis* could be left by will or sold, subject in Justinian's time to a right of pre-emption in the *dominus*, and a fine or premium of 2 per cent. on the price, if the option was not exercised[2]. It might end by agreement, lapse of term, destruction of the land, death of holder, without successors, and forfeiture, which might be for irretrievable damage, non-payment of rent for (usually) three years, or failure for the same period to pay the taxes[3].

Superficies originated in building leases by the State and cities. In the Empire it was not always *locatio*: it might arise by *emptio* or even *donatio mortis causa*. Before Hadrian it had come to be granted by private persons[4] and there were edictal remedies, *in rem*. Besides giving an interdict *de superficiebus*[5], the Edict provided that the praetor would give any action which might be necessary[6], but, at least in later law, such an action was not available unless the right was perpetual[7]. Elsewhere we hear of other special *actiones utiles*, *hypothecaria*, *confessoria*, *communi dividundo*[8]: in fact all the ordinary relations could arise in connexion with these interests and would give the appropriate remedy in *utilis* form. No surviving classical text refers to a case between private parties[9]. It seems to have undergone little change in later law[10].

XCVIII. The Institutes close the discussion of *dominium* and servitudes with a statement of cases in which the maxim "*dat qui habet*"

1 C. 4. 66. 1. 2 H. t. 3. 3 The chief legal sources on this topic are C. 4. 66; C. 5. 17. 13; C. 11. 63. 1; C. Th. 5. 15; D. 27. 9. 3. 4; Inst. 3. 24. 3. See Girard, *Manuel*, 392 sqq.; Costa, *Storia*, 281. 4 The provisions of the Edict shew this. 5 Lenel, *E.P.* 459; D. 43. 18. 6 43. 18. 1. pr. Lenel thinks this an *actio in factum*. 7 43. 18. 1. 3. 8 Lenel, *op. cit.* 460. 9 Vat. Fr. 61 is apparently a public case. 10 Doubts have, however, been thrown on the classicality of other than purely contractual effects. See, *e.g.*, Beseler, *Beiträge*, 1. 100; 2. 99; 3. 169.

did not hold, cases in which an owner could not alienate and cases in which a non-owner could. The chief cases in which an owner could not alienate were the following:

(*a*) A husband, though technically owner, could not alienate dotal land[1].

(*b*) *Pupilli*, women in *tutela*, as to *res mancipi*, *furiosi* and *prodigi interdicti*, could not alienate[2].

(*c*) Persons who were owners for the time being, but in such circumstances that their right might determine by operation of law (*e.g.* a *heres* where a *res* was the subject of a conditional legacy, or the owner of a *statuliber*), could alienate only subject to the rule that any right created by them would determine by the legal determination of their ownership[3]. But a mere *restitutio in integrum* would not end an ownership which had become vested in persons not parties to it[4].

(*d*) *Res litigiosae*. Property the subject of litigation was under special rules to be considered in connexion with the law of actions[5].

(*e*) It was not in general possible to convey property to a man on the terms that it should not be alienable. Such an arrangement would be a mere contract and would not nullify an alienation[6]. But in the Empire there was legislation on the matter, affecting *fideicommissa*, associated with a considerable development of family settlements by will, which will be considered later[7]. And Justinian made any prohibition on alienation in a will or by agreement operative to annul transfers[8].

The chief cases in which a non-owner could alienate were these:

(*a*) Guardians of various types had powers of alienation, differing in different cases, already considered[9]. In general this must be by *iure gentium* modes, but *curator furiosi* could alienate by *mancipatio*[10].

(*b*) *Filiifamilias* could alienate for the *paterfamilias* if authorised[11], but not by *cessio in iure*, as they could not take part in a *legis actio*[12].

(*c*) Slaves, duly authorised, could alienate for their owners, but not by *cessio in iure* or *adiudicatio*, as they could take no part in legal proceedings[13]. Similarly a slave in usufruct could alienate for his holder[14].

(*d*) A pledgee could alienate the *res* if the debt was not paid, when due, at first only where an express agreement to that effect had been made (but even where the debtor revoked his authority[15]), but later as an implied incident of the transaction[16]. It could not be by a civil law

1 *Ante*, § XL. 2 *Ante*, §§ LVI, LX, LXI, LXII. 3 *Ante*, §§ XXVII, LXVIII. 4 *Post*, § CCXLIV. 5 *Post*, § CCXLIV. 6 Exception (*ante*, § LXVIII) in case of slavery. 7 *Post*, §§ CXXV, CXXVII. 8 C. 4. 51. 7. 9 See n. 2. 10 See Mitteis, *R.Pr.* 1. 208, who considers also the case of other guardians. 11 See *e.g.* 6. 1. 41. 1. 12 Schol. Sin. XVIII (49); see G. 2. 96. 13 50. 17. 107. 14 7. 1. 25. 1.; 24. 1. 3. 8. Mitteis holds that a slave could not alienate by *mancipatio*. *Ante*, § LXXXV. 15 G. 2. 64. 16 20. 5. 4. Details and restrictions, *post*, § CLXVI.

method. The agreed power of sale appeared early[1], the implied power may be a transfer from *mancipatio cum fiducia*, in which the creditor was owner.

(*e*) Alienation by a third party agent. Possession was lost even if a third party handed over the thing. It is therefore held by many authorities that even in the republic, if the necessary intents existed, a third party could alienate for the owner[2]. This is logical, but it means less than might appear. If the owner intended to transfer ownership to *X* and told me to deliver it, the ownership would pass, but I was a mere *nuntius*. The difficult case would be where the authorisation was, *e.g.*, to sell to whom the agent liked, on what terms he liked, subject to liability for a careless bargain. It does not seem likely that if there had been such a possibility and practice as is supposed, Gaius would have spoken of alienation by *procurator* (*i.e.* general agent) as one of the few cases[3]. It is clear that in later classical law a man with general authority could alienate, and sale[4] and delivery within a mandate transferred ownership[5]. But there seems little evidence of an earlier development than in case of acquisition.

XCIX. The cases in which a man acquired through the act of another were these:

(*a*) Free persons not in his possession. The gradual development of the rule that possession could be acquired by the act of an *extraneus* has already been considered[6], and it seems clear that, in the later classical law, ownership would be acquired if the necessary intents were present. No classical texts mention such a rule, though they speak of possession[7]. But Diocletian speaks of it as an existing institution[8], and it is of course clear for later law[9]. Delivery at the buyer's request to a third person is not however acquisition through him. It does not appear how far, under a general authorisation to acquire, there would be acquisition through a *procurator*, by *occupatio* or the analogous *iure naturali* modes. Servitudes could not be acquired through a *procurator* in classical law, since the modes of acquisition were primarily civil. As to the informal methods, *quasi traditio* and *praescriptio* would presumably be possible, but even if pact and stipulation gave the right[10], it would not be available, for there was no agency in contract[11].

1 20. 1. 35. 2 See *e.g.* Mitteis, *R.Pr.* 1. 213. 3 G. 2. 64. 4 41. 1. 9. 4; Inst. 2. 1. 42. 5 17. 1. 5. 3. This is Paul, who in Sent. 2. 15. 3 appears as saying that, even though the mandate is not followed, the alienation is good. Though it is the earlier authority it can hardly be correct. As our MS. is only the *l. Romana Wisigothorum*, it is likely that this is a fourth or fifth century addition. If I send a man to sell articles in the street at a certain price with no power to give undertakings, and he so sells, the alienation is not, properly speaking, by an agent, any more than it would be if the thing were done, as it constantly now is, by a slot machine. 6 *Ante*, § LXXIII. 7 G. 2. 95; P. 5. 2. 2. 8 C. 7. 32. 8, "*utilitatis causa.*" 9 Inst. 2. 9. 5. 10 *Ante*, § XCIV. 11 Mitteis, *R.Pr.* 1. 213.

In acquisition by a representative, if the state of mind is material, the question would arise whether the agent's or the principal's must be considered. The texts are contradictory and are certainly to some extent interpolated. The most probable view in an uncertain matter seems to be that in classical law where the property passed directly, even though the mandate was general, only the state of mind of the principal (*scientia*, etc.) was material, but the compilers tend, incompletely, to make the state of mind of principal and agent material[1].

(*b*) Slaves possessed by their *domini*. What they acquired went to the owner, but a slave, as he was incapable of taking part in a judicial process, could not acquire by *cessio in iure* or *adiudicatio*[2]. He acquired for the bonitary, not for a merely quiritary owner[3]. If owned in common he acquired *pro rata* though it were in the affairs of one owner[4], but if expressly in the name of one owner this barred acquisition by any other[5]. This was not representation, for it operated *invito domino*[6].

(*c*) Slaves in usufruct, the rules being in general the same for persons *bona fide* possessed. They could acquire possession and ownership for the fructuary[7] subject to the limitation that it must be *ex operis* or *ex re fructuarii*. and that what the holder did not acquire went to the owner[8]. "*Ex operis*" covers only the case of a slave hiring out his services to a third person[9]. The hire was acquired by the fructuary, *ex operis*. "*Ex re*" is more important. It covers all property received in the affairs of the holder, buying with his money, borrowing for a purpose of his estate[10], etc. Inheritances and legacies given to the slave did not concern the fructuary. They were clearly not *ex operis*[11], and though some texts suggest that intent to benefit the holder made them *ex re*[12], this was not the view which prevailed[13]. Many texts say also that the fructuary

1 Schulz, *Z.S.S.* 33. 37; see also Debray, *N.R.H.* 1914, 396, reviewing Solazzi, *Errore e Rappresentanza.* 2 G. 2. 96. 3 G. 2. 88. 4 G. 3. 167. (As to effect of *nominatio* or *iussum*, see Buckland, *Slavery*, 392.) The matters will be adjusted in *communi dividundo*. 5 41. 1. 37. 3; Inst. 3. 28. 3. Gifts to slave by one owner vest in the other *pro parte* (45. 3. 7. 1) apart from *nominatio*. If one of common owners leaves the slave a legacy, it is wholly valid for the other (33. 5. 11; 35. 2. 49. pr. As to reason see Buckland, *loc. cit.*). The rule applies equally in classical law whether there is a manumission or not, for that is void, P. 3. 6. 4. As to effect under Justinian, *ante*, § XC. 6 41. 1. 32. 7 G. 2. 86; Vat. Fr. 51. 8 G. 2. 91, 92; Ulp. 19. 21; P. 5. 7. 3; Vat. Fr. 71 b; Inst. 2. 9. 4. 9 Salkowski, *Sklavenerwerb*, 118. It has nothing to do with results of labour on property of the holder. This belongs to holder but is not acquired through the slave. It does not cover earnings where the fructuary made the contract. 10 *E.g.* 41. 1. 23. 3; 2. 14. 19; 46. 4. 11. pr. 11 41. 1. 19; 29. 2. 45. pr. 12 7. 1. 21; 29. 2. 45. 4; 41. 1. 19 (interp.). 13 G. 2. 92; Inst. 2. 9. 4; C. Th. 4. 8. 6. 6; D. 6. 1. 20; 28. 5. 60. pr.; 41. 1. 10. 3, 4; h. t. 19; h. t. 54, etc. It is maintained by Herzen, *Mél. Girard*, 1. 523 sqq., that the fructuary could not acquire such things, but that in the case of *bona fide possessor* the expression "*ex re*" was differently construed, and that intent to benefit *b. f. p.* made it *ex re*. But his definition of "*ex re domini*" in this case would make all *hereditates* go to *b. f. p.*

could not acquire a *donatio*[1], but several say that intention to benefit the holder made it *ex re*[2].

These rules were much modified where there was *nominatio* or *iussum*. If there was *nominatio* of anyone, no other could acquire. If it was *ex re fructuarii*, but *nominatim domino*, the owner acquired: he could acquire anything[3]. In the converse case, *i.e.*, *ex re domini*, but *nominatim fructuario*, it was void: *nominatio* excluded the *dominus*, and it was not *ex re fructuarii*, or *ex operis*[4]. If it was *iussu domini*, *ex re fructuarii*, the *dominus* acquired[5]. If it was *iussu fructuarii ex re domini*, the *dominus* acquired, since it was not *ex re fructuarii* or *ex operis* and *iussum* had not the privative effect of *nominatio*[6].

(*d*) For persons in *manus* or bondage the rule was as in case of slaves[7].

(*e*) It is commonly held, though the evidence is defective, that guardians could acquire by *traditio* for their wards, from early times.

(*f*) In the case of the *filiusfamilias*[8] there is a long history. In the republic the position of a son in this matter was the same as that of a slave. He could have a *peculium*, like a slave, but when, under Augustus, a new kind of *peculium* appeared this old *peculium* was distinguished: *peculium profectitium* is a convenient, though apparently unauthorised, name. The new institution was the *peculium castrense*[9], a fund which consisted of what was given to the man for the purpose of military service or had been acquired by him as a result of it[10]. While the son lived, the father had no interest in it[11]. The son could alienate it freely even by will (though, till Hadrian, he must, for this, be still on service[12], in which case a military will sufficed[13]). For the protection of it he had the rights of action of a *paterfamilias*[14]. If he survived the father, he kept it. If he was emancipated or adopted, he took it with him[15]. If he made a will of it, it was an inheritance, but if he did not, and died in the family, it reverted to the father as *peculium*[16]. Under Justinian, even if the son died intestate, his issue and his brothers and sisters were preferred to the father[17], and this was real succession, the property being *bona adventicia* in their hands. If it went to the father, it is not quite clear whether he took it as *hereditas* or as *peculium*, a point of some practical importance[18].

1 41. 1. 10. 3, 4. **2** 41. 1. 19 (interp. passage); 7. 1. 22, 25; 41. 1. 49. The interpolations shew that this was the rule of later law. **3** 41. 1. 37. 5. **4** 45. 3. 1. 1; h. t. 22. **5** 7. 1. 25. 3. **6** 45. 3. 31. As to *condictio* for adjustment, 45. 3. 39. Further texts and details, Buckland, *Slavery*, 349, 363. Where the slave made a purchase the ownership might be in suspense till it was clear out of whose money it was paid for. See Buckland, *cit.* for this and analogous cases of suspense. **7** G. 2. 86, 90; Ulp. 19. 18. **8** As to peculiar rules in the case of *dos* of a *filiafamilias*, *ante*, § XL. **9** Its rules were a gradual development. Fitting, *Das peculium castrense*. **10** 49. 17. 11. **11** 14. 6. 2. **12** Inst. 2. 12. pr. **13** Inst. 2. 11. 3. **14** 49. 17. 4. **15** 49. 17. 12 **16** 49. 17. 2. **17** Inst. 2. 12. pr. **18** *Post*, § CXXXII.

The *peculium quasi castrense* was an extension of the same idea, beginning under Constantine[1] and applied to earnings in certain public services. It was extended from time to time to new posts and professions: it is not certain that the rules were in all the cases identical, as the legislation is only imperfectly known[2]. The two funds were clearly similar and the only known difference between these rules and those of *peculium castrense* is that in general no will could be made of *peculium quasi castrense*. In the privileged cases in which it was devisable the will must be in ordinary form[3]. Under Justinian it was freely devisable in this form[4].

Bona materna. Bona adventitia. Constantine provided that what a child inherited from its mother should belong to it, and not be merged in the father's estate, though he had a usufruct[5] of it. Successive Emperors extended this to other acquisitions[6], and under Justinian the rule was that all acquisitions of a child which were not from the father, or under the preceding heads, were to belong to this class of *bona adventitia*[7]. While the son was in the family the father had the usufruct with no power of alienation[8], and the son had no special capacities in regard to it as he had in *castrense* and *quasi castrense*[9]. He could make no will of it: on his death it went to his father, at first no doubt as *peculium*, but, later, in some cases at least, as *hereditas*[10]. Justinian provided that it should be an inheritance for his issue and brothers and sisters, and, failing these, for his paternal ancestors[11]. If he was emancipated (and probably if adopted) Constantine gave him two-thirds, the father keeping the rest. Justinian gave the father the usufruct of half, all going ultimately to the son[12].

1 C. 12. 30. 1 = C. Th. 6. 35. 15. Name not found till Justinian; see for full account Fitting, *op. cit.* 388 sqq. **2** See the principal texts, Accarias, *Précis*, 1. 772. **3** Inst. 2. 11. 6. Consuls, *praefecti legionum, praesides provinciarum* and some others. C. 3. 28. 37. 1 a. Under Justinian this, like the soldier's will, was not subject to the *querela inofficiosi testamenti*, h. t. 37. 1 f. **4** Inst. 2. 11. 6. The father was not liable *de peculio* on contracts connected with these funds, 49. 17. 18. 5. *Post*, § CLXXXIV. **5** C. 6. 60. 1 = C. Th. 8. 18. 1. **6** See C. Th. 8. 18 *passim*. **7** C. 6. 61. 6. In a few cases, the so-called *bona adventitia irregularia*, it was provided that the father had no rights of enjoyment. See Windscheid, *Lehrb.* § 517, nn. 17 sqq. **8** C. 6. 61. 4. pr.; h. t. 6. 2. **9** Nor the father any exemption from *actio de peculio*. **10** Inst. 2. 12. pr.; Nov. Theod. 14. 1. 8; C. 6. 61. 4; h. t. 7, which lays down elaborate rules as to what is to be done in case of inheritance and legacy where one of them wishes to take it and the other does not. **11** C. 6. 61. 6. 1 c. **12** C. 6. 61. 6. 3. See further, *post*, § CXXXIII.

CHAPTER VII

ACQUISITION *PER UNIVERSITATEM*. SUCCESSION BY WILL

C. Nature of Will, p. 281; Forms of Will, 282; Early forms, *ib.*; *Testamentum per aes et libram*, *ib.*; CI. The Praetorian Will, 284; Later forms, 285; Special cases, 286; CII. *Testamenti factio*, 287; Capacity of testation, *ib.*; Capacity to have a will, but not to make, 288; CIII. Capacity to be instituted, 289; *Ius capiendi*, 291; Capacity to witness, 292; CIV. *Institutio heredis*, 293; *ad certam rem*, 294; *dies*, 295; condition, *ib.*; shares, 297; CV. *Substitutio Vulgaris*, 298; *Subs. pupillaris*, 300; *Subs. quasi pupillaris*, 302; CVI. Classification of *heredes*, *ib.*; *necessarii*, *ib.*; *sui et necessarii*, 303; CVII. *Extranei*, 304; *Hereditas iacens*, *ib.*; CVIII. Capacity of *heres extraneus*, 307; *Institutio* of slaves, 308; CIX. Entry, 309; *Cretio*, 310; Informal entry, 311; CX. Legal position of *heres*, 312; *Bonorum separatio*, 314; *Iudicium familiae erciscundae*, 315; *Hereditatis petitio*, *ib.*; CXI. Lapsed shares, *ib.*; *Leges caducariae*, 316; *Transmissio hereditatis*, 317; CXII. *Exheredatio*, 318; Civil law rules, *ib.*; *postumi*, 319; CXIII. Praetorian rules, 321; *Collatio bonorum*, *ib.*; *exheredatio* in later law, 322; CXIV. Material restrictions on power of devise, 323; minor cases, *ib.*; *Querela inofficiosi testamenti*, 324; CXV. Effect of *Querela*, 327; System of the Novels, 328; *Querela inofficiosi donationis, dotis*, 329; CXVI. Causes of failure of validly made Will, *ib.*

C. The will of Roman Law had for its primary purpose in historical times[1] the appointment of a *heres* or *heredes*, a successor or successors in whom the rights and liabilities of the deceased should vest as a whole. No doubt it might and usually did contain a number of other matters, appointment of *tutores*, legacies, *fideicommissa*, manumissions, directions as to the application of particular funds, and so forth, but its essence was the appointment of a *heres*: *testamenta vim ex institutione heredis accipiunt, et ob id velut caput et fundamentum intelligitur totius testamenti heredis institutio*[2]. How ancient this principle is we need not here consider, but it represents the law for historical times. Two further propositions almost equally fundamental are (i) *semel heres, semper heres*: a person who has once assumed or been invested with the position of *heres* cannot divest himself of it, a rule which, *e.g.*, greatly affected the construction of an *institutio ad tempus*, and (ii) *nemo pro parte testatus*: a will must cover the whole estate: a man cannot deal with part of his property, leaving the rest to pass on intestacy. These principles were in full force at the beginning of the Empire though there has been controversy as to their actual antiquity[3]. It should be added that to all

1 For discussion of the original priority of succession by will or on intestacy, Scialoja, *Dir. Ereditario*, 45 sqq. For the view that the original conception on death was devolution of a chieftaincy of the corporate family, Maine, *Ancient Law*, 182 sqq.; Scialoja, *op. cit.* 25 sqq. 2 G. 2. 229. 3 For very divergent views see Lenel, *Essays in Legal History*, ed. Vinogradoff, 120 sqq. and Ehrlich, *Zeits. f. verg. Rechtsw.* 17, pp. 99 sqq. See also Appleton, *Le testament Romain*, p. 57, n. 5, and literature there cited.

these principles practical needs led to the admission at various times of real or apparent exceptions[1], but they are in no case such as to create any doubt whatever about the principles themselves[2].

FORMS OF WILL. Gaius[3] gives us a brief account of two ancient forms of will obsolete long before the beginning of the Empire, and therefore needing for present purposes no full discussion.

Testamentum in comitiis calatis[4]. The close connexion of the *familia* with the religious law made the transfer of the rights and duties to a successor a matter of public interest. Any variation of the established order of succession was therefore subject to the supervision of the public authority. The *comitia curiata*, the assembly of the people, *curiatim*, met twice a year for this purpose, summoned by a *lictor* and apparently presided over by a pontiff, being called when meeting in this way, for this and some other purposes affecting religion (*inauguratio* of the *rex* or a *flamen*, *adrogatio*, *detestatio sacrorum*), *comitia calata*[5]. The will was presumably approved by the pontiffs before its submission to the *comitia*. Whether the *comitia* actually voted on the proposed will or merely gave its solemn attestation is much disputed[6]. The will was obsolete very early: there is no trace of it as existing in historic times[7].

Testamentum in procinctu[8]. This was a will made before his comrades by a soldier, when a campaign was under way and no sitting of the *comitia* was imminent. Whether this was contemplated as an assembly, the *centuriata*, analogous to the *comitia* (*curiata*) *calata*, as is rather suggested by the language of Aulus Gellius, or was an informal declaration before his immediate comrades is uncertain, the former being the more probable view, as the auspices were necessary[9]. It seems to have lasted into the seventh century[10], but Cicero describes it as obsolete[11], though having coexisted with the mancipatory will[12].

Testamentum per aes et libram. Of these earlier forms of will, one could

1 *Post*, § CXV. The rule that *sui*, other than sons, omitted, can come in and claim by *ius accrescendi* (§ CXII) is sometimes regarded as an exception, Scialoja, *Diritto Ereditario*, 55. 2 As to relief against acceptance, *post*, § CIX; as to a will operating only on part of the estate, *post*, § CXV; as to a will in which all the *institutiones* are invalid but the other provisions remain, in the latest law, *post*, § CXV. 3 G. 2. 101. 4 G. *loc. cit.*; Aul. Gell. 15. 27. 1–5; Ulp. 20. 2. 5 Aul. Gell. *loc. cit.* 6 All sorts of views are held, that the *comitia* voted the will, that they merely witnessed it, that the XII Tables substituted witnessing for voting, that it did this and also destroyed the control of the pontiffs, and so forth. See Appleton, *Le Testament Romain*; Greiff, *De l'origine du testament Romain*, and for a very instructive discussion, Girard, *Manuel*, 813 sqq. 7 It has been doubted whether it dealt with the inheritance at all (Lenel, *Essays in Legal History*, ed. Vinogradoff, 120 sqq.). In reply see Girard, *loc. cit.*, and lit. there cited. See also Buckland, *Law Quarterly Review*, 32. 97 sqq. 8 G. 2. 101; Aul. Gell. 15. 27. 3. 9 Cicero, *de nat. deorum*, 2. 3. 9. 10 Vell. Paterc. 2. 5. 3. 11 Cicero, *loc. cit.* 12 Cicero, *de or.* 1. 53. 228.

be made only on two days in the year, and perhaps only by patricians, the other only in wartime. The inconvenience was met by the device of *mancipatio familiae*: the whole property was mancipated to a *familiae emptor* who, according to Gaius, was *in loco heredis*[1]. Whether this means that he took the property, subject to any instructions, not at first binding, or whether, as is sometimes held, he was never more than a sort of trustee, is much disputed[2]. At this stage the transaction did not closely resemble a will. It was no doubt oral, made only at the point of death, open, irrevocable, and perhaps taking effect at once. But its character gradually changed. It became usual to write down the instructions, thus securing secrecy; they became enforceable, and variable. The final stage is that which Gaius speaks of as existing in his day[3], though it was of course much older[4]. The *familiae emptor* was now a mere formality. The contents of the document were the true will: they were no longer directions to be carried out by the *familiae emptor*, the gifts took effect of their own force[5]. This was the important will of the classical law, the *testamentum per aes et libram*. Gaius tells us that[6] there were present the testator, the *familiae emptor*, the *libripens* and not less than five witnesses (as for an ordinary *mancipatio*). The actual document had been previously prepared. The *familiae emptor* took a formal *mancipatio* in words which may be thus translated: "Let your *familia* and *pecunia* be bought into my mandate and custody by this copper" ("and scale" according to some authorities, says Gaius) "in order that you may be able to make a will in accordance with the public statute." He struck the scale with the copper and handed it over by way of price. The testator holding the written will said: "As these provisions are written in these tablets so do I give and bequeath and make my will, and so do you Quirites bear me witness."

The *mancipatio*, as thus stated, differs from the ordinary form. It does not contain the usual first member declaring the right, though many editors, observing corruptions in the text, emend it so as to introduce such a clause[7]. Again, what is said to be bought or acquired is not the property but the guardianship of it, and the declaration of the purpose "in order that you may make your will" is quite unlike anything in the ordinary form. The words "*secundum legem publicam*" are obscure

1 G. 2. 103, "*heredis locum obtinebat.*" 2 See, for diverse views, Lenel, *Essays, cit.*, and Ehrlich, *cit.* 3 G. 2. 103 sqq. 4 It is the usual will in the time of Cicero, *de or.* (*cit.*). 5 It is impossible to fix dates for this evolution. The most diverse views are held. For Lambert, *Fonction du droit civil comparé*, 1. 496, the true mancipatory will dates from about 150 B.C. For Mommsen it seems to be much older (*Staatsr.* 3. 319, n. 2; *D.P.R.* 6. 1. 364, n. 1). See Girard, *Manuel*, 819 sqq.; Lenel, *Essays, cit.* 134; Grieff, *Origine du testament*, 101 sqq.; Appleton, *Le Testament Romain*, 103 sqq.; Cuq, *Recherches historiques sur le testament per aes et libram*; *N.R.H.* 10. 533 sqq. 6 G. 2. 104. 7 See Krueger, ad G. 2. 104 in *Coll. librorum jurisp. antei.*

but may mean that the power of testation was regarded as based on the XII Tables. The *nuncupatio* by the testator was not regarded as a part of the *mancipatio*[1]. This was a true will, not necessarily open, ambulatory, *i.e.* not operating in any way till the death, and capable if not of revocation, simply, of variation in any degree.

In practice it seems to have been almost always in writing, but there is no evidence that this ever became legally necessary, though it would seem that the various praetorian remedies were not in classical law available except where the will was written, a fact which would ensure the use of writing[2]. It has however been contended that if there was a writing in due form the actual *mancipatio* was no longer in use in the time of Gaius[3], and it is at least quite probable that in a somewhat later age, the parties were content not to go behind the formal document alleging the *mancipatio*: it is another thing to say that they were compelled by law to accept this[4].

Like other formal acts the will must be in Latin[5], till 439 when it was provided that it might be in Greek[6].

CI. The praetorian will. This is spoken of by Gaius as a *testamentum*[7], though hardly in strictness entitled to that name. The praetor, recognising that the formality of the mancipatory will was useless, provided by his edict that a will sealed by seven witnesses (*i.e.* having all the substantial safeguard of the mancipatory will) should be operative to entitle the *heres* under it to obtain *bonorum possessio*, if the testator died a *civis sui iuris*[8]. It did not make a *heres*, for, even though the testator used this form, what the beneficiary got was not *hereditas* but *bonorum possessio*. Moreover it was not till late in the classical law that this became *cum re*, *i.e.* effective against the *heres* entitled in the absence of a will[9]. And a will might do many things other than the appointment of a *heres*, which, so far as we know, this instrument could not do. There is no evidence that a *tutor* could be appointed by it, though one so appointed would probably be confirmed in his office by the praetor. There is no trace of manumission by it[10]. It operated under certain edicts which, so far as appears, dealt only with giving possession of property to persons who

1 Ulp. 20. 9. 2 In C. 6. 11. 2 (A.D. 242) we are told that *bonorum possessio* can be claimed under a *nuncupatio*. But this, even if genuine (see next page), is post-classical. 3 Collinet, *Ét. Hist. du Droit de Just.* 1. 257 sqq. But Ulpian a generation later treats the *mancipatio* as necessary (Fitting, *Alter und Folge*, 117; Ulp. 20. 9). On this point see the remarks, *ante*, pp. 238 sq. 4 Cf. the English law of Surrender in Copyhold. 5 Except for *miles*, *post*, § CXXVI. 6 C. 6. 23. 21. 6. 7 G. 2. 119, 147, and, according to Lenel, in the edict (*E.P.* 336). 8 G. 2. 147; Ulp. 23. 6; 28. 5, 6. The simplification is not great; only the formal acts are dispensed with. 9 *Post*, § CXXXIX; G. 2. 120. 10 It probably would not make the slave *tuitione praetoris liber* (*ante*, § XXVII). It is not clear that a testator would be able to despoil his *heres* and not himself without full form. Cf. 15. 1. 53; 33. 8. 8. 7. The Fr. Dos. which deals with the matter mentions no case

could shew gifts to them in a document authenticated by seven witnesses. It was not only in case of defect of form that the praetor's intervention was important. Where the consent of *tutor* to a woman's will had not been obtained *bonorum possessio* was given without it. *Bonorum possessio* could be obtained where a *suus omissus* died before the testator, where the will was *irritum* by *capitis deminutio* or non-entry, or *ruptum* by *agnatio* of a *postumus* or by the making of a valid second will which failed to take effect or was revoked with intent to revive the first[1], and other cases[2]. The circumstances in which this was *cum re* will be considered later[3]. It may be noted here however that the *bonorum possessor* must carry out the provisions of the will[4], and that if, being also entitled on intestacy he neglected the will, he would come within the provisions of the edict, "*si qui omissa causa testamenti*[5]." It will be observed that this *bonorum possessio*, at least so far as it was *cum re*, prevented the application of the *ll. caducariae*. But the *bonorum possessio* could not be claimed if the testator had not *testamenti factio*[6] or, it seems, if the words of the *institutio* were looser than those necessary for a true *heres*[7].

Later forms of will. In 413 two public forms were provided, one *apud acta*, *i.e.* entered on the rolls of a court, the other deposited in the State archives[8]. There was no need of further attestation. Soon after this there was obscure legislation authorising a civil will without *mancipatio familiae*, but with seven, sometimes five, witnesses[9]. An enactment of 439 definitely settled the law by introducing the tripartite will[10], so called as deriving its rules from three sources. It must be made in one operation, *uno contextu*[11], with seven witnesses, both civil law requirements[12]. The witnesses must seal, which was praetorian. They and

in a will. Such texts as 29. 4. 6. 10, 12, 17, 28 prove nothing for the purely praetorian will.

1 G. 2. 118 sqq.; 2. 147 sqq.; Inst. 2. 17. 6 sqq.; 3. 9. pr.; D. 28. 3. 12. pr.; 37. 11. 3; h. t. 11. 2; Ulp. 23. 6. **2** If testator lost and regained capacity before death, G. 2. 147. It could not be given under the will of a woman in *legitima tutela*, before Hadrian, Cic. *Top.* 4. 18. **3** *Post*, § CXXXIX. **4** 28. 3. 12. pr., legacies and *fideicommissa*. **5** 28. 3. 12. pr.; *post*, § CXXI. **6** G. 2. 147; Cicero, *Ad fam.* 7. 21; *Top.* 4. 18. **7** 37. 11. 6; *post*, § CIV. *B. p. secundum tabulas* exists in the time of Cicero (*Verr.* 2. 1. 45. 117). Its original aim seems to have been to give possession to the person entitled at civil law, its reforming effect being a later product, Girard, *Manuel*, 809, and the literature there cited. **8** C. 6. 23. 19. **9** C. Th. 4. 4. 3, 7; *Lex Rom. Burg.* 45. 1. There is an enactment of A.D. 242 which speaks of a will with seven witnesses as fully valid without *mancipatio familiae*, but it has in all probability been altered. C. 6. 11. 2. **10** C. 6. 23. 21. **11** The documents may be prepared before, but the witnesses must do their part on one day, *nullo actu interveniente*. **12** Seven becomes the normal number of witnesses for most transactions; *repudium* in divorce, 24. 2. 9; grants of *civitas* to soldiers, *ante* § XXXVI; Girard, *Textes*, 124; Bruns, 1. 275; in many cases even in *mancipatio* itself *ante*, § LXXXV. See for further illustrations, Lévy-Bruhl, *Le Témoignage instrumentaire*

the testator must "*subscribere*[1]," a new imperial requirement. This is the important will of later law and after its introduction we hear little of the praetorian will[2].

There were under Justinian less important forms of general application. The public wills survived, and there was an oral will with seven witnesses, mentioned in an enactment of 242 A.D., which however has probably been altered[3]. It existed in and before the time of Theodosius, and survived under Justinian, but was probably used only in cases of extreme urgency[4].

There were also a number of special forms of will. Thus in time of pestilence the witnesses need not be in the same room with a testator suffering from contagious disease[5]. In remote districts, where *cives* were rare, five, or even fewer, witnesses would suffice[6]. There were provisions by which blind men could dictate their wills before seven witnesses and a *tabularius* or, having had it written out before, have it read to them before the witnesses by a *tabularius* (an eighth witness being used if no *tabularius* was procurable), acknowledge it and have it duly sealed by the witnesses and the *tabularius*[7]. There were also special provisions for deaf mutes and other cases[8], and a great number of special rules for soldiers' wills[9].

There was a general holograph will the history of which is bound up with that of informal wills in favour of issue. Constantine provided in A.D. 321 that males could devise their estate among *liberi* by an unattested will, and in A.D. 327 that a mother's informal division among her issue should be valid[10]. In 439 Theodosius II provided that such an imperfect will was to be good only among *liberi*, which suggests that it had been used in a wider field[11]. Justinian recites these provisions, treating the extension to women as being due to Theodosius, Constantine's provision having been for arrangements *inter vivos*, which were to be binding on the death[12]. In 446 it was provided by Valentinian that a holograph will, *i.e.* written entirely by the testator, was to be valid for all purposes without witnesses[13]. Justinian adopted the enactment of Theodosius with some corrections in statement[14], but not that of

148 sqq. In our case the seven are the five witnesses, the *libripens* and the *familiae emptor* of the mancipatory will.

1 *Subscriptio* is the writing of the name by the seal, with (usually) the word "*subscripsi.*" If the will was in the testator's own hand and so stated, he need not *subscribere*. Justinian added, and afterwards removed, some other formalities, C. 6. 23. 29; Nov. 119. 9. 2 C. Th. 4. 4. 7. 2 (see also the *interpretatio* of C. Th. 4. 4. 3) is earlier than the tripartite will, but the praetorian will is mentioned in C. 6. 11. 2, which is probably altered by Justinian. 3 C. 6. 11. 2. 4 Recorded cases of oral mancipatory will are cases of urgency, Girard, *Manuel*, 823, n. 2. 5 C. 6. 23. 8. 6 C. 6. 23. 31, *ruri conditum*. 7 C. 6. 22. 8; P. 3. 4 a. 4. 8 C. 6. 22. 10. 9 *Post*, § CXXVI. 10 C. Th. 2. 24. 1, 2. 11 Nov. Theod. 16. 5. 12 Nov. 107. pr. 13 Nov. Val. 21. 2. 1. 14 C. 6. 23. 21. 3.

Valentinian. But, in a novel[1], he regulated the divisions among children, providing that the essential parts must be in the testator's writing and in full. Provision for others could be made, if declared before witnesses (number not stated), without other formality, and any arrangement *inter vivos* between father and children for division among them, subscribed by all parties, was valid[2].

CII. CAPACITY. *Testamenti factio.* We are told that "*testamenti factio publici iuris est*[13]," which seems to mean that the rules of wills, as to form, capacity and effect, were governed by law and not variable by the testator. It is clear that the will was contemplated as one of the greatest elements in the *commercium.* The first question is of capacity of testation (active *testamenti factio*). In general any *civis sui iuris* over puberty could make a will[4], but there were several exceptions, the chief being:

(*a*) Those declared *intestabiles* as a punishment[5].

(*b*) Deaf mutes from birth. This is Justinian's rule[6]. No deaf mute could have made a mancipatory will, and perhaps before Justinian no such person could make a will without imperial permission[7].

(*c*) Those *de statu suo incerti.* The instances given are those of a slave freed by will, or a *filius*, who was not aware that the *paterfamilias* was dead, but we are told that the rule applies to those who are *dubitantes vel errantes* as to their *status*[8]. The rule seems to rest on a rescript of Pius. The principle is usually held to be that, as testation is an act involving intent as to *patrimonium*, one who is not certain that he has a *patrimonium* cannot have this intent. Such a person, says Paul, "*certam legem testamento dicere non potest*[9]."

(*d*) In early law a woman could not make a will: she could not appear before the *comitia. Libertinae* could make mancipatory wills with consent of the patron as *tutor*[10], but *ingenuae*, except vestal virgins, could not, unless they had suffered *capitis deminutio* and so passed under a *tutor fiduciarius*[12]. The practical reason probably is that the *tutor* whose consent was needed might not be the relative who would suffer by the will. Though he were the nearest agnate at the time of testation, he might be dead and those in another line the nearest at her death. And he might be a testamentary *tutor.* The rule disappeared under Hadrian, who allowed women to devise, with consent of their *tutores*[13].

1 Nov. 107. 2 A will not satisfying the rules of form is *t. imperfectum*, Inst. 2. 17. 7. There is a great deal of legislation under J. as to details of form. 3 28. 1. 3. 4 G. 2. 113; Ulp. 20. 12; P. 3. 4 a. 2. Even though under punishment for crime, P. 3. 4 a. 9. 5 28. 1. 18. 1; 28. 1. 26, which however had when written probably no application to this matter. As to *intestabiles, ante*, § XXXIII. 6 C. 6. 22. 10. pr.; cf. D. 28. 1. 7; Inst. 2. 12. 3. 7 Ulp. 20. 13. 8 Ulp. 20. 11; D. 28. 1. 14 and 15. 9 28. 1. 14. 10 G. 3. 43. 11 Aul. Gell. 1. 12. 9. 12 G. 1. 115 a; not even *b. p. secundum tabulas* was possible. Cicero, *Top.* 4. 18. 13 G. 2. 112, 113, so that they could make wills at twelve while males must be fourteen, P. 3. 4 a. 1; Ulp. 20. 15; G. 2. 118. It

There are cases in which a man's will might be valid, though he was at the moment incapable of making one. A lunatic could not "test" except in a lucid interval, but a will made before he was insane was good[1]. The same rule applied to a *prodigus interdictus*. The mancipatory will was barred as being an act in the *commercium*, and the rule remained in later law, for obvious practical reasons[2]. A *captivus*, being a slave, could not make a will[3], but one previously made was good by *postliminium* if he returned, and, if he died in captivity, it was good as the result of a *l. Cornelia*, probably of the time of Sulla[4]. There seems to have been an express provision, but there is endless controversy as to what this *fictio legis Corneliae* exactly was[5]. Probably the *lex* did not declare the will good, but provided that his estate was to be dealt with as if he had never been captured, and on this the lawyers built the further rule that the case was to be handled as if he had died at capture.

Some persons not *cives sui iuris* could make wills. On principle it would seem that colonary Latins, having *commercium*, could do so, and this is confirmed by the way in which the exclusion of Junian Latins is stated[6], and, at least for some *coloniae*, by Cicero[7]. As each *colonia* had its separate statute, it is possible that in some the power did not exist, and it may be that the express exclusion of Junian Latins is to exclude them from the rights of peregrines in their locality, for these could of course make wills (though not Roman wills), if their local laws allowed this[8]. *Servi publici populi Romani* could make wills of half their *peculium*[9]. *Filiifamilias milites* could devise freely their *peculium castrense*, as, after Hadrian, could those who had been *milites*[10]: this case and that of *peculium quasi castrense* have already been considered[11].

The capacity of testation must have existed when the will was made[12], and capacity to have a will, at the death[13]. If, in the meantime, the power was lost and regained, the will was in general destroyed at civil law. The *furiosus* was no exception, for he had not lost the capacity to have a will, but the *captivus* was, and if a man condemned for crime was afterwards pardoned and completely restored, his will was revalidated[14], but not if, as was most usual, he was merely pardoned[15]. But where capacity was reacquired the praetor gave *bonorum possessio*. This was *sine re* in classical law[16].

may be that, since the process of emancipation involved sale and manumission from bondage this was treated as making them, *pro tanto*, *libertae*. Cuq, *Manuel*, 690.

1 P. 3. 4 a. 5, 11; Ulp. 20. 13; Inst. 2. 12. 1. **2** Ulp. 20. 13; Inst. 2. 12. 2; P. 3. 4 a. 12. **3** P. 3. 4 a. 8; Inst. 2. 12. 5; D. 49. 15. 12. 5. **4** Ulp. 23. 5; Inst. 2. 12. 5; D. 28. 1. 12. **5** For various opinions see Buckland, *Slavery*, 299, 308. **6** G. 2. 110; Ulp. 20. 14. **7** *Pro Caecina*, 35. 102. **8** Ulp. 20. 14. **9** Ulp. 20. 16. This does not seem to have extended to *servi publici* of municipalities. **10** G. 2. 109; Ulp. 20. 10; P. 3. 4 a. 3. **11** *Ante*, § XCIX. **12** 28. 1. 2, 4. **13** 28. 1. 6. 1, 8. 1, 18. **14** 28. 3. 6. 12. **15** C. 9. 49. 4. **16** G. 2. 147–149; Ulp. 23. 6; D. 28. 3. 12. pr.

CIII. Capacity to take under a will (passive *testamenti factio*). The class of those who can take is wider, since it covers children and so forth. In general anyone may be instituted who has *commercium*, but there are so many special cases that it is simpler to enumerate the chief classes who were at various times and for various reasons excluded.

(*a*) *Peregrini* and *dediticii*, not having *commercium*[1]. Unimportant under Justinian.

(*b*) The Gods, in general. Exceptions were made from time to time, but it is not certain why particular gods were favoured[2]. It is probable that, so far as Roman Law is concerned, none of these exceptions much preceded the Empire, for the formalities of *cretio* could hardly have been complied with. The practical question in whom the *hereditas* vested is answered by Mommsen[3] in favour of the State, by whose officers it was administered, though it was paid into the Temple treasury: the Temple priests were not a corporate body. Constantine allowed the institution of the Catholic Church[4], and a little later we get institutions of particular churches[5]. Under Justinian an *institutio* of Christ went to the church of the district[6].

(*c*) Women. By the *l. Voconia*, of 168 B.C., women could not be instituted *heredes* by a testator placed in the first class of the *census* by wealth[7]. The rule died out early in the Empire, probably because the *census* itself was out of use and the *lex* applied only to those actually *censi*[8].

(*d*) Natural children and their mother. Legislation, beginning with Constantine, prohibited, or restricted, the institution of such children, if not legitimated, or their mother, the rules differing according as there were or were not legitimate children. Justinian provided that in the former case the *naturales* and their mother might not take more than one-twelfth, or a *concubina* without children more than half this. In other cases they might take all[9], subject to the *querela inofficiosi testamenti*[10].

(*e*) *Incertae personae*. This expression would cover persons ambiguously described, but its important application is to those whose identity cannot be ascertained. The exclusion seems to have been, so far as the illustrations shew, of those of whose identity the testator could have formed no certain idea[11], persons so defined that anyone might chance

1 Ulp. 22. 2. 2 Ulp. 22. 6. Girard observes (*Manuel*, 834) that they are nearly all peregrine deities, and supposes this to mean merely that the national gods were provided for. Perhaps it is merely the recognition for Roman Law of an existing practice. 3 *Staatsr.* 2. 60; *D.P.R.* 3. 68. 4 C. 1. 2. 1. 5 C. 1. 2. 15. 6 C. 1. 2. 25. 7 G. 2. 274. 8 Perhaps not originally confined to *classici*. Cicero applies it to all on the *census* in any class, excluding only the poor and women testators. *Verr.* 2. 1. 36–44 (90–114). 9 C. 5. 27, passim; Nov. 89. 12 sqq. 10 *Post*, § CXIV. 11 Cf. 28. 1. 14.

to come within the terms, *e.g.* "whoever shall be first at my funeral." The fact that the individual person who might benefit was uncertain was no objection if he was of a class clearly defined, *e.g.* "whoever of my cognates shall be first at my funeral[1]." Justinian allowed *institutio* of *incertae personae* already conceived[2].

(*f*) *Postumi*. These are described by Gaius as *incertae personae*[3], but are sometimes treated as a distinct class[4], as in fact they are. There is nothing uncertain about "the next child of such and such parents." The real objection to them was that they were essentially persons not existing when the will was made, so that they could not then be *capaces*[5]. *Postumi sui* were dealt with by jurisprudence and legislation, to be considered later[6]. *Postumi extranei* could not be validly instituted before Justinian, though the praetor would give *bonorum possessio secundum tabulas* in such cases[7].

(*g*) Corporate bodies. These seem to be excluded as *incertae personae*[8], no distinction being drawn between the corporation and its members. Other reasons are assigned from the same point of view. Thus Ulpian, who says that *universi* cannot *cern* or *pro herede gerere*[9], must have been familiar with acts of administration in respect of property conceived of as binding on the whole body though everybody had not joined in it[10]. And legacies to *municipia* are found from the beginning of the Empire[11]. From whatever cause, *municipia* could not be instituted, apart from *privilegia*[12], in classical law, except that *scc.* allowed them to be instituted by their *liberti*[13]. In 469 it was provided that all "*civitates*" could be instituted, and this is the law of Justinian's time[14]. No doubt

1 G. 2. 238; Ulp. 22. 4; Inst. 2. 20. 25. 2 C. 6. 48. It seems to have been in the first Code, Inst. 2. 20. 27. 3 G. 2. 242. 4 G. 2. 241, 287 and the corresponding passages in the Institutes of Justinian. 5 Even if already conceived, the rule, perhaps rather late, that one conceived was treated as already born would not cover the case, for that rule applies only so far as it benefits him alone, and this would benefit the testator by validating his will, 1. 5. 7; 50. 16. 231. 6 *Post*, § CXII. 7 Inst. 3. 9. pr. In another text (Inst. 2. 20, 28) he says that they could be instituted in earlier law, and this is commonly explained as a loose reference to *bonorum possessio*. But the closing words of the two texts cited suggest an entirely different explanation. The *institutio* of a *postumus extraneus* though it could not take effect, as such, might nevertheless be so far valid as to revoke an earlier will, though, for the reason stated, it did not itself take effect. See *post*, § CVIII., and Buckland, *N.R.H.*, 1920, 560. 8 Ulp. 22. 5. 9 *Ib.* 10 Mitteis attributes it to a difficulty in admitting vote of the body for private law, though it was familiar in public (*Rom. Prr.* 1. 379). Ulpian's difficulty in *cretio* seems to be the practical one that "*universi*" could not do it—there would be some who could not and in any case it would not be practicable. But the difficulty goes really further. *Cretio* as an *actus legitimus* could not be done by representative and a corporation is incapable of acting except by representative. 11 See the reff. in Mitteis, *op. cit.* 377, n. 7; Ulp. 24. 28. 12 See Accarias, *Précis*, 1. 890. 13 Ulp. 22. 5; cf. D. 36. 1. 27. 14 C. 6. 24. 12. ? all *municipia*.

for similar reasons other corporate bodies could not be instituted, except under *privilegia* or by their *liberti*[1] (though they could receive legacies[2]). It does not appear that there was a general power till the time of Justinian[3]. The State, which does not differ in conception from a magnified *municipium*, could not be instituted[4] and, by the time *municipia* could be, the State as an owner of property was superseded by the Emperor, who was an individual man and could of course be instituted. As to the case of *piae causae*, the way in which these were treated in later law has already been considered[5].

There were other exclusions of less importance introduced at various times. Such are those of *intestabiles*[6], heretics, children of traitors, women remarrying within the year, etc.[7]

There were some persons who could be validly instituted, but were disqualified from taking unless they satisfied certain requirements before it was too late to claim. They had *testamenti factio* (passive), but not *ius capiendi*.

(*a*) Junian Latins. By an express provision of the *l. Iunia* they were barred from taking anything under an inheritance unless they had qualified by becoming *cives* before the time of claim had expired: in that case they could enter[8]. This case lasted till Justinian abolished the class[9].

(*b*) *Coelibes, orbi*, etc. The rules as to these are a creation of the *l. Iulia* and the *l. Papia Poppaea*, designed to encourage marriage and improve the birth-rate: it is hardly possible to distinguish, in this connexion, what was done by each statute. A *coelebs* was an unmarried person, male over 25, female over 20[10]. Such persons could claim nothing under a will[11]. *Orbi* were childless married persons. These could take only half of any gift to them[12]. *Pater solitarius* seems to mean a widower with children[13]: he was penalised to an extent which is unknown[14]. As in the case of Junian Latins, those concerned could avoid the prohibition and gain *ius capiendi* by satisfying the *leges* before it was too late to claim[15]. There were some exceptions. Ascendants and descendants

1 C. 6. 24. 8; Mitteis, *op. cit.* 402. 2 34. 5. 20. 3 C. 6. 48. 1. 10. 4 Such texts as Livy, *Epit.* Bk. 58; Aul. Gell. 7. 7. 6; Cicero, *de l. agr.* 2. 16. 41, prove nothing for Roman law. 5 *Ante*, § LXV. 6 Possibly, but see *ante*, § XXXIII. 7 C. 1. 5. 4. 2; C. 5. 9. 1; C. 9. 8. 5. 1, etc. 8 G. 2. 110; Ulp. 22. 3. 9 *Ante*, § XXXIV. 10 Ulp. 16. 1. Not applicable to men over 60 or women over 50 unless they were not satisfying the law when they reached that age. Ulp. 16. 3. 11 G. 2. 111. 12 G. 2. 286 a. The rest governed by *ll. caducariae*. A text of Ulpian rather suggests that women must satisfy the requirement of *ius liberorum* to avoid this penalty; Ulp. 16. 1 a. But see G. 2. 111, 286, and D. 50. 16. 148. 13 Ulp. 13. rubr. 14 *Vir et uxor inter se* are under special disadvantage. They can take from each other only one-tenth if they have no children,—relaxations in respect of children of an earlier marriage or deceased children of the present marriage, Ulp. 15, 16. 15 Ulp. 17. 1.

to three degrees were said to have *ius antiquum*, and, even though *caelibes* or *orbi*, could take anything left to them, and their share of any lapsed gift[1]. Relatives to six degrees could take anything expressly left to them, and were said to have *solidi capacitas*[2]. Some relatives by marriage were similarly exempted[3], as were women, who had been married, for a certain time after the marriage ended[4]. The destination of gifts which thus failed will be considered later[5]. There is controversy about details and, from a comparison of the statements by Gaius and Ulpian[6], it seems likely that the rules were changed from time to time. In any case the adoption of the Christian religion, which from very early times regarded celibacy as a chief virtue, made it impossible to retain these rules. It is clear from the devices framed for their evasion that they had always been unpopular, and, under Constantine all disabilities attaching to celibacy or *orbitas* were abolished, at any rate as far as express gifts were concerned[7].

Capacity to witness a will. Ulpian lays down the principle that anyone might be a witness with whom there was *testamenti factio*[8], but, as there were many exceptions not reducible to any one principle, it would be more exact to say that no one could be a witness unless he had *testamenti factio*. Gaius seems to limit the right to *cives*[9], but Latins, even Junian, could be witnesses[10]. Women were excluded[11]: they could not be instituted in early law[12] and apparently could not be witnesses to *mancipatio*. For this reason deaf or dumb people were excluded, the rule surviving, as often, the reason for it[13]. *Prodigi interdicti* were excluded, apparently as an inference from their incapacity to make a will[14]. Slaves, though there was *testamenti factio* with them, were excluded[15], but if at the time supposed by all parties to be qualified their attestation was good—*error communis facit ius*[16]. Lunatics and *impuberes* were excluded for obvious reasons[17] as also were *intestabiles*[18]. Apart from these general exclusions there were cases in which one was excluded because of his relation to the particular will. No one could witness a will who was in the same family group as the testator or the *familiae emptor*[19]. Gaius thinks it unwise, though not unlawful, to have as witness the *heres* or one in his family group[20]. Justinian definitely excludes

1 Ulp. 1. 21; 17. 2. **2** Vat. Fr. 216, 217. **3** *Ib.* 218, 219. **4** Ulp. 14. **5** *Post*, § CXI. **6** Ulp. 13–18; G. 2. 111, 144, 286 a; see also Vat. Fr. cit. **7** The expression *ius capiendi* occurs under Justinian (*e.g.* 49. 14. 2. 2) but it now meant only *testamenti factio*, C. 8. 58. 1. **8** Ulp. 20. 2; Inst. 2. 10. 6. **9** G. 2. 104. **10** There was *testamenti factio* with them. **11** Inst. 2. 10. 6. **12** They could not have appeared before the *comitia*. **13** Ulp. 20. 7; Inst. 2. 10. 6. **14** Inst. 2. 10. 6; D. 28. 1. 18. pr. **15** Inst. 2. 10. 6; D. 28. 1. 20. 7. **16** Inst. 2. 10. 7; C. 6. 23. 1. Probably of wider application. **17** Inst. 2. 10. 6; D. 28. 1. 20. pr. and 4, except *furiosus* in a lucid interval. **18** Inst. 2. 10. 6; D. 28. 1. 18. 1, 26. **19** G. 2. 105, 106; Inst. 2. 10. 9. Or be *libripens*, G. 2. 107; Ulp. 20. 3–5: *domestici testes adhibendi non sunt.* **20** G. 2. 108.

these[1]. But there was nothing to prevent legatees from witnessing[2], and all the witnesses might be of one family group[3].

It is clear that the exclusion of various witnesses in the classical law rested in general, not on considerations of prudence, but on formal grounds. The *familiae emptor* and his family were excluded because they could not have been witnesses in a *mancipatio*. The *heres*, the person most interested in setting up a false will, could be a witness, though Gaius shews that the prudential point was beginning to be made, by advising against this, but it was not till Justinian's time that the exclusion was law. Even then any other beneficiary was a good witness.

The witness must have been capable when the will was made: the fact that he afterwards became disqualified was immaterial[4]. The function of the witness must be noticed. With us he merely witnesses the signature: he need not know that the document is a will. In Rome he witnessed the transaction: he must know it was a will though he need not know its contents[5]. The surviving witnesses would be wanted again at the formal opening of the will, which was done before an official as soon as possible after the death. Each witness acknowledged his seal and said, "*in hoc testamento interfui*," shewing that he attested not merely the sealing but the transaction[6].

A will which broke the rules of *testamenti factio* or did not appoint a *heres* was said to be *iniustum* or *non iure factum*[7].

CIV. *Institutio heredis.* This was the principal, perhaps at one time the only, function of the will[8]; in classical law there could be no will without an effective *institutio heredis*[9]. The will must cover the whole property: *nemo pro parte testatus*[10]. We shall see that the law of the *querela* provided exceptions to this rule[11]. And where the praetor upset a will by giving *bonorum possessio contra tabulas*, the *institutiones* failed, but some other provisions remained good. This, however, is not a real exception, for the will was still valid at civil law[12].

In classical law the *institutio* must be at the beginning, not in the sense that otherwise it was void—the desire to avoid intestacy led to a different interpretation of this and other rules. The principle is explained by the exceptions. Nothing could come before the *institutio*

1 Inst. 2. 10. 10. **2** Inst. 2. 10. 11. **3** Ulp. 20. 6; Inst. 2. 10. 8. **4** 28. 1. 22. 1. **5** P. 3. 4 a. 13; D. 28. 1. 20. 9. Descends from *mancipatio*. The whole system is coloured by reminiscence of *mancipatio*. The principle is shewn by the exclusion even in late law of *surdi* and *muti*. Nov. Th. 16. 1 in laying down that witnesses need not know the content of the will is enacting nothing new. **6** Girard, *Textes*, 811, Bruns, 1. 317. P. 4. 6 describes the process. It is clear that it was designed to facilitate the collection of duties. **7** 29. 2. 22; 28. 3. 1. **8** G. 2. 116. **9** G. 2. 229, 248. But we shall see (*post*, § CXXVI) that some things ordinarily in a will could be done by codicil without a will. The rule remains in principle in later law. **10** Inst. 2. 14. 5. **11** *Post*, § CXV. **12** *Post*, § CXIII.

which could lessen the share taken by the *heres*, and any provision so placed was void. Thus disherisons might precede the *institutiones*[1], but not legacies or manumissions[2]. As to appointments of *tutores* the Proculians held that they might precede as they took nothing from the *heres*, the Sabinians taking the other view, though their reason is not recorded[3]. The whole rule seems a reminiscence of *mancipatio familiae* in which the transaction necessarily began with the *mancipatio* of the *familia* and, more remotely, of the comitial will. Under Justinian the place of the various provisions was immaterial[4].

In classical law imperative words were needed: "*T. heres esto*" or "*T. heredem esse iubeo*" or the like. Even "*T. heredem facio*" or "*heredem instituo*" was not enough and, *a fortiori*, precative forms such as "*T. heredem esse volo*" were excluded[5]. In 339 it was provided that any form sufficed if the intent was clear[6]. And, a century later, it was provided that a will might be made in Greek[7]. The *institutio* must make it clear who was to be *heres*, but even in classical law any description sufficient for identification sufficed[8].

As the *heres* was universal successor an *institutio ex certa re* was inadmissible. It was not void, but, in order to preserve the will, the limitation was ignored in the case of a sole *heres*[9]. But the case might be more complicated and the main rules appear to have been the following[10].

Where there were two *heredes* each instituted to specific things only, so expressed as to cover the whole, Ulpian, in the Digest, says that nominally they shared equally so that each was liable for half the debts, but the *iudex* in the action for division, *familiae erciscundae*, confined each *heres* to what was expressly given to him, so that, if debts were heavy, one might get nothing at all. This was to give them each a half subject to a *praelegatum* to each of what is expressly left to him, and we may suppose the same rule to apply where the things stated were not the whole[11].

Where one was instituted for a certain fraction of a *fundus* and the other for a fraction of the same or another *fundus*, the *fundus* and the shares were ignored and the case was dealt with on the lines of Ulpian's

1 28. 5. 1 (Trajan); 28. 3. 3. 2. **2** G. 2. 229, 230; Ulp. 1. 20; 24. 15, but the rule did not apply to *fideicommissa*, Ulp. 25. 8. **3** G. 2. 231. Perhaps because *tutela* originally conceived of as a right, of which *heres* is thus deprived. **4** Inst. 2. 20. 34; C. 6. 23. 24. **5** G. 2. 117; Ulp. 21. **6** C. 6. 23. 15. Even in (later) classical law defective words were sometimes treated as mere error of scribe, 28. 5. 1. **7** C. 6. 23. 21; as to *miles*, *post*, § CXXVI. **8** P. 3. 4 b. 3. **9** 28. 5. 1. 4. Exceptional rule of Severus, *post*, § CXVI. **10** The texts are from the Digest: it is uncertain how far they represent classical law. **11** 28. 5. 35. As these gifts are *praelegata*, they will however be subject, so the text seems to say, to the *l. Falcidia*. The text is corrupt and probably largely due to Justinian.

rule above stated[1]. Where some were appointed *ex certa re*, and others to shares in the *hereditas*, Justinian declares the former mere legatees[2]. The language indicates that the rule was not essentially new, though in classical law they may have taken shares, being under a *fideicommissum* to hand over to the others all but the specific things[3].

A *heres* might not be instituted from a certain day—the day was struck out[4]. It may have been regarded as too definite a breach of the continuity between deceased and *heres*. It could have served little purpose—the result would be a mere wanton postponement of other claims under the will[5]. For other reasons a *heres* could not be appointed till a certain day—the limit was struck out as an infringement of the rule: *semel heres semper heres*[6].

Dies incertus, *i.e.* a time certain to come but uncertain as to date (*certus an, incertus quando*) had in wills the effect of a condition. This does not involve a necessary breach of continuity. Thus the ordinary illustration taken, *cum T. moreretur*, might happen at once[7].

A *heres* might be appointed conditionally, *i.e.* subject to an event both future and uncertain[8]. A gift to *X* "if St Paul's is 400 feet high" was not conditional: it was either valid or not according to the facts. A gift "if *X* becomes Consul" was conditional and there could be no acceptance of it, *aditio*, till *X* was consul, which might never happen. Conditional institutions were subject to many restrictions. An impossible condition was bad and was struck out, the *institutio* being treated as absolute, on the principle of maintaining *institutiones*[9]. An impossible condition is one not in the nature of things, clearly not a very exact idea, but shifting from time to time with the advance of scientific knowledge: many of the modern achievements of science would have been set down as not in the nature of things by the Romans[10]. Impossibility to the person concerned was immaterial if the thing could conceivably happen. "If he becomes Consul" was not an impossible condition, though it might in the given case be most unlikely. Im-

1 28. 5. 9. 13; h. t. 10. 2 C. 6. 24. 13. 3 Cf. the rule in Inst. 2. 17. 3, *post*, § CXVI. 4 28. 5. 34. 5 Windscheid, *Lehrb.* § 555, n. 3. 6 28. 5. 89; h. t. 34; Inst. 2. 14. 9. 7 35. 1. 75; C. 6. 24. 9. *Dies certus quando incertus an*, *e.g.* if or when he shall reach the age of fourteen, is a condition, 28. 6. 33. pr. But see *post*, § CXIX. As to *institutio* "cum ipse morietur," see Brunetti, *Dies incertus*, 130–143, with special reference to C. 6. 24. 9. He holds that this was not treated as condition, but, exceptionally, allowed to be valid as *dies*. His point is that otherwise it must fail in the case of an *extraneus* as he could not possibly enter. 8 Inst. 2. 14. 9; D. 28. 7 passim. 9 28. 7. 1; Inst. 2. 14. 10; in contract a different rule is applied: there the impossible condition vitiates the transaction, *post*, § CXLVIII. As to history of word "*impossibilis*" and the conception of impossibility see Rabel, *Mél. Gérardin*, 473 sqq. 10 The common instance is "to touch the sky with one's finger." In one case it is said, after hesitation, that a condition "if he build a tomb within three days" must be treated as impossible, 28. 7. 6.

possibility is initial impossibility[1]. Supervening impossibility (*casus*) was on a different footing, and was treated in *institutiones* as failure of the condition[2]. Immoral or illegal conditions also were struck out[3]. This is a very strong illustration of the desire to save *institutiones*, for one might have said that a testator who imposed such a condition deserved that his will should fail[4].

To the rule, that impossibility to the person concerned did not cause the condition to be struck out, there was an important exception. If a *paterfamilias* instituted a son whom he wished to exclude, on a condition not technically impossible, but one that in practice the son could not satisfy, *e.g.* "if he is praetor at the earliest possible age," this was not an *omissio* (which would upset the will[5]) or an *exheredatio* (which, if unjust, gave the *querela*[6]), but the son would be excluded. The rule was modified in the sense that a son in *potestas* could be instituted conditionally only on a condition in his power. Other conditions were treated as omissions, and even one in his power was so treated if it outraged natural affection. If it was in his power and he neglected it, he was excluded. The question of fact, what is or is not in his power, gave difficulties in some cases[7].

Where an *institutio* was under a resolutive condition the latter was struck out, as conflicting with the rule: *semel heres semper heres* (*e.g.* "until he goes to Capua[8]"). This applied equally whether it was an event or some act to be done by him, but, at least under Justinian, a way was found by which the testator in this last case could achieve much the same result. Where he was instituted "if he does not do so and so" the *institutus* took the estate at once, giving security that he would return it if he did the act barred. He would not cease to be *heres*, and, no doubt, what he had to restore was the nett assets, as he was liable for the debts[9]. This was the *cautio Muciana*, probably due to Q. M. Scaevola of Cicero's time[10], but, as it seems, originally applicable only to legacies and extended to *institutiones* only under Justinian, or at any rate in post-

1 Difficulties where the *condicio* assumes a non-existing state of facts, 28. 5. 46; 40. 4. 16; 40. 7. 19; h. t. 28. pr., Buckland, *Slavery*, 490. 2 9. 2. 23. 2. As to some apparent exceptions (29. 7. 3; h. t. 4), *post*, p. 297. 3 28. 7. 14; P. 3. 4 b. 2. 4 It was suggested that such a thing was evidence of insanity which would upset the will. 28. 7. 27. 5 *Post*, § CXII. 6 *Post*, § CXIV. 7 28. 2. 28. pr.; 28. 5. 4. pr.; 28. 7. 15. Not applied to other *sui heredes*. Perhaps at one time no condition could be imposed on *institutio* of a son. It was permissible in classical law to impose any condition, such that it must be determined in his life, provided there was an *exheredatio* in the contrary event, 28. 2. 28. pr. The rule in the text (above) may have applied to all *postumi* who, in classical law, upset the will if not provided for. *Post*, § CXII. 8 28. 5. 89; Inst. 2. 14. 9; D. 28. 5. 34. 9 35. 1. 7. pr. 10 See Girard, *Man.* 839. It seems to serve little purpose in *institutiones*, for one conditionally instituted could get *bonorum possessio* in any case on giving security, 37. 11. 6. *Post*, § CXXXV. 37. 11. 6; 2. 8. 12; 28. 5. 23. pr. As to a possible difference in effect, Girard, *Manuel*, cited.

classical times[1]. There are difficulties as to the exact limitation of its application, *i.e.* to what kinds of negative conditions it was applied, but these will best be considered under legacy[2].

Some conditions vitiated the *institutio*. Such were *institutiones captatoriae*, institution of *A* on condition that he instituted the testator, or likely so to operate[3], and *conditiones perplexae*, self-contradictory conditions. The instance given is: "Let *T* be *heres* if *X* is and let *X* be *heres* if *T* is[4]." Technically this must be impossible, for neither can take till the other has, and they cannot accept together, for *aditio* cannot be made while a condition is outstanding[5]. Why it was so harshly treated is not clear[6].

The condition, "*heres esto, si volet*," is null; it adds nothing[7]. An *institutio* in the terms "*quos T. volet*" or "*si T. volet*" is void; an *institutio* may not be at the absolute discretion of a third party. But the result might be reached by making the *institutio* depend on a trifling act of a third party, e.g. *si T. capitolium ascenderit*, which was quite valid[8].

The condition must be satisfied before entry, but it was usually indifferent how or when. If however it was an act to be done, of such a nature that it could be done many times, it was inferred to be the testator's intent that it be done after the death[9]. But circumstances might release the *heres* from the obligation to satisfy the condition. Where a man was instituted under a condition of swearing to do something, the praetor remitted the condition, but, at least in Ulpian's time, refused the hereditary actions till the thing had been done[10], which is nearly the same as substituting the act for the oath[11]. So too if a condition required the co-operation of a third party and he would not act, the condition was regarded as satisfied[12]. And if the *heres* was prevented from satisfying it by one who had an interest in his not doing so, the condition was treated as satisfied[13]. But there was no relief where the act was to be done by some third party independently of him[14].

A man might institute as many *heredes* as he liked, and vary the

1 H. Krueger, *Mél. Girard*, 2. 1, shews that most of the texts applying it to *institutiones* were written of legacy (35. 1. 7. pr., 1; h. t. 18), and shew signs of interpolation. 28. 7. 4. 1 does not appear to have been so written, but it is not clear that it refers to *c. Muciana*. See 35. 1. 7. 1. 2 *Post*, § CXIX. 3 28. 5. 72. 4 28. 7. 16. 5 28. 7. 13, 14; 29. 2. 18; h. t. 21. 2; h. t. 32. 1; as to *b. p., post*, § CXXXV. 6 Bufnoir, *Conditions*, 31, says it is as not seriously meant, but there seems no ground for this. 7 28. 7. 12. 8 28. 5. 32; h. t. 69. 9 35. 1. 2; h. t. 11. 10 28. 7. 8. The remission operates *ipso iure* (h. 1. 8). It produces full civil law effect, Pernice, *Labeo*, 3. 1. 54. 11 Not identical: he is *heres* at once and can enter before doing the act. 12 28. 7. 3; h. t. 11; 35. 1. 14. Must be distinguished from the case of supervening impossibility, *ante*, p. 296, and from the case (n. 8) in which the condition is an act to be done independently by a third person. 13 50. 17. 161. It must have been intended to prevent. See 40. 7. 38. Prevention is essentially interference with the action of donee. 14 40. 7. 4. 7. See n. 8. As to evolution in the conception of conditional gifts, see Vassali, *Bull.* 27. 192.

shares as he would, subject to the claims of *sui heredes*. It was the usual practice, borrowed from the system of weights, to regard the whole as an *as*, of which one or more *unciae* (twelfths), called *uncia*, *sextans* (2 *unciae*), *quadrans* (3), *triens* (4), *quincunx* (5), *semis* (6), *septunx* (7), *bes* (8) (two-thirds[1]), *dodrans* (9), *dextans* (10), *deunx* (11), *as* (12)[2], were assigned to each *heres*. They might be subdivided, the smallest name recorded being *scriptula*, the twenty-fourth part of an *uncia*[3].

There was no rule requiring division into 12: the testator might make his testamentary *as* of as many *unciae* as he pleased. As he could not be partly testate, if he gave only nine shares there would be nine *unciae*. And if 12 were allotted and a *heres* having one *uncia* refused or was disqualified, there would be only 11 *unciae* covering the whole, or, what is the same thing, his *uncia* would accrue to the others[4].

If nothing was said of shares, the *heredes* took equally. If some had shares allotted and others had not, those to whom no share was named took all unallotted out of 12[5], but in this case if 12 or more were allotted, the *as* was doubled and assumed to have 24 *unciae* (*dupondius*), and they took all unallotted out of 24[6]. This gave an odd result, for if five were allotted to *A*, six to *B* and *C* was merely instituted, *C* took one *uncia*, but if six had been given to *A*, *C* would have taken 12, *i.e.* a half.

CV. *SUBSTITUTIO* (*subinstitutio*). One of the many safeguards against intestacy was the rule that a testator might institute others to take if the *institutio* did not take effect. This at least was the purpose of the most usual, though possibly not the oldest, form of *substitutio*, *substitutio vulgaris*. In its simplest form this would run "*T. heres esto, si heres non eris C. heres esto*[7]." Technically, *T.* was said to be *heres* in the first grade, and *C. heres* in the second[8]. It might be more complex, *e.g.* there might be a further *substitutio, tertius gradus*[9]. *Heredes* might be reciprocally substituted, the purpose being not to avoid intestacy, which this would not do, but to avoid the operation of the *ll. caducariae*[10]. The substitute might have a different share, or two might be substituted to one[11]. In general, as appears from the form, if the *institutus* took, the substitute

1 *Duae* (*partes*) *assis*, but see Varro, *L.L.* 5. 172. 2 The names for 9, 10 and 11 are derived from *dempto*(*a*) *quadrante, sextante, uncia.* 3 *Semuncia* ($\frac{1}{2}$), *binae sextulae* ($\frac{1}{3}$), *sicilicus* ($\frac{1}{4}$), *sextula* ($\frac{1}{6}$), *dimidia sextula* ($\frac{1}{12}$), *sescunx* ($1\frac{1}{2}$ *unciae* $=\frac{1}{8}$ *as*), *uncia duae sextulae* ($\frac{1}{8}$ *as*). Symbols for these fractions, see Volusius Maecianus (Huschke, *Jurisp. Anteiust.* (5), 411). 4 Inst. 2. 14. 5, 7. 5 Inst. 2. 14. 6. 6 *Ibid.* 7 Inst. 2. 15. pr. The *institutio* in the first grade would often be conditional. As to the security which *substitutus* could claim from such a *heres* who had obtained *bonorum possessio* (*post*, § CXXXV) see P. 5. 9. 1. 8 G. 2. 154; P. 3. 4 b. 4. 9 G. 2. 174; Ulp. 22. 33; D. 28. 5. 54; 28. 6. 1. 10 *Post*, § CXI. 11 Inst. 2. 15. 1, 2. There are difficult questions on the point whether if a *suus* is disinherited in an *institutio*, this must be repeated in the *substitutio*, 28. 2. 8. The text is corrupt. See *post*, § CXII.

was excluded. But there were exceptions. If a man instituted a slave thinking him a freeman, and substituted *X* to him, Tiberius decided in the case of his own slave, Parthenius, that the slave's owner and the substitute divided[1]. And where an insolvent instituted a *heres necessarius*, a slave, and substituted to him, the substitute was preferred if he was willing to take, for it was only where no other *heres* would take that an insolvent might free a slave by will to the detriment of his creditors[2]. If a common slave was instituted and one owner refused, that share would go to a substitute if there was one[3], so that the slave and he would both take. But another text denies this; there is some difficulty on the question whether the *institutio* of a common slave is one *institutio* or two[4].

The chief rules of *substitutio vulgaris* were these:

(i) The testator, in substituting, might vary shares, conditions and charges as he liked, but in general the substitute took the share with its burdens[5].

(ii) It was in effect a conditional *institutio*; thus the *hereditas* was *delata* to the substitute only when the condition was satisfied by failure of the *institutio*, so that the *substitutio* would fail if the *substitutus* was not then alive and *capax*[6].

(iii) As the *institutio* might be simple and the *substitutio* was necessarily conditional, and might have a further condition, the two gifts are distinct *institutiones*. The question arose whether an *institutus*, also substituted to another *heres*, could accept one share and refuse the other. It is clear that one instituted for two separate shares accepted both by accepting one[7]. The same rule applied here[8], though one text, plainly corrupt[9], seems to deny it. One who had entered under an *institutio* could not refuse a share to which he was substituted and the one entry sufficed. So also if he entered under the *substitutio* first[10].

(iv) *Substitutus substituti instituto substituitur*[11], *i.e.* where *B* was substituted to *A* and *C* to *B*, *C* was also substituted to *A* if *B* should fail, whether they were also *coheredes* or not. If *B* was dead, or refused before *A*'s share fell in, *C* would not get this, apart from the present rule. If the events happened in the other order the rule would presumably not be wanted[12].

1 Inst. 2. 15. 4; 28. 5. 41, where a theoretical justification is attempted. 2 Ulp. 1. 14. 3 28. 6. 48. pr. 4 29. 2. 65. Buckland, *Slavery*, 384. The law of *cretio imperfecta* provides further apparent exception, but it really illustrates a different principle, *post*, § CIX. 5 31. 61. 1. 6 29. 2. 69; 38. 16. 9. 7 29. 2. 80. 8 29. 2. 35, 76. 9 29. 2. 80. 1: "*si tamen delatae sint.*" 10 29. 2. 76. The difficulty which would result in this case if the *spatium deliberandi* of the *institutio* had expired is not discussed. 11 Inst. 2. 15. 3. The rule is here attributed to Severus and Caracalla, but elsewhere it is laid down by Julian, 28. 6. 27. It is based on presumed intent of the testator: hence a limitation mentioned and rejected by Papinian, h. t. 41. pr. 12 See Papinian, *loc. cit.*

(v) *Coheredes* might be substituted to each other[1]. The effect of this was that if one refused, his share passed to the other. This was much what would have happened in early law even if they were not reciprocally substituted. But the *substitutio* was material in several ways.

(*a*) The testator could vary the shares, conditions and charges.

(*b*) Substitution, being express *institutio*, was subject to all its rules. It follows that, as the *delatio* did not occur till the *institutio* had failed, the substitute must still be alive and *capax*, or he could not take it; *institutio* failed if *heres* died before *delatio*. Thus the benefit was personal. If, having entered for his own share he died before the other *institutio* failed, the *substitutio* failed and the share would be divided among the other *heredes*[2]. If there had been no *substitutio* his representatives would take the part of the lapsed share which would have come to him had he still been alive[3].

(*c*) The *ll. caducariae*, which excluded *coelibes*, etc., exempted relatives[4] so that they could take *in solidum*, but, except as to ascendants and descendants, this applied only to what was expressly given to them. Thus if *heredes* were reciprocally substituted, and one was a bachelor brother, he would take his share of a gift which fell in, as there was an express gift of it. But if there were no substitution, and a share fell in, the *ll. caducariae* excluded him from any share in it[5].

Substitutio pupillaris. This was of narrower application and different purpose. Where a man had a *suus heres*, born or unborn, he was allowed to provide in his will for the case in which this *suus* survived him, and so inherited, but died under puberty, and thus unable to make a will. The father might, in his will, substitute a person to take the inheritance of the child in that event[6]. This was in effect making a will for the child[7]. It is an ancient institution; at first it seems to have required that the child should have been instituted, and to have covered only what came from the father. But in the Empire it covered the child's whole estate, and it was allowed even though the child was disinherited[8]. It had a practical purpose, besides avoidance of the child's intestacy. If a father had disinherited a *suus* for misconduct, and an instituted son survived him, and died *impubes*, the property might, but for this provision, go to that disinherited *suus*. It was usually coupled with a *substitutio vulgaris* in favour of the same person, either or neither operating, according to the event[9]. The *substitutio vulgaris* was usually in the will, but the *pupillaris* was preferably put in a separate document, not to be

1 Inst. 2. 15. 3, etc. 2 28. 6. 23. 3 Subject to the *ll. caducariae*, *post*, § CXI. 4 *Ante*, § CIII; *post*, § CX. 5 Though *solidi capaces* they had not the *ius antiquum* or *praemia patrum*. See G. 2. 207; Ulp. 17. 2. 6 G. 2. 179; Ulp. 23. 7; Inst. 2. 16. Not possible in any other case, G. 2. 184. 7 Cicero, *de inv.* 2. 21. 62; G. 2. 180. 8 Cicero, *loc. cit.*; G. 2. 182; Ulp. 23. 8; Inst. 2. 16. 4. 9 See Inst. 2. 16. pr.; G. 2. 179.

opened unless the child died under puberty, to avoid the risk that, for what might be many years, someone would have an interest in making away with the child[1]. But it was so usual to make both institutions in favour of the same person that, from the time of M. Aurelius onwards, one kind of *substitutio* implied the other unless the contrary appeared[2].

The person so substituted might also be an *institutus* in the father's will. Hence the question arose whether, as the *substitutio* might cover property not in the father's *hereditas*, the case was to be treated as two wills or one, *i.e.* whether one who had accepted the *institutio*, was bound to accept the *substitutio* as no more than a further share, which he could not refuse, or whether it was a distinct will under which he might refuse if he liked.

The view which prevailed, a survival on this point of the original notion, was that it was one will, so that having accepted the *institutio* he could not refuse the *substitutio*[3]. Ulpian went so far as to say that a slave made *heres necessarius* of the father and substituted to the *impubes* was *heres necessarius* of the latter also[4]. The older lawyers held indeed that even if the *institutus*, also *substitutus*, died before the pupil, but after accepting the *institutio*, his representatives took under the *substitutio*[5], but Ulpian laid down the rule that it was a distinct *institutio*, in so far that it failed if he was not alive when the *impubes* died[6]. There were other difficulties of the same kind resulting from the notion that it was one will and two *hereditates*. The language of Justinian shews the confusion[7]. Finally he decides that acceptance or repudiation as to one binds as to the other[8].

The chief rules of *substitutio pupillaris* were these:

(i) Its validity depended on that of the father's will. If that totally failed the *substitutio* failed[9]. But if any validity was left to any of the *institutiones*, this saved the pupillary substitution, *e.g.* if the will was only partially upset by the *querela*[10], or was upset by *bonorum possessio contra tabulas*, which left it valid at civil law[11]. An inference drawn from its dependence was that, if in a separate document, it must be made after the will[12].

(ii) It must be in favour of a *certa persona*, except that it might be

1 G. 2. 181; Inst. 2. 16. 3. Safer still to put both in the separate document. 2 28. 6. 4. pr. The case of Curius seems to have raised the question: it is frequently discussed by Cicero and others. For the texts, Meyer, *Orat. Rom Fragg.* 304, 318. 3 29. 2. 59; 28. 6. 10. 3. 4 28. 6. 2. 4 in f.; h. t. 10. 1. 5 29. 2. 59. 6 28. 6. 8. 1. There was the same illogicality in *s. vulgaris*. No new entry was needed for the *substitutio*, for it was no more than another share. But if the *substitutus* was dead when the *substitutio* was *delata* his representatives had no claim, 28. 6. 23. 7 Inst. 2. 16. 2. 8 C. 6. 30. 20. 9 Ulp. 23. 9; D. 28. 6. 1. 3; h. t. 2. 1. 10 28. 6. 31. pr. 11 28. 6. 34. 2. Other cases, h. t. 2. 1, 2. 3, 38. 3. This last passage is corrupt. 12 28. 6. 16. 1.

"whoever shall be my *heres*," which was understood to mean *heres* under the will, entering and surviving the *impubes*[1].

(iii) It might be to a disinherited *suus*, but not to an *emancipatus*. Thus it failed if the child was emancipated or given in adoption, or predeceased the testator[2].

(iv) It could not last beyond puberty, but it might be for less, and different substitutes might be appointed according to the age at which the child died[3].

(v) It might be under condition, like any other *institutio*[4].

(vi) If the substitute, knowing his position, neglected for a year to get a *tutor* appointed, the *substitutio* failed, at least in later law[5].

Substitutio exemplaris or *quasi pupillaris*. This is an extension of the foregoing, for the case of insane descendants, not necessarily *sui* or *impuberes*. The Emperors allowed testators, on petition, to substitute *heredes* for descendants incapable of testation from insanity or other defect. If the *incapax* died, still afflicted, the substitute took, but, if he recovered, the *substitutio* was void and did not revive on relapse[6]. Justinian, leaving other cases unaffected, allowed it without special petition in the case of the insane. Any ascendant might appoint such a substitute for anything to which he instituted the defective. The substitute must be a *certa persona*, a sane descendant of the *furiosus*, if any, if none some other sane issue of the testator. Failing these, anyone. If several were so appointed it seems that each substitute would take what came from his appointor, but the *substitutio* does not appear to have affected what came from none of them. It is laid down as in earlier practice that the defect must be *perpetuum*, and that the *substitutio* is void altogether on recovery[7].

CVI. CLASSIFICATION OF *HEREDES*. These are in three classes[8]:

Necessarii heredes. These are slaves of the testator freed and instituted by his will, so called because they are *heredes* with no power of refusal[9]. The name applied to all slaves so freed and instituted, but its most important application was to the case of an insolvent. Such a man might name a slave as one of his *heredes*, so that, if the others refused, the slave would be *heres*, and the disgrace of insolvency would

1 Inst. 2. 16. 7. 2 28. 6. 41. 2. So in strictness if he was adrogated after the death of the father, though here there would be the Antonine security for restoration to the substitute, as in all *adrogatio* of an *impubes*, *ante*, § XLV, and the *substitutus* had *actiones utiles*, 28. 6. 40. 3 28. 6. 14; h. t. 38. 1. 2. 4 28. 6. 8. 5 C. 6. 58. 10, extracted from Nov. Theod. 11 (A.D. 439). 6 28. 6. 43. 7 Inst. 2. 16. 1; C. 6. 26. 9. 8 G. 2. 152 sqq.; Ulp. 22. 24, 25. 9 G. 2. 153; Ulp. 22. 24; Inst. 2. 19. 1. Those *in mancipio* were also *necessarii* (G. 2. 160). One of whom testator had only bonitary ownership could not be so utilised; he could not be *heres* as he would be only a Latin. Ulp. 22. 8. Where a testator instituted a *servus alienus* with a gift of liberty and afterwards acquired the slave the two gifts were void, liberty to a *servus alienus* being a nullity, 28. 5. 50. pr.

fall on him and not on the deceased[1]. The slave had indeed a certain protection. The edict provided that he could apply for *bonorum separatio*, so that anything acquired by him, either before or after the sale of the estate by the creditors, would not be liable to the creditors[2], who thus took no more than if there had been no *heres*. And as the creditors suffered to the extent of his value, no more than one could be so freed; only the first named was free. The rules under the *l. Aelia Sentia* did not apply in this case[3], but if the slave was incapable of freedom under any other rule he could not be so utilised[4]. It must be a voluntary manumission. If, *e.g.*, the *dominus* held a slave under a *fideicommissum* to free him, the slave was not *necessarius* and could be free without taking the inheritance[5].

Sui et necessarii heredes. These were those in the *potestas* of the deceased who became *sui iuris* at his death, and *postumi* who would have been in that position if born soon enough[6]. The name *sui* is explained to mean that they were, in a sense, *heredes* to themselves, and they were *necessarii* as being *heredes* without any question of refusal[7]. But though this was the civil law, it was unfair that they should be disgraced by their father's insolvency, and the Edict allowed them the *ius abstinendi*, if they stood aloof, did not intermeddle, and shewed that they did not mean to be *heredes*[8]. In that case the *bonorum venditio* would proceed in the name of the deceased, and though the will was technically valid the praetor refused any action against the *suus*[9]. Pupillary substitutions were good[10], as were manumissions[11], and, if the estate proved solvent, presumably legacies must be paid. Any surplus belonged to the *heres* and not to the creditors[12]. In classical law the *suus* could alter his mind and take the *hereditas* at any time before the goods were actually sold, but Justinian limited this to three years,

1 Inst. 2. 19. 1. **2** 42. 6. 1. 18; G. 2. 155. As to another case of *bonorum separatio, post*, § cx. **3** G. 1. 21; Ulp. 1. 14. **4** 28. 5. 84. pr. If alienated or freed, *post testamentum factum*, he is not *necessarius*, but acquires for his new master or himself. Ulp. 22. 11, 12; G. 2. 188; Inst. 2. 14. 1. **5** 28. 5. 3. 3. **6** G. 2. 156 sqq., 183; Inst. 2. 19. 2. Ulp. 22. 14 and G. 1. 159 include a *nurus in manu filii*, but she will be a *sua* only if the son dies *vivo patre*. **7** 28. 2. 11; 38. 16. 14; G. *locc. citt.*; Inst. 2. 19. 2. It is objected (Strahan Davidson, *Problems in Rom. Crim. Law*, 1. 86 sqq.) that this idea of *condominium* cannot be the ancient one. The absolute *dominium* of the *paterf.* over his family is inconsistent with *condominium* of these in the family property. He adopts the suggestion that it is a late piece of idealism. But it is implied in the language of the XII Tables (5. 4) and in the ancient inalienability of the *heredium*. See Cuq, *Inst. Jurid.* 1. 287, n. 3. **8** 29. 2. 71. 9; G. 2. 158; Inst. 2. 19. 2. G. gives *ius abstinendi* also to one *in mancipio*, though he is not a *suus* but merely a *necessarius* (G. 2. 160). The right being lost if the *heres* intermeddles (G. 2. 163), it was provided that one who did acts of piety or urgent necessity might guard himself by declaring that he did not do them as *heres*. 29. 2. 20. pr. **9** 29. 2. 57. pr. **10** 29. 2. 42. pr. **11** 40. 4. 32, if not in fraud of creditors. **12** 36. 1. 69. 2.

even though the estate had not yet been realised[1]. If the attitude of the *heres* was obscure, a creditor could sue him, when he would have to take one position or the other. In the later classical law the *beneficium deliberandi* seems to have been extended to him, *i.e.* he could, like an *extraneus*, apply to have a time fixed within which to make up his mind[2].

CVII. *Extranei heredes.* All other *heredes* could refuse. Some time would elapse before they decided, and in that time the *hereditas* was said to be *iacens*[3], and to be offered to them (*delata*). Rules had to be evolved to deal with the difficulties which resulted from the fact that in the meantime the goods belonged to none, and yet must be protected, and the business must be carried on. The immunity with which they could be stolen or damaged would naturally strike the imagination sooner than mere commercial inconvenience, and was provided against in many ways. The remedy found was usually independent of any notion of personality or ownership in the *hereditas* itself. There could be no theft of *res hereditariae*, but a special machinery was invented, the *crimen expilatae hereditatis*[4]. On the other hand for damage to the *hereditas* the *heres* was allowed to proceed by the Aquilian action, on the ground, not elsewhere supported, that the word "owner" does not necessarily mean owner at the time of the wrong[5]. There was a special machinery for dealing with freed slaves who pillaged the *hereditas* before their liberty took effect[6]. These various proceedings shew no coherence among themselves, and express an evolution which had not yet reached the point of vesting rights in the *hereditas*. One case is striking. Under the interdict *vi aut clam*, the question whether the *heres* could proceed in respect of acts done before acceptance is discussed in a long text[7]. Early jurists are cited, and the rule arrived at is that he could. The reasons assigned are independent of the personification of the *hereditas*; it was admitted that *hereditas* could not be owner. Then comes the remark that besides all this, there is the fact that the *hereditas* could be considered as the owner, no doubt an addition.

The conception of the *hereditas iacens* thus reached was of great importance in the private law. It was an incomplete personification of the *hereditas*, arising only in cases in which there was no *heres necessarius*, and thus there would be an interval of time between the death and the

1 28. 8. 8; C. 6. 31. 6. 2 28. 8. 8. One not within either definition may be a *necessarius*, *i.e.* a grandchild instituted by a grandfather who disinherited the father. He cannot refuse, but he is not a *suus*, as he would have no ground of complaint if omitted (28. 3. 6. pr.) and he is not a slave. The cause of the defective terminology is no doubt that the idea of disherison is not primitive, but is superimposed on the existing classification. In classical law such an institution would simply benefit the father, but probably under Justinian the property would be *bona adventitia*, *ante*, § XCIX. 3 43. 24. 13. 5. 4 47. 19; C. 9. 32. 5 9. 2. 43. 6 47. 4. 1. pr. Other illustrations, Pernice, *Labeo*, 1. 360 sqq. 7 43. 24. 13. 5.

entry of the *heres*[1]. During this interval the *hereditas* was offered (*defero*) to the person entitled, *hereditatis delatio*. If he decided to accept, his acceptance was *aditio*, and, as we shall see, it was sometimes declared in a formal manner, called *cretio*[2].

This quasipersonification gave rise to interesting questions. The jurists did not go so far as to call the *hereditas* "*persona ficta*"; that expression is mediaeval. They said that the *hereditas* "*personae vicem sustinet*" or the like. The compilers of the Digest were not very particular on this point, and in fact the modern technical meaning of *persona* was developing in their age. There are at least two texts in which the *hereditas* is spoken of as *dominus* of *res hereditariae*[3]. These texts shew clear signs of alteration, and, even so, there is none that goes the length of calling the *hereditas* a person. Justinian in the Institutes makes it clear that it is not[4].

The *hereditas* represented a *persona*, but whose? On this point there was disagreement among the classical lawyers. It is laid down by some jurists, not exclusively representing either school, that it represented the person of the future *heres*, and thus that the entry of the *heres* was retrospective so as to date from the opening of the succession. The view which prevailed, however, was that the *hereditas* represented the *persona* of the deceased. But though this view is dominant in the Digest[5], there are texts which express the opposite view. Thus, on the question whether a *servus hereditarius* could stipulate in the name of the future *heres*, both opinions are several times expressed[6], and it is now generally held that for most purposes the later jurists accepted the view that entry was retrospective[7], on grounds of convenience, however difficult it might be to reconcile this with the view, also dominant, that the *hereditas* represented the person of the deceased.

But the *hereditas* did not represent the *persona* of the deceased for all purposes. The Institutes express a limitation in the words: *in plerisque personam defuncti sustinet*[8]. This might merely mean that the *hereditas* did not take up the political, social and family rights of the dead man, but the restriction is much more significant. Its practical application was mainly in limitations on the activity of *servi hereditarii*, who were the only people capable of acting on behalf of the *hereditas* (and were so

1 Where a *suus* is yet unborn, or a *necessarius* is instituted conditionally, the position is much the same, and no doubt the rules were the same, but no text applies the theory of *hereditas iacens* to this case. We have little discussion of the questions which must have arisen, but on the texts *hereditas iacens* and *heres extraneus* are inseparable ideas. See, *e.g.*, 43. 24. 13. 5. 2 See G. 2. 162 sqq., and *post*, § CIX. 3 9. 2. 13. 2; 28. 5. 31. 1. 4 Inst. 3. 17. pr. As to the general conception of personality in Roman Law, see *ante*, § LXIII. 5 41. 1. 33. 2, 34. 6 2. 14. 27. 10; 45. 3. 16; h. t. 18. 2; h. t. 28. 4; h. t. 35. 7 46. 2. 24; 50. 17. 138. 8 Inst. 3. 17. pr.

capable only through the principle we are considering), since ordinary mandates were ended by death[1]. These limitations all express the fact that the representation was not complete, but they do not all turn on one principle; there is usually a good reason for them, apart from any theoretical one, a reason which is no doubt the real cause of the existence of the limitation. A *servus hereditarius* could not acquire, for the *hereditas* to which he belonged, another to which he had been instituted, as there could be no authorisation[2]. If he was allowed to accept without authorisation the *heres* to whom he would ultimately go might find himself saddled with a *hereditas damnosa*[3]. The slave could not stipulate for a usufruct for the *hereditas*; there was in fact no life to which it could attach[4]. He could not stipulate in the name of his late master, there being no such person[5], or as most jurists thought, but not all, in that of the future *heres*, who was, as yet, an *extranea persona*[6]. But he could stipulate in the name of himself or a fellow slave, or in no name at all[7]. On the other hand he could be examined as a witness in litigation affecting the *hereditas*, though a slave could not ordinarily be heard where his master was concerned; the *hereditas* was not his master, it only represented him[8]. In all these matters there was no strict adherence to a theory. The rules were based on considerations of convenience; logical justification is, at least for later law, little more than excuse.

However far we might wish to go, in endowing a *hereditas* with the attributes of personality, there were inevitable limits. It could do nothing involving a conscious act. It could not commit delict or crime, or be privy to it. It could not authorise a contract, appoint an *institor*, or grant a *peculium*. In strictness an *institor* would cease to serve and a *peculium* to exist, but in practice this was not so. It is clear that *peculia* continued, and that a contract with *institor*, even by one who knew of his principal's death, bound the *heres*[9]. The continuance of *peculium* is important in the story of the changes of the law as to acquisition of *possessio*. *Animus* being necessary to possession, a *hereditas*, having none, could not possess[10], and it could not acquire *possessio* through a slave, for even where a slave took *possessio* for a living owner, the master had not ordinarily *possessio* unless he knew the fact[11] or had authorised.

These rules, however logical, were too inconvenient to stand. The

1 See, however, 14. 3. 17. 3 and *post*, § CLXXIX. 2 41. 1. 61. pr. 3 A legacy could be left to a *servus hereditarius* and would vest in the *hereditas* (31. 55. 1; 30. 116. 3) but the slave could not accept it, so as to bar repudiation by the person in whom it would ultimately vest under the gift, since this would bar him from attacking the will under which the legacy was made, as having accepted a benefit under it. 4 Vat. Fr. 55, 56; D. 45. 3. 26. 5 12. 1. 41; 45. 3. 18. 2. 6 See p. 305, n. 6. 7 Inst. 3. 17. 1. 8 1. 8. 1. pr.; 48. 18. 2. 9 14. 3. 17. 3 (but the words referring to knowledge may be corrupt); 15. 1. 3. pr. 10 *Ante*, § LXXII. 11 *Ante*, § LXXIII.

first inroad on principle was in the field of *peculium*, naturally, as it had been in the case of a living owner. The texts give evidence of dispute and change of rule[1]. It is clear that a *servus hereditarius* could, in classical law, continue an existing possession, and even complete it for the purpose of *usucapio*. But as to beginning *possessio*, the law is not clear even in the case of *peculium*. Papinian is made to express conflicting views on the question whether a *servus hereditarius* could acquire usucapion possession, even *in re peculiari*. The view most generally held, and supported by various emendations, is that classical law allowed him to begin usucapion possession for the *peculium*, but that Justinian first allowed it in a wider field[2]. Probably, apart from *peculium*, even interdict possession could not be acquired by him till the time of Justinian[3].

Although *servus hereditarius* played for the moment an important economic part, the facts did not alter his essential character, or increase his faculties. His powers were still dependent and derivative. This became important if the *hereditas* was not accepted. If no *heres* entered under a will or on intestacy, all that the slave had done was void. Thus the *fiscus* which took the property, subject to the rights of creditors, would ignore obligations incurred since the death[4]. Further, since such a slave could not bring any actions, any remedies that there were in the region of civil, as opposed to criminal, law, must stand over till a *heres* entered. Thus the discussions in the Digest take the form of enquiry how far the *heres* could sue or be sued for what was done when the *hereditas* was *iacens*.

CVIII. It is in relation to *heredes extranei* that the question of *testamenti factio* arose. The *institutus* must have been capable of being instituted at the time when the will was made, at the death (or in conditional institutions, when the condition was satisfied), and thenceforward till actual entry[5]. Loss of *testamenti factio* between these last dates was fatal even though it was regained; if *delatio* became impossible while it was running, the *delatio* was destroyed. But it was immaterial between the two earlier dates, if regained before the later of them—*media tempora non nocent*[6], the rule as to capacity at the time of testation being merely a survival from the *mancipatio familiae*.

1 41. 2. 1. 5; 41. 3. 45. 1; 44. 7. 16. 2 The chief texts are 6. 2. 9. 6; 41. 3. 20; h. t. 31. 5; h. t. 40; h. t. 44. 3; h. t. 45. 1. 3 The texts on the possessory interdicts do not give any cases of dispossessed *servi hereditarii*, or discuss any cases in which they began possession. But in 43. 24. 13. 5 already noted, it is said that the *heres* has "*quod vi ut clam*" in respect of acts done while the *hereditas* was *iacens*, but this text does not deal with the case in which a *s. hereditarius* had taken possession. On the position generally, see Pernice, *Labeo*, 1. 360 sqq. 4 45. 1. 73. 1. 5 28. 5. 50. 1; Inst. 2. 19. 4, etc. See however Schulz, *Z.S.S.* 35. 112 sqq. 6 28. 5. 60. 4; h. t. 6. 2, etc.

The cases in which *testamenti factio* did not exist have already been considered[1], but some remarks are needed as to *postumi*. At strict civil law no *postumi* could be instituted. The extent to which this was relaxed in the case of *postumi sui* will be considered later[2]. A *postumus suus* was a person who would be a *suus heres* if born in the lifetime of the testator[3]. But as he need not be even conceived when the will was made, it was impossible to tell beforehand who might or might not be a *suus heres*. It was therefore allowed to institute a future child of any woman, not at present married to anyone else, who could afterwards lawfully be the testator's wife. Such an institution was in any case so far valid as to constitute the document a will which would revoke one previously made[4], but it did not operate positively if, in the event, the child born was not such as to satisfy the definition of a *suus heres*, *e.g.* the child of another marriage altogether. In that case he was a mere *postumus extraneus*; the *institutio* was not valid, but as we have said, he could get *bonorum possessio secundum tabulas*[5]. But here, as in all cases of succession, it was necessary that he be actually conceived at the time of *delatio*[6]. Under Justinian[7] any such *postumus* could be instituted.

Slaves had *testamenti factio* for this purpose, of course derivative. Where a man appointed his own slave, the man was, as we have seen, *heres necessarius*. In the classical law, notwithstanding the general favour both of *institutiones* and gifts of liberty, the dominant view was that the *institutio* was void unless accompanied by an express gift of liberty[8]. It is clear that some jurists held a different opinion[9], and Justinian enacted that *institutio* should imply *manumissio*[10]. If sold or freed before the will operated, the man was not a *necessarius*, but might acquire *iussu* (*novi*) *domini* or for himself, as the case might be[11]. We have seen that in classical law, if an owner freed a man in whom another had a usufruct, he became a *servus sine domino*, at least for a time, and it may be that the *institutio* was void. Under Justinian he became free and no doubt, if instituted, took the *hereditas*[12]. The case

1 *Ante*, § CIII. 2 In connexion with *exheredatio*, *post*, § CXII. 3 G. 1. 147; Inst. 1. 13. 4; cf. D. 50. 17. 73. 1. It will be observed that these statements differ in form. Justinian defines one who is a *suus*; Gaius and Q. Mucius define one who can be such. 4 28. 2. 9; h. t. 4; h. t. 28. 3. 5 D. 37. 11. 3. 6 *Ib.* 7 C. 6. 48. 1; Inst. 3. 9. pr. 8 G. 1. 21; 2. 186. Thus if I institute my slave with no gift of liberty and later free or sell him, he cannot acquire the *hereditas* for himself or his master. G. 2. 187; Ulp. 22. 12. 9 See C. 6. 27. 5. 1; Inst. 2. 14. pr. 10 C. 6. 27. 5. 1 b. sqq. 11 G. 2. 188; Ulp. 22. 12; D. 28. 5. 7. 1, 9. 16. 12 *Ante*, § XXIX; Ulp. 1. 19; C. 7. 15. 1. pr. Esmein holds (*Mél. Gérardin*, 233 sqq.) that this is an extension of a rule originally applying only to *vindicta*, dependent on the (supposed) absolute effect of a judgment in early law. There are elaborate rules for the case where a master frees and institutes, but one or both of the gifts is or are conditional: they were in general so interpreted as to secure that the slave should not get liberty without the *hereditas*, Buckland, *Slavery*, 510 sqq.

of a *servus communis* presents some difficulties. If simply freed, in classical law he vested wholly in the other owner[1], but under Justinian was free, subject to rules already discussed[2]. If instituted with no gift of liberty, this was said to be "*ut alienus*," and the right to take vested in the other owner[3], who might even be made *coheres* with him[4]. If there was also a gift of liberty, this was "*ut proprius*," but we are not told what happened in the classical law. It is generally held that the slave entered for, and at the command of, the other owner. There are logical difficulties[5], but the upshot seems to be that the *institutio* took effect, and the manumission did not. It is not however clear why Ulpian should distinguish the two cases, if their effect was the same. Whatever the classical law may have been, Justinian provided that the slave was free and took the *hereditas*, the other master being compensated[6].

Institutio of a *servus alienus* was, in general, *institutio* of the master, with whom there must be *testamenti factio*[7]. The owner took, not one with lesser rights, whatever the testator's intent[8]. If the slave changed hands before entry, his new master acquired[9]. He must then have *testamenti factio*, but it is not clear that he must have had it when the will was made, if he acquired the slave later. There could be no entry without the master's authority. If there were several owners they acquired *pro rata*, and there might be several entries, or, if all approved, one entry for all[10]. But though in general the *institutio* was equivalent to that of the master, this was true only in relation to *testamenti factio* and other broad principles; the personality of the slave counted in many ways. Thus the time allowed for claim (under *cretio vulgaris*) ran from that of the slave's knowledge. And the slave himself must enter[11].

CIX. *ADITIO*. ENTRY[12]. As entry could not be made by representative[13],

1 P. 4. 12. 1; Ulp. 1. 18. 2 *Ante*, § XXIX. 3 Ulp. 22. 7, 10. 4 28. 5. 90. 5 Salkowski, *Sklavenerwerb*, 18 sqq. 6 C. 7. 7. 1. 1. For the case of one supposed to be free, *ante*, § CV. 7 Thus *fideicommissa* can be imposed on him. Ulp. 22. 9; D. 28. 5. 31; 36. 1. 26. 1. A gift of liberty accompanying an *institutio* of a *servus alienus* was ignored. P. 3. 4 b. 7. If testator afterwards acquires the slave, the gift of liberty being a nullity the whole gift is void. The rule is stated by Justinian from Florentinus (28. 5. 50. pr.), but it seems out of place in Justinian's law. 8 29. 2. 45. 3, etc. There were doubts and conflicts, 7. 1. 21; see *ante*, § XCIX. 9 Inst. 2. 14. 1; D. 37. 11. 2. 9. Or himself if freed, G. 2. 189; Ulp. 22. 13. 10 29. 2. 68; Inst. 2. 14. 3. 11 G. 2. 190; 29. 2. 26; h. t. 30. 7; h. t. 36; 31. 82. 2, etc. 12 In general the will may be opened and entry made at once. But, under Augustus, the *sc. Silanianum* provided that, if there was suspicion that the deceased had been killed by his slaves, there might be no opening or acceptance until there had been enquiry and torture of slaves who might have been concerned—pain of forfeiture. P. 3. 5; D. 29. 5. As to state of knowledge essential to entry, see 29. 2. 17–19, 23, etc. The *ll. caducariae* did not allow rights to vest till the will was opened. Thus there could be no entry till then and the gift might fail by death of *institutus* between death of testator and opening of the will. Ulp. 17. 1. 13 29. 2. 36. It is an *actus legitimus*. But a slave or son could enter if authorised, h. t. 26. Direction to him to enter for his share could hardly be *pro herede gestio* for another share.

it follows that if the *heres* was *infans* or *furiosus* the *hereditas* would be lost at civil law, unless the *infans* attained *intellectus* or the *furiosus* recovered his wits. The difficulty was lessened by the fact that in classical law the curator of a *furiosus* could get *bonorum possessio decretalis*[1] and the *tutor* (or father) could, it seems, obtain actual *bonorum possessio secundum tabulas*[2].

Acceptance is called *aditio*. Gaius tells us that this might be either by a formal act of acceptance called *cretio* (*cernere*) or by acting as *heres*, *pro herede gestio*, or by mere expression of intent, *nuda voluntas*[3]. In the Empire *cretio* was not necessary unless expressly required by the will, but this was probably not the case in the time of Cicero[4]. *Nuda voluntas* is not mentioned by any jurist but Gaius[5]. The formal declaration, *cretio*, was made in a traditional form of words of which the essential part appears to be "*adeo cernoque*[6]." It was usual to have witnesses, though there is no evidence that they were required by law[7]. Like all formal declarations it was required to be in Latin[8].

The name *cretio* is also applied to the clause, sometimes inserted in the will, by which the *heres* was required to accept in this manner. The purpose of this was not primarily to secure an unequivocal acceptance, but to make good a defect in the civil law, which set no limit of time within which a *heres* must accept[9]. Thus it invariably set a limit of time within which the *cretio* must be made[10], and it might of course impose other directions as well[11]. The time was commonly 100 days, though other times might be fixed[12]. The days ordinarily ran from the time when the *heres* had notice and was able to enter; in this case it was called *cretio vulgaris*. But the days were sometimes made to run from the opening of the will; here it was called *cretio continua*[13]. The form of the requirement must be carefully looked at. It did not make *cretio* a condition, but merely directed the *heres* to make *cretio*. As it stands this would be empty in classical law, for if he did not "cern" there was nothing to prevent informal acceptance. Thus it was reinforced by such words as "*si non ita creveris, exheres esto*[14]," so as to exclude him altogether if he did not "cern." The *exheredatio* negatives the *institutio* altogether in that event, and we may gather, from the way in which Gaius puts the

1 *Post*, § CXL. **2** 37. 1. 7. 2 perhaps only *decretalis*. **3** G. 2. 167; Ulp. 22. 25. **4** Cicero never mentions *pro herede gestio*. D. 29. 2. 62 shews that *nuda voluntas* was not known to Javolenus, but *pro herede gestio* was to Labeo. **5** It is copied into the Institutes, 2. 19. 7, and it appears in C. Th. 5. 1. 1. **6** G. 2. 164–66; Ulp. 22. 28. The forms differ only in the omission by U. of the useless words, "*testamento suo*." **7** See Autun Gaius, 42. **8** Cp. *Cretiones* of Sarapias; Girard, *Textes*, 806. **9** G. 2. 164, 167. **10** G. 2. 170. **11** See Cicero, *Ad Att.* 11. 12. **12** G. 2. 170. See for an actual example of 60 days, Cic. *Ad Att.* 13. 46. 3. If too much time was given the praetor might shorten it, G. 2. 170. **13** In *vulgaris*, "*quibus scieris poterisque*," in the other these words do not appear. G. 2. 165, 171–73; Ulp. 22. 31, 32. **14** G. 2. 165; Ulp. 22. 27.

case, that these words were a matter of course. But, if there was a *ubstitutio*, we lear n that there were two forms of *cretio*, *perfecta* and *simperfecta*[1]. In theperfect form the words were, after the direction: "*si non ita creveris exheres esto et C. heres esto.*" Here even if the *institutus* (*T.*) acted as *heres*, he was excluded, unless he made *cretio*, and the substitute took. But if the words "*exheres esto*" were omitted, there were no words to exclude him even if he did not "cern." But this was the condition on which *C.* was to be *heres*. If *T.* made *cretio* he was sole *heres*; if he did not, but accepted informally, he and *C.* shared. This was the logical rule of earlier classical law[2], but M. Aurelius provided that even if, in *cretio imperfecta*, *T.* did not "cern," he would exclude *C.* if he accepted in any way[3]. He seems to mean, within the fixed time, his point being that the practical aim of the testator, to secure acceptance within a certain time, has been realised.

Gaius notes a difference of opinion on another point. Some lawyers had held that, in the imperfect form, if *T.*, while the time was running, acted as *heres* without formal *cretio*, he admitted *C.* to a share and could not afterwards fall back on *cretio* and exclude him[4]. The logic of this seems to be that the words "*si non ita creveris*" are understood to mean "if you do not become *heres* by *cretio*," and he had made this impossible by becoming *heres* otherwise, so that the condition on *C.*'s institution was satisfied. But this is not the *prima facie* meaning of the words, and the view of Sabinus, which was, probably, the accepted one, was that at any time before the time limit had expired he could fall back on *cretio* and exclude *C.* The point was rendered obsolete by the rule of Marcus Aurelius.

How late the rules of *cretio* existed it is hard to say. A law of 339 may perhaps allow in its stead any declaration before certain officials[5]. An enactment of 407 abolished it altogether, in terms, and is so stated in Justinian's Code[6]. But in its original form it was part of an enactment which dealt with inheritances coming to a child in *potestas*, and did not necessarily apply to any other case[7]. But it is also possible that at this date *cretio* was not in use except in cases of this kind, in which there is evidence of a special requirement of it[8]. On any view it was gone under Justinian.

If the will contained no *cretio* clause, any recognised form of entry

1 G. 2. 174 sqq.; Ulp. 22. 32–34. 2 G. 2. 177. 3 Ulp. 22. 34. 4 G. 2 178. 5 C. 6. 9. 9. Justinian refers it to *B.P.*, cf. C. 5. 70. 7. 30 in f., but for earlier law its language seems to exclude this, especially when it is compared with C. Th. 8. 18. 8, where closely similar language is used to denote entry as distinguished from claim of *B.P.* In its present form it can refer only to *B.P.* Originally it may have dealt with both. 6 C. Th. 8. 18. 8; C. 6. 30. 17. 7 Or even probably, Girard, *Manuel*, 885. 8 See C. Th. 4. 1. 1 and C. Th. 8. 18. 1–8.

sufficed. *Pro herede gestio* means doing some act as *heres*, a conception perhaps not at first clearly defined[1], but, in classical law, meaning some act of administration. It was however permissible to carry out an act of piety or urgency without being bound, by making it clear that it was not done *animo heredis*[2]. But since apart from the *cretio* clause there was no limit of time, the *heres* might delay as he would, with resulting inconvenience to creditors and substitutes. The remedy was found in the *spatium deliberandi*. The *heres* might himself apply to have a time fixed, which might not be less than 100 days or, apart from imperial sanction, more than nine months[3]. If he did not apply, a creditor might sue him and, in court, submit an *interrogatio* "*an heres sit.*" If the *heres* was silent, this was a refusal. If he asked for a *spatium*, this was given to him. If at the end of the time he had not accepted, this was refusal. If he accepted, the matter was clear[4]. It is to be noted that if he did not answer, or allowed the time to pass, he was excluded by praetorian law, but not by civil. But it would mean denial of the *actiones hereditariae*, which comes, practically, to much the same thing[5].

If at any time within the *spatium*, if one was fixed, the *heres* expressly repudiated the *hereditas*, by word or deed, not having intermeddled, he was at once excluded[6]. But if there was a *cretio* clause, mere repudiation within the time did not bar; he could still fall back on the *cretio*[7]. The reason was probably that, as the substitute was admitted only "*si T. non creverit*," his admission was not effective till this was impossible[8].

Acceptance was in general irrevocable, but there were exceptions. A *minor* could get *restitutio*[9]. Hadrian, by *privilegium*, relieved one who had accepted in ignorance of heavy debt which afterwards came to light, and this was made a ground of relief for *milites*, but not for others[10]. And if a man was compelled by threats to accept or refuse a *hereditas*, the praetor gave him *restitutio in integrum*[11]. In the case of *dolus* the remedy in both cases was the *actio doli*; the acceptance or repudiation was not undone[12].

CX. LEGAL POSITION OF THE *HERES*. The *heres* stepped, roughly speaking, into the shoes of the deceased, so far as what may be called property rights were concerned. There were of course many limitations.

1 In 29. 2. 62 there are traces of a view that any act shewing intention to be *heres* was *gestio*. 2 29. 2. 20. pr. 3 28. 8. 1 sqq.; G. 2. 167; C. 6. 30. 22. 13 a. 4 C. 6. 30. 9; D. 39. 2. 69. 5 It does not appear that a substitute has the same means of putting pressure. 6 P. 4. 4. 1; G. 2. 169; Ulp. 22. 29. 7 G. 2. 168; Ulp. 22. 30. 8 We have already noted that this *spatium deliberandi* was extended to *sui* in the later classical law. 9 G. 2. 163; Inst. 2. 19. 5. 10 G. 2. 163; Inst. 2. 19. 6. Justinian points out that the *beneficium inventarii* (n. 9) makes this unnecessary. 11 4. 2. 21. 5, 6. But Celsus quoted by Ulp. in a text which is rather corrupt says that acceptance under *metus* is void, 29. 2. 6, 7. 12 4. 3. 9. 1; h. t. 40.

Some rights, *e.g.* usufruct, were extinguished. Some rights of action were destroyed, *e.g.* the *actio iniuriarum*, if it had not reached *litis contestatio*[1]. The *exceptio legis Cinciae* was not available to the *heres*[2]. A few contractual liabilities were ended, *e.g.* those as *sponsor* or *fidepromissor*[3], and such obligations as involved personal service. The *heres* of a person entrusted with a mandate did not succeed him, though he would be liable for any breaches of contract committed before the death[4]. Delictal obligations did not pass at all, except so far as the *heres* had benefited by the proceeds[5]. And, conversely, he had, or might have, obligations that the testator had not; the legacies and so forth were clearly not binding on the testator. These he must carry out, subject to the *l. Falcidia*, etc., so far as the estate would go. But debts he must pay in full, whatever the state of the finances[6]. Hence the power of repudiation.

The situation in this respect was profoundly altered by an innovation of Justinian, the *beneficium inventarii*. He provided that the *heres* must make an inventory of the estate, to be begun within 30 days of his knowing of his right and finished within 90. If he did this, he was not to be liable beyond the assets[7]. The *spatium deliberandi* was not abolished, but the *heres* who preferred to rely on this was penalised; he was to be liable for all debts, and not to have the benefit of the *l. Falcidia* in relation to legacies, and if he let the time elapse he was regarded as accepting[8]. It would be only in a minority of cases that this would be material, for probably most testators were solvent, and few left away more than three-quarters of the estate in legacies.

As the *heres* represented the deceased, it might be supposed that each *heres* was liable for the whole. The XII Tables however provided that each *heres* could sue and be sued only in proportion to his share[9]. It was possible for the testator to vary this by charging specific debts or

1 *Post*, § CXXXV. 2 *Ante*, § XCI. 3 *Post*, § CLVI. 4 17. 1. 27. 3. 5 G. 4. 112; D. 50. 17. 38. As to this, *post*, § CCXXXIII. Things left *per vindicationem* belong to legatee on acceptance of *hereditas*; as to this and the case where the legacy is *conditional*, *post*, § CXVII. The right of action for interference with the family sepulchre is available not only to a *heres* who has accepted, but to *sui* who abstain, who are not *heredes* except in form, *i.e.* not for any other practical purpose. Damages recovered by such a person were not part of deceased's estate, 47. 12. 6, 10. 6 29. 2. 8. pr. 7 The mode of administration seems crude. Apparently the *heres* pays creditors on the principle, "first come, first served." When no more creditors present themselves he may realise what is left and pay legacies. If a belated creditor now appears he has no claim against *heres* or a vendee, but can enforce hypothecs against legatees, and even bring *condictio indebiti* against them. C. 6. 30. 22. 5. 8 C. 6. 30. 22. 12, 14, 14 b, 14 c. In earlier law one who let the time pass was treated as refusing. G. 2. 167. 9 Debts, D. 10. 2. 25. 13 (Paul); C. 2. 3. 26 (Diocl.); C. 4. 16. 7 (Diocl.). Claims, D. 10. 2. 25. 9 (Paul); C. 3. 36. 6 (Gord.). In C. 4. 2. 1 Caracalla describes the rule as to debts as "*explorati iuris.*" In C. 8. 35. 1 he bases the rule as to claims on "*antiqua lex.*"

any fraction of the debts on any particular *heres* to the benefit of the others, but Papinian states the rule that this must not be done to the practical exclusion of that *heres*[1]. A restriction was reached by treating the charge as a kind of legacy. It must be found what would be the share of that *heres* in the nett estate, if debts were distributed proportionally and the total amount of debt imposed on him must not exceed three-quarters of that. Thus where *A*, *B* and *C* were *heredes* in equal shares and all debts were charged on *A*, the assets being 1000, the debts 400, the nett value being 600, each share would be 200. Not more than 150 could be charged on *A* so that he would get 50 and the others 275 each[2].

The debts due to or by the deceased were now due, to the extent stated, to or by the *heredes* personally. There was no fiction or other device, and the name of the dead man would not ordinarily appear in the action at all. If the *heres* was insolvent, the confusion of the two estates might injure the creditors of the deceased, but the praetor gave relief by *bonorum separatio*. The creditors, or any of them (even conditional), might apply to have the estates kept distinct till the debts were paid. This must be done within a reasonable time and before actual mingling of the estates. The Digest, probably by interpolation, fixes a limit of five years[3]. No creditor, who had in any way accepted the personal liability of the *heres*, could claim *separatio*[4], but if it was validly claimed, no pledge created by the *heres* was good against the creditors[5]. The *heres* was not barred from claiming any surplus, as he did not claim the *separatio*[6]. On the question whether the creditors who had claimed it could come on the *heres* for any deficit, the texts disagree. Paul and Ulpian exclude them, as they have made their election[7]. Papinian allows them to come in, but only after the creditors of the *heres* are satisfied[8].

If a *heres*, to damage his own creditors, accepted an insolvent estate, there was no corresponding right, but, at least under Justinian, there might in an extreme case be *restitutio in integrum*[9].

The *heredes* owned the property in common and might of course go

1 10. 2. 20. 5. The limitation is sometimes said to be due to an interpolation. 2 Same result reached in a different way. Each share of gross is 333⅓. Each normal share of debt 133⅓. Nett for each, 200. But *A* being charged with all debts must pay the others so much as the *l. Falcidia* allows, as if it were a legacy. This is 150, making 75 each. Thus *A* gets 50, the others 275 each. The case might of course be much more complicated. 3 42. 6. 1. 12, 13. 4 h. t. 1. 10, 11. 5 42. 6. 1. 3. But a sale of the *hereditas*, *bona fide*, before the claim, was not affected, h. t. 2. As to *missio in possessionem* of a *heres suspectus* who does not give security, *post*, § CCXLV. We have already seen (*ante*, § CVI) another case of *bonorum separatio* of a different type. 6 42. 6. 1. 17. 7 *Ib.*; h. t. 5. 8 h. t. 3. 2. 9 42. 6. 1. 2, 5.

on doing so, but this "*consortium*[1]" would occur only where the *heredes* were close relatives, and was almost out of use in the classical law. In default of division by friendly arrangement[2], the machinery was the *iudicium familiae erciscundae*[3]. Its primary purpose was the distribution of *iura in rem*; it was not concerned with debts either way. But the *iudex* in adjudicating the various properties and issuing, if necessary, condemnations for equalising payments, took into account payments made or undertaken by one of the *heredes* by agreement, and might himself assign particular claims and liabilities to particular *heredes*[4]. This did not bind the creditors, who, if they liked, could still sue the *heredes* separately. But one action is more convenient than many, and it was the practice for the *heredes* under such an arrangement, of their own or the judge's making, to give the *heres* to whom a claim of debt was assigned authority to act as *procurator* (*in rem suam*[5]).

Apart from claims against actual coheirs, the primary remedy of the *heres* was the *hereditatis petitio*[6], a general real action for the recovery of all or any part of the *hereditas* held by one who claimed adversely to be *heres*, or, setting up no title at all, held merely "*pro possessore*." It was indeed extended as an *actio utilis* against one who had bought the *hereditas* or a fraction of it from a holder *pro herede*[7], but apart from this it did not lie against those claiming to hold under any other title. Nor was it available for recovery of debts, except where these were due from a holder *pro herede* or *pro possessore*, and of course he must restore things in the *hereditas*, but not of it, *e.g.* things lent to the deceased, in which there could be no question of a *ius in rem*[8]. Apart from this, the *heres* must bring the ordinary actions. *Hereditatis petitio* thus differed from an ordinary real action in scope. It differed also in its rules as to damages. Before the *sc. Iuventianum* (129 A.D.) the possessor was treated as having been administering for the true *heres*, bound therefore to account for any profits and damage caused by bad administration, and entitled to claim expenses reasonably incurred. It was hardly possible to distinguish between *mala* and *bona fide* holder while *usucapio lucrativa* existed. But the *Iuventianum* distinguished. *Bona fide possessor* need account only for his enrichment, *mala fide possessor* must restore all loss which his intervention had caused to the *heres*. And it allowed the action against one who had *dolo malo* ceased to possess[9].

CXI. Lapsed shares. If one *institutio* was void *ab initio*, *e.g.* a

1 17. 2. 52. 8. 2 See *e.g.* Cicero, *ad Att.* 11. 13. 3; 11. 15. 4; 12. 38 a. 2; 13. 12. 4; 13. 13. 4; 13. 46. 3; 16. 6. 3, etc. 3 D. 10. 2. 4 10. 2. 2. 5–4. 5 10. 2. 2. 5, *post*, § CLXXXIX. 6 D. 5. 3. The action was tried before the *centumviri* in the late Republic and early Empire. 7 5. 3. 13. 4, 5. 8 5. 3. 19. 9 5. 3. 20. 6 sqq. See on these points, Girard, *Manuel*, 914 sqq. The case was of claim by *fiscus*, but 5. 3. 20. 9 applies the rules to private cases. Sceptical view, Beseler, *Beiträge*, 4. 4.

peregrine was instituted, the will was simply construed without[1] it. This rule was never altered. But where a valid *institutio* lapsed from any cause, there were great historical changes. In early law the will was construed without it; the shares of the other *heredes* were increased, and they could not refuse this. Any legacies specially charged on that *institutio* fell with it[2], till Severus made such a lapse carry its burdens with it, as a *substitutio* then did[3]. But the *ll. caducariae*, the *l. Iulia* and the *l. Papia Poppaea* had made a profound change. It will be remembered that these laws introduced some cases of complete or partial incapacity, and that the *l. Iunia* at about the same time introduced another. The *ll.* went further; they set up a new destination for lapsed gifts, whether the lapse was due to their provisions or not. Lapsed gifts were divided into two classes, *caduca*, those which failed after the death, and gifts *in causa caduci*, those which failed before the death[4], though both classes seem to have been treated alike. They went to other *heredes* with children, failing these to *legatarii* with children, and failing these to the *Aerarium*, the popular treasury[5]. Ascendants and descendants to three generations were however entitled to *ius antiquum*, and could take these lapses whether they had children or not[6]. Where they went to *coheredes*, it may have been in proportion to their shares; perhaps in case of legatees it was in proportion to the size of the legacy, but it is more probable that legatees took equally, and the same may be true of *heredes*, the acquisition being a new gift, not a lapse.

At some time, not later than Caracalla and probably earlier, the *Aerarium* was replaced by the imperial treasury, the *Fiscus*. According to Ulpian, Caracalla suppressed the rights of *heredes* and legatees in such windfalls, reserving those of ascendants and descendants with *ius antiquum*. Failing these all went to the Fisc[7]. But this is doubtful, since he elsewhere in the same book speaks of the "*praemia patrum*" as still existing[8]. They were only completely abolished by Justinian[9]. *Caduca*, etc., took their burdens with them; he who benefited by them must carry out the legacies and manumissions charged on them, and

1 It is *pro non scripto*, not a case of lapse, C. 6. 24. 1. 2 31. 29. 1, 2. 3 31. 61. 1. 4 C. 6. 51. 2 a, 4. It is not easy to see why they are distinguished, for though all the lapses caused by the *ll.* are in the first class, so are many others and they were treated alike. Ulpian does not distinguish, 17. 1. 5 G. 2. 150, 207. 6 Ulp. 17. 2, 18. 7 Ulp. 17. 2. 8 Ulp. 25. 17. See also Ulp. 1. 21; Fr. *de iure fisci*, 3 cited by Accarias, 1. 1012. Girard suggests (*Man.* 896; *Textes*, 495) that the *praemia patrum* were soon after reintroduced by Macrinus. *Vita Macrini*, 13, says that he deprived all the rescripts of his predecessors of authority, and Dio Cassius (78. 12) says that he abolished the laws of Caracalla on inheritances and manumissions (both cited by Girard). But our law can hardly have been a rescript (apart from the badness of the authority), and the legislation mentioned by Dio would seem to be that on taxes, and the Regulae appear to have been written before the time of Macrinus (Fitting, *Alter und Folge*, 116). 9 C. 6. 51. 1. 4.

thus they might be refused[1]. It is important to note that, for these laws to apply, the will must retain some validity; if all *institutiones* failed there was intestacy[2]. There were various ways of evading these laws. Thus adoptive children sufficed till Nero[3]. The restrictions did not apply to *fideicommissa* till the *sc. Pegasianum*, A.D. 71[4]. A little later tacit trusts not expressed in the will were forbidden and penalised[5]. And it was always possible to avoid the *leges* by substitutions, and by making the *institutio* of a *coelebs* conditional on his having qualified.

When the State adopted Christianity, which regarded celibacy as a virtue, it was impossible to maintain these severe penalties on it, and Constantine abolished the incapacitation of *coelibes* and *orbi* so far as direct gifts to them were concerned[6]. But he left the *praemia patrum* in the case of lapse[7], and the special rules between husband and wife. These last were abolished in 410[8], and Justinian swept away the *praemia patrum*[9]. Under him the old *ius accrescendi* was restored, but the rule was maintained that such a lapse carried its burdens with it[10].

There were however two sets of circumstances which would prevent the operation of these rules: *indignitas* and *transmissio hereditatis*.

In some cases the law deprived a beneficiary of the advantage, on the ground of *indignitas*. The gift was not treated as void, giving rise to lapse or *caducum*, but as effective but forfeited. A *tutor* by will who excused himself lost any benefit under the will[11], as did anyone who attacked the will unsuccessfully[12], and one who accepted a legacy under a secret trust in favour of one who could not take[13]. There are many other cases. These forfeits were not all dealt with alike. Thus in the case of the *tutor* the gift went to the child concerned, but usually it went to the Fisc[14].

There were some cases in which, though the person entitled died without claiming, his rights passed to a successor. Most of them were late, but even in classical law if a minor had failed to accept and died, his *heres* was sometimes allowed to claim[15]. Pius applied a similar rule where a father, whose son was instituted, had been entitled to *restitutio in integrum* for absence[16], the son having died meanwhile, and there were other cases[17]. Later law carried the matter further. In 426 it was provided that where a *hereditas* was *delata* to a child under seven, from

1 Ulp. 17. 3. They are claimed, "*caduci vindicatio*," and do not accrue *ipso iure*. G. 2. 207; Vat. Fr. 195; Ulp. 25. 17. **2** Arg. G. 2. 144; Accarias, 1. 1013. **3** Tac. *Ann.* 15. 19. **4** G. 2. 286. **5** Ulp. 25. 17. **6** C. 8. 57. 1. **7** See *e.g.* C. Th. 13. 5. 7. **8** C. 8. 57. 2. **9** C. 6. 51. 1. **10** h. 1. 4. The enactment is very complex and verbose. **11** 34. 9. 5. 2. **12** 34. 9. 5. 1, 3 sqq. **13** 34. 9. 10. **14** See D. 34. 9 passim; C. 6. 35. **15** 4. 4. 18. 5. **16** 28. 2. 30. pr. **17** Where *e.g.* the delay was caused by *sc. Silanianum* (*ante*, § CIX), 29. 5. 3. 30, or incertitude as to *status* or absence on public service. See Cuq, *Manuel*, 785, n. 4, for a list of cases.

his mother, and he died before the *paterfamilias* could enter for him, the latter could still claim the *hereditas*[1]. In 450 it was provided that if issue were instituted and died before the will was opened, their rights passed to their issue, so that there was no lapse[2]. In 529 Justinian laid down a general rule. If anyone to whom a *hereditas* was *delata* died within one year not having made up his mind, his own successors could come in and claim provided they did so before the expiration of that year[3].

CXII. Restrictions on the power of devise. These were of two kinds. There were rules requiring the testator, if he wished to exclude his issue, to do so in express terms. This was the law of *exheredatio*, of formal restriction. There were other rules, not so ancient, the aim of which was to prevent exclusions which satisfied the forms, but were essentially unjust. These may be called material restrictions, and the most important case was that of the *querela inofficiosi testamenti*.

EXHEREDATIO. The original principle of these rules was that the *sui heredes* were so closely connected with the *hereditas* that any exclusion must be express; it was an outcome of the omnipotence of the *paterfamilias* that he could do this. It was not always with a view to practical exclusion. Fathers disinherited young children and provided for them by *fideicommissum* "*ut eis consulant*[4]." The rules changed greatly under the influence of the tendency to diminish the importance of agnation[5].

Civil law rules[6]. Sons in *potestas*, if not instituted, must be disinherited *nominatim*, otherwise the will was void. *Nominatim* does not necessarily mean "by name"; "That thief, my wife's son," was enough if there was only one[7]. The form was "*exheres esto*," but under Justinian any other clear words sufficed[8]. If this *exheredatio* was before any *institutio* there was no need to repeat it in other institutions and substitutions, nor was it necessary, if the son was instituted in the first place, to disinherit him for the case of his abstention. And the will did not fail if the son was not duly disinherited in each successive class of institutions and substitutions, but those in respect of which he was not disinherited were void[9]. *Exheredatio* of a son might not be conditional, unless he was instituted on the contrary condition[10]. Other existing *sui*

1 C. 6. 30. 18. 1. **2** C. 6. 52. 1. **3** C. 6. 30. 19. 1. He says that Paul had laid down this doctrine. **4** 28. 2. 18. **5** A will which breaks these rules is *testamentum nullius momenti*, 28. 5. 69. **6** Antiquity doubtful. The case of a *miles* omitted in the false belief that he was dead gave rise to litigation in the late republic (Cicero, *de or.* 1. 38. 175, 57) which looks as if the rule existed, but was not settled. But Girard points out that the question may have been whether the *ceteri* clause was enough for a son, and the *centumviri* ruled that it must be *nominatim*; *Manuel*, 867, citing Hölder and C. 6. 28. 4. 2. **7** 28. 2. 1–3. **8** G. 2. 127; C. 6. 28. 3. **9** 28. 2. 3. 3 sqq.; h. t. 8; h. t. 14. Some of the texts are corrupt. **10** 28. 2. 3. 1. A *postumus*, even a son, may be disinherited conditionally, 37. 9. 1. 5.

heredes might be disinherited by a general clause, "*ceteri exheredes sunto,*" and if this was not inserted the will was not void, but the *omissi* came in by a *ius accrescendi*[1], which seems to mean increasing the number of the *heredes*. The share they took is oddly stated. If the *instituti* were *sui*, the *omissi* took equally with them (*pars virilis*); if *extranei*, the *omissi* took half the *hereditas*. If there were both the *omissi* took *pars virilis* as against *sui* and half as against *extranei*[2]. This way of calculating would sometimes give an *omissus* more than the share of the instituted *suus* and more than he would have obtained on intestacy[3]. There was a dispute as to the effect where a *suus filius omissus* ultimately died before the testator. The Proculians held that the will was saved; the Sabinians that it was void, and this view prevailed[4].

Difficulty arose if, after the will was made, a person came into existence of the class requiring *exheredatio* or *institutio*[5]. This would upset the will, since, as *incapaces* and regarded as *incertae personae*, they could not be instituted or disinherited by anticipation[6]. It seems that whether male or female, child or grandchild, the will was void[7], except that, probably quite early, the rule developed that, if such a person died before the will operated, he was ignored[8].

Relief from the destructive effect of these rules was given partly by juristic interpretation and partly by legislation. These *postumi* were those who would have been *sui heredes* if they had existed when the will was made. The same difficulty arose with those who became *sui* of their grandfather by the death of their father between the making of the will and the grandfather's death. The first class provided for, late in the republic, were *postumi legitimi*. These were children and grandchildren born after the testator's death, if, in the latter case, the father was dead when the will was made. They might be instituted or disinherited

1 G. 2. 124, 128; Ulp. 22. 17; P. 3. 4 b. 8. 2 G. 2. 124; Ulp. 22. 17. 3 Two sons and an *extraneus* instituted equally, a daughter omitted. Sharing with her brothers she gets two-ninths with them and one-half the third of the *extraneus*. This gives her seven-eighteenths, more than either brother gets and more than she would get on intestacy. If there were several *omissi*, it is not clear whether they took a *pars virilis* each or between them, as against *sui instituti*. See Karlowa, *R.Rg.* 2. 890, for the latter view. But the language of C. 6. 28. 4, which emphasises the point that under this system legacies were wholly valid, while under the praetorian scheme (*post*, § CXIII) some failed, and appears to treat this as the main distinction in effect between the two systems as against *sui*, hardly favours the view that there was this other great difference. And it is difficult to reconcile with the not very high authority of L. R. Burg, 45, who says that they took "*in aequalem*" with *sui*. 4 G. 2. 123; Inst. 2. 13. pr.; D. 28. 2. 7. 5 G. 2. 130–134 (defective); Ulp. 22. 18 sqq.; P. 3. 4 b. 10. 6 *Ante*, § CIII. 7 Ulp. 22. 18; Inst. 2. 13. 1. This exceptionally harsh rule may not be ancient. Cicero speaking of it applies it only to sons, *de or.* 1. 57. 241; *pro Caec.* 25. 72. It can hardly be an application of the praetorian rule, for Ulp. uses the word "*ruptum.*" The fact that they are likely to have been forgotten hardly accounts for it. 8 At praetorian law, 28. 2. 12. pr.

by anticipation[1]. To be quite safe there should be express disherison of "what issue may be born of my wife (etc.[2])," but, if it proved to be a girl or a *nepos*, the general *ceteri* clause sufficed, provided, says Ulpian, something was left to them to shew they were not forgotten[3]. The next class were *postumi Aquiliani*. Aquilius Gallus devised a form for instituting or disinheriting grandchildren born after the grandfather's death, whose father died after the will but before the grandfather, and this was gradually extended to all remoter issue born after the death who would have been *sui* if then alive[4], *e.g.* great-grandchildren or grandchildren whose father had been emancipated.

The next step was a statute, the *l. Iunia Velleia*, probably of A.D. 26[5]. It dealt with two cases: first, anyone born a *suus* between the making of the will and the death (*postumi Velleiani, primi capitis*), and, secondly, grandchildren born before the will was made, becoming *sui* later, their father passing from the family, in the grandfather's life, by death or *capitis deminutio* (*secundi capitis*[6]). These are sometimes called *quasi postumi*. They were not *incerti*, and could have been instituted, but previous institution would not, apart from the statute, have saved the will. The next to be provided for were the *postumi Iuliani*. Julian held that on the combined effect of the two provisions of the *lex*, it was possible to provide for grandchildren born after the will was made, but before their father's death[7]. These covered most cases, and Tryphoninus laid down the general rule that it was possible to provide by anticipatory *institutio* or *exheredatio* for anyone who became a *suus* after the will was made, in the natural course of things so far as he was concerned[8]. If he became a *suus* by his father's *emancipatio*, this was within the rule; there had been no juristic event touching him. But if he became a *suus* by himself being adopted, this would not be[9].

In this case, *i.e.* of persons voluntarily introduced into the family by adoption, *anniculi probatio* or similar act of the *paterfamilias*, there was no relief in earlier classical law[10]. Previous *exheredatio* of such a person would be a nullity, and it seems to have been held, without any obvious logical necessity, that previous *institutio* did not save the will[11]. Hadrian, in an exceptional case of *erroris causae probatio*, allowed previous *institutio* to save the will[12], and the jurists generalised this, so that the rule of later classical law, and after, was that such persons would not

1 Ulp. 22. 19. **2** Ulp. 22. 22; D. 28. 2. 28. 3. **3** Ulp. 22. 21. **4** 28. 2. 29. pr.–5. **5** Girard, *Manuel*, 870. **6** Ulp. 22. 19; D. 28. 2. 29. 15. **7** 28. 2. 29. 15. **8** 28. 2. 28. 1. It was important so to frame the *institutio*, etc. as to cover all cases, P. 3. 4 b. 9; 28. 2. 28. 2; Accarias, *Précis*, 1. 907. **9** Inst. 2. 17. 1; as to *missio in possessionem* for the protection of the interest of unborn heirs—*missio ventris* (D. 37. 9), and for the case of children whose legitimacy is doubted (*ed. Carbonianum*, D. 37. 10), *post*, § CCXLV. **10** See the instances in G. 2. 138 sqq.; Ulp. 23. 3. **11** G. 2. 142. **12** G. 2. 143.

upset the will if previously instituted, but that previous *exheredatio*, being a nullity, would not save the will[1]. But there was no particular hardship in requiring a man, who did such an act as adoption, to reconsider his will.

CXIII. Praetorian changes. The praetor could not affect the civil law validity of a will; he could not make or unmake a *heres*[2]. What he could do was to give *bonorum possessio* to a person, *heres* or not at civil law[3], which gave him the power to take possession of the goods by appropriate steps. Here it was *bonorum possessio contra tabulas*, and its effects will shortly be stated. The tendency of his changes was two-fold, to put women claimants on the same level as men, which he did only imperfectly, and to ignore the strict civil conception of the family, by admitting *emancipati*[4] and some others. His rules, which applied only to male testators, were, shortly, as follows:

1. Male *sui*, sons or remoter issue, must be instituted *nominatim*—the *ceteri* clause still sufficed for women[5].

2. In either case, if this was not done, the will was upset. The omitted person could get *bonorum possessio contra tabulas*[6].

3. Persons other than *sui* admitted to the same right were, mainly, those who would be *sui* but for a *capitis deminutio* and were not in another family, with some others. Such were *emancipati*, children left in the grandfather's family by the deceased when he was emancipated, his children emancipated by the grandfather while he, the father, was in *potestas*[7], or after, those not put under *potestas* when the father obtained *civitas*[8], and perhaps vestal virgins and *flamines*, who passed out of *potestas* without *capitis deminutio*[9]. If a father with an emancipated son was adrogated, the son could not claim till later classical law[10]. Adoptive children, emancipated, had no claim, as they were in their original group[11], but a child given in adoption to his father by the grandfather could claim in the grandfather's estate, as not in another family[12] from the praetor's point of view. Any *liberi* instituted, even a child given in adoption into another family, could, by a special provision of the edict, claim if there was some other person who had a claim, and brought the edict into operation[13], the point being that they might thus increase their share.

The rules of *collatio bonorum* created an important restriction of this right. Any of these persons who were *sui iuris* might have received

1 28. 2. 23. 1; G. 2. 140. 2 Inst. 3. 9. 2. 3 Inst. 2. 13. 3. 4 Ulp. 22. 23. 5 *Ib.*; G. 2. 129. 6 G. 2. 125; Inst. 2. 13. 3; D. 37. 4. 3. 10. 7 Ulp. 22. 23; G. 2. 135; Inst. 2. 13. 3; D. 37. 4. 3. 9; h. t. 6, 7, 17. 8 *Ante*, §§ XXXV, XXXVI; G. 3. 20, 25, 26; Coll. 16. 7. 2. 9 Arg. 37. 4. 1. 6. 10 37. 4. 17. 11 G. 2. 136, 137. 12 37. 4. 21. 1. 13 37. 4. 3. 11; h. t. 8. 11; h. t. 10. 6. The title contains other analogous cases.

property when emancipated[1], and had, in any case, had means of acquiring property since then, such as a *filiusfamilias* had not. The unfairness was met by the rule that if such persons claimed to share with *sui*, but only in that case[2], they must bring in for division what they possessed, subject to the provision, indicated by the purpose of the rule, that the *collatio* could be demanded only if the *institutus* was a *suus*, and the coming in of the *emancipatus* benefited him and injured the *suus*[3]. If a *suus* was instituted for a quarter and an *extraneus* for three quarters, an *emancipatus* who upset the will benefited the *suus*, who now got half[4]. There would be no *collatio*, but there would be if the figures were reversed. If an *emancipatus* upset a will and lost legacies as large as his share there was no *collatio*, as he had gained nothing[5]. There might be liability to *collatio* in favour of one *suus* and not another. Where a son in *potestas* was given half, and two children of the *emancipatus*, left in the family, the other half, and the *emancipatus* upset the will, the son was not affected as he took the same amount, but as the *emancipatus* took half of what his children would have taken, they could claim *collatio*[6].

There was another case of *collatio—collatio dotis*. A daughter who had received a *dos* might, if the *dos* was to revert to her, have to make *collatio* of it if she in any way claimed[7] to succeed except *ab intestato*[8]. As the *dos* was not directly available while the marriage lasted it was allowed for in that case in arriving at her share[9]. The principles seem to have been much the same, but the rule applied essentially to a daughter in *potestas*, since in any other case the *dos* would come in under the other rule.

The rule of *collatio* did not apply to what even a *filiusfamilias* could acquire, *e.g.*, *peculium castrense*. The change in the economic position of *filiifamilias* greatly lessened the importance of this form of *collatio*, which had indeed almost disappeared in the time of Justinian[10].

4. *Bonorum possessio contra tabulas* did not completely upset the will; this was still valid at civil law, but that meant little, as the *bonorum possessio* became *cum re* soon after its introduction[11]. But some provisions were unaffected; *exheredationes*, pupillary *substitutiones* and legacies to parents, children, wife and son's wife[12]. Manumissions failed, apart from some exceptional cases[13]. As to *tutelae* it appears that the appointments needed confirmation[14].

1 See 39. 5. 31. 2. 2 C. 6. 20. 9; D. 37. 6. 1. 5. 3 37. 6. 1. 4 sqq. Security may be required, P. 5. 9. 4. 4 37. 4. 8. 14. 5 37. 6. 1. 4–7. 6 37. 6. 3. 6; 37. 8. 1. 17. Probably, though the texts are not conclusive, he need bring in no more than would balance the loss, 37. 6. 1. 3, 8. 7 37. 7. 1. Difference in later law between *profectitia* and *adventitia*, C. 6. 20. 4. 8 37. 1. 3. 9 C. 6. 20. 5. 10 37. 7. 1. 7; C. 6. 20. 4; h. t. 19. 1. A new kind of *collatio*, extended by Justinian to wills, will be more conveniently considered under intestacy, *post*, § CXXVIII. 11 *Post*, § CXXXIX. 12 37. 4. 10. 5; 37. 5 *passim*. 13 40. 4. 29. 14 26. 3. 3.

In the course of the Empire, before Justinian, the chief changes were two; Antoninus Pius provided that women *sui heredes* were not to have more under the praetor's rules than they would have had under *ius accrescendi*, which still existed. One entitled at civil law could proceed under those rules, if he or she preferred. The rule of Pius was understood to apply to *emancipatae*, in whose case it meant that they were not to get more than they would had they been entitled to claim *ius accrescendi*[1]. The chief point seems to have been that under *ius accrescendi* all legacies were due, while under the praetor's rule some were destroyed[2].

The rules of *exheredatio*, under Justinian, may be shortly stated as follows:

All *exheredatio*, of existing *sui* or *postumi*, must be *nominatim*, *i.e.* express; the *ceteri* clause being abolished. If this was not duly done the will failed, in the case of a *suus omissus*, altogether, in other cases except as to certain provisions already mentioned. The principles of *collatio* still applied but were of small importance[3].

CXIV. Material restrictions. The power of *exheredatio* was not unlimited. The general provisions for the case of unjust exclusion will be stated shortly, but there are some minor provisions first to be dealt with.

By a *sc. Afinianum*, of unknown date[4], it was provided that one who adopted one of three brothers was bound to leave him a quarter in any event. This probably means a quarter of what he would get on intestacy, though Theophilus makes it a quarter of the estate[5]. Failure to do this did not upset the will (unless some other rule was broken, *e.g.* he was omitted), but he had an action against the *heres* for the quarter. The purpose of the rule is controverted[6]. Justinian abolished it in recasting the law of *adoptio*[7].

The *adrogatus impubes* had a right to the *quarta Antonina*[8].

The patron had indefeasible rights, to be discussed under the law of intestacy[9], and the *parens manumissor* seems to have been in the same position. A widow without *dos* was entitled, under a novel of A.D. 537[10], to one-fourth of the husband's estate, however many children there were, subject to diminution in respect of her other means, and there

1 G. 2. 126; C. 6. 28. 4. 1 which puts it down to Caracalla. Kniep (*Gaius*, ad 2. 126) accepts this, holding the passage in G. a later addition, and P. and U. know nothing of it. But it is clear that Pius did in fact legislate on legacies in *b. p. c. t.* 37. 5. 5. 6; h. t. 23. 2 Gaius does not say what becomes of what she cannot take, accrual?, *caducum*? He does not tell us whether of two *emancipatae*, one omitted and the other instituted, the *instituta* ranks as a *sua* or an *extranea* for the purpose of applying the rules of *ius accrescendi*. 3 Inst. 2. 13. 5; C. 6. 28. 4. 6–8. 4 Inst. 3. 1. 14. 5 Ad Inst. 3. 1. 14. 6 For various opinions see Girard, *Manuel*, 183; Cuq, *Manuel*, 201. 7 C. 8. 47. 10. 3. 8 *Ante*, § XLV. 9 *Post*, § CXXXIV. 10 Nov. 53. 6.

was a converse rule for husbands without *donatio*. There seems to have been a maximum limit of 100 *aurei*. In 542 it was provided that the share should be a *pars virilis* if there were more than three children[1].

The remaining rule is much more important.

QUERELA INOFFICIOSI TESTAMENTI[2]. However formally *exheredatio* was carried out, it might be unjust, and there were other cases in which the law recognised a moral duty to make provision unless there was plain reason for exclusion. The remedy devised was this *querela*, a complaint that the will was *inofficiosum*. It was nominally rested on the notion that the testator must have been insane[3], which would involve complete nullity of the will, but the notion was not logically applied, for there were cases in which the will was left partly effective. In classical law the proceedings were before the *centumviri*[4]. The burden of proof that the exclusion was unjust was on the claimant[5]. There is controversy as to the exact nature of the proceeding. It seems to have been a basis for *hereditatis petitio* rather than an independent procedure, but it clearly involved a special preliminary enquiry, so that it can be treated as a separate matter. It is not clear whether there was a separate judgment or whether judgment in the *hereditatis petitio* followed directly on the enquiry, but the better view seems to be that there was a separate judgment[6]. As it involved some reflection on the testator, it was allowed only as a last resort; no one might use it if he had any other remedy.

1 Nov. 117. 5. 2 P. 4. 5; Inst. 2. 18; D. 5. 2. Neither Gaius in the Institutes nor Ulpian in the Regulae has anything to say about the *querela*. There is a good deal from Ulpian in D. 5. 2. 3 Inst. 2. 18. pr.; D. 5. 2. 2; h. t. 5. It is only "*color insaniae*." 4 5. 2. 17. pr. See as to an extension for the case of *bonorum possessores* and others, not tried before the *centumviri*, Eisele, *Z.S.S.* 15. 256 sqq. 5 See 5. 2. 3. Not excluded by pact *inter vivos*, P. 4. 5. 8. 6 Girard, *Manuel*, 874 and the literature there cited. For the sixth century commentators it is not a distinct action, but a ground on which *hereditatis petitio* can be brought, having its special rules and restrictions. The aim being to make the case one of intestacy, it is like any other claim of the *hereditas* against the *institutus*, and it may be that this is only the result of the disappearance of the old classifications of actions and substitution of new arrangements. (See Collinet, *Études Historiques*, 1, 192 and reff.) The question remains whether it ever was a distinct action. The materials are scanty, as we have little information independent of the sixth century writers. According to one view the Byzantine system represents no essential change. It was never more than a particular basis for the *hereditatis petitio*. *Querela* is unique for the name of an action, and there are other points in favour of this view. Others hold that, though it was no more than a basis for the *hereditatis petitio* there were a separate hearing and decision on which that of the *hereditatis petitio* would follow, since to bring the *querela* is to shew that there is no other basis. Paul in the only classical text which throws light on the matter (P. 4. 5. 8–10) seems to treat it as an independent procedure. It cannot be extremely ancient. The equitable idea it expresses is not primitive, nor are the *centumviri*. It is possible that, even if it was a distinct thing in classical law, it began in the admission of unfairness in reply to or in support of *hereditatis petitio*. See Jobbé-Duval, *Mél. Gerardin*, 355 and *Mél. Fitting*, 1. 437, where the literature is fully examined.

Thus a *suus omissus*, as he could proceed under the rules of *exheredatio*, could not bring the *querela*[1].

The *querela* might be brought by various persons, subject to the principle which results from its relation to *hereditatis petitio*, that no one might bring it who was not entitled on intestacy[2]. If a person not really entitled brought it, and got judgment, either through judicial error or because the defendant made no defence (*e.g.* knowing that though this case was unfounded, there were others which would succeed), the successful litigant benefited not himself, but the person really entitled[3]. There were however exceptional cases in which one not *heres* on intestacy could bring it for his own benefit. Thus, if the nearest *heres* failed because he was justly excluded, the next could bring it, if he was within the classes to whom it applied. The same was true if the nearer person refused to claim. But these cases may be post-classical[4].

The rules determining the classes who could claim, not all recognised at the same time, express two distinct ideas, the old idea of common property in the family estate and the later one of duty to consider claims of near relatives.

The classes are[5]:

1. Descendants, *i.e.*, *sui* and other *liberi*, of a man, unjustly disinherited[6], and descendants of a woman, unjustly omitted, including *postumi*[7].

2. Ascendants unjustly omitted[8].

3. Brothers and sisters unjustly omitted, if some base person was instituted[9]. This is an early case. It was confined till Justinian to those having both parents in common and still agnatically connected. Under him it extended to all consanguineous brothers and sisters (*i.e.* of the same father) whether the agnatic tie existed or not. But uterines (*i.e.* having only the same mother) were always excluded. *Turpes personae* are defined in the *Codex Theodosianus* in rather vague terms; they included *infames* and all who earned their livings in disreputable ways[10]. Justinian is a little more precise: in particular, he adds *liberti*[11].

The classical rule was that the persons entitled might bring the *querela* not merely if wholly neglected, but if they took less than a fourth of what they would have on intestacy, *pars legitima*. (This was sometimes called the *quarta Falcidia*[12], which has led to the view that the rule itself

1 5. 2. 23. pr.; Inst. 2. 18. 2. 2 5. 2. 6. But in that case—even against the emperor *heres*. P. 4. 5. 3. 3 5. 2. 6. 1. 4 5. 2. 14; h. t. 31. 5 *Querela* transmissible in later law if proceedings actually started, though *lis* not yet *contestata*. Earlier law uncertain. 5. 2. 6. 2. 7 interp. 6 As to express *exheredatio* of *emancipati*, see 5. 2. 23. pr. 7 Inst. 2. 18. pr.—2; P. 4. 5. 2; D. 5. 2. 1, 5, etc. Even *spurii*, h. t. 29. 1. 8 h. t. 15. pr. 9 C. Th. 2. 19. 1; C. 3. 28. 27. Restriction probably post-classical. 10 C. Th. 2. 19. 1, *interpretatio*. 11 C. 3. 28. 27. 12 C. 3. 28. 31.

was based on the *l. Falcidia*[1].) If however the will, containing an insufficient gift, contained also a direction that the amount was to be made up, there was, from the fourth century, no case for the *querela*, but an action lay against the *heres* to have the due amount made up—*actio ad supplendam legitimam*[2]. There was a good deal of law as to what sort of gift counted for the exclusion of the *querela*. All gifts under the will and all *donationes mortis causae* counted[3], but not, in general, *donationes inter vivos*. Ulpian held indeed that such a *donatio* would count if it had been expressly given with that aim, but this view was not accepted, and was directly negatived by Justinian[4]. Zeno allowed *dos* and *donatio ante nuptias* to count[5], and Justinian added gifts to defray the expense of obtaining a *militia*[6].

Apart from the reorganisation in the Novels Justinian made several changes in detail. He provided that any benefit under the will excluded the *querela*, the aggrieved person being confined to the *actio ad supplendam legitimam*, which did not affect the will; in fact implying the direction to make up the amount wherever it was needed[7]. Soon after the publication of the Institutes he established a fresh minimum in the case of children. They were to be entitled to one-third if there were four or less, and one-half if more[8].

CXV. If the court held the exclusion just, the *querela* failed[9], and there were other circumstances which would exclude it. The chief were:

(i) At first two years delay, later five, to run, not, as Modestinus held, from the death, but, as Ulpian held, and Justinian enacted, from entry of the *heres*[10]. The Emperor might extend it for good reason; if he did, any manumissions which had taken effect were good, the *libertus* being bound, at least in later law, to pay 20 *aurei* to the successful claimant[11].

(ii) Any recognition of the validity of the will, as by accepting a benefit under it[12]. A *tutor* was not personally barred by accepting a legacy for his ward, nor did he bar the ward by accepting one for himself[13]. But one who volunteered to act as *procurator* to accept for another was barred[14].

1 The *querela* is older, but it is suggested that it was not till after the *l. Falcidia* that an exact quota bound the court. As in the *Falcidia*, debts, funeral expenses and value of freed slaves are deducted in arriving at the value of the estate, P. 4. 5. 6. **2** C. Th. 2. 19. 4; C. 3. 28. 36. pr. **3** Inst. 2. 18. 6. **4** 5. 2. 25. pr.; 38. 16. 16; C. 3. 28. 35. **5** C. 3. 28. 29; cf. Greg. Wis. 4. 2. **6** C. 3. 28. 30. 2. In later law, *militia* includes certain heritable and transferable offices about the court. See Brissonius, *de verb. signif.* s.v. **7** Inst. 2. 18. 3. **8** Nov. 18. 1. A hasty enactment: if there were four their legitim was one-twelfth each: if five, one-tenth. **9** C. 3. 28. 11. **10** Pliny, *Ep.* 5. 1. C. 3. 28. 36. 2. Pliny's language suggests that the two years were based on the period of *usucapio*. **11** 5. 2. 8. 17; h. t. 9. **12** 5. 2. 12. pr. **13** Inst. 2. 18. 4; D. 5. 2. 22. 1, 3. **14** 5. 2. 32. pr.

(iii) *Transactio.* If the claimant made a valid compromise with the *scriptus heres* and it was carried out, the *querela* was barred, and the will valid[1].

(iv) Death of the claimant without taking steps. But, at least in later law, if he had taken steps clearly shewing intent to bring the *querela*, and died without evidence of changed intentions, the claim survived to his *heres*[2]. It is likely that in classical law he must have definitely begun the action[3].

(v) Abandoning the *querela* after beginning it, *i.e.* after definite joinder of issue, but not where the withdrawal was due to fraud of the *scriptus heres*[4].

The question remains: What was the effect of the *querela*? This varied with the facts, and only a few typical cases can be dealt with.

Where there was only one claimant and he succeeded against all the *instituti*, the will was void; manumissions and other gifts failed and legacies already paid could be recovered as *indebita*, unless the *scriptus heres*, when he paid, knew of the *querela*, in which case he was liable to the successful claimant[5]. If however the decision was arrived at by default, then, as in case of proved collusion, legacies and manumissions were valid[6]. If he failed he lost all benefits under the will, and they went, not to the *heres*, but, in general, for *indignitas*, to the fisc[7]. But he did not suffer this penalty unless the matter went to judgment. If he died or withdrew or compromised he did not lose his gift[8]. Nor did he lose it if he was not acting on his own behalf. Thus, where a *tutor* was acting on his ward's behalf, neither he nor the ward suffered[9].

Where a claimant succeeded against one *heres* and failed against another, we get the fact brought out that the *querela* was not necessarily an arraignment of the whole will, but litigation *inter partes*, and a decision against one did not affect others. The event might happen in several ways. A brother might bring it against two *heredes* of whom only one was a base person[10]. A claimant might bring it against different *heredes* in different actions and the *iudices* decide differently (or one of the *instituti* might have by the will only what he would have on intestacy). Or he might withdraw it against one. The result would be that the will stood partly good, so that, in effect, a man was *pro parte testatus*[11].

1 5. 2. 27. pr. **2** 5. 2. 6. 2; h. t. 7. **3** Paul in Cons. 6. 5. **4** 5. 2. 8. 1; h. t. 21. pr. **5** 5. 2. 8. 16. **6** 5. 2. 17. 1; h. t. 29. pr. **7** 5. 2. 8. 14. But *fideicommissa* charged on him are unaffected, P. 4. 5. 9; D. 5. 2. 8. 14, and, in classical law, a substitute of an *institutus* who failed in the *querela* would take in preference to the *fiscus*, P. 4. 5. 10. As this involved his *institutio* the case could not arise under Justinian. **8** 5. 2. 8. 14. **9** 5. 2. 30. 1; 34. 9. 5. 9; h. t. 22. **10** 5. 2. 15. 2; h. t. 24. **11** *Ib.* He did not in strictness die intestate; his will was not *pro parte* void, it was set aside *pro parte*.

Except so far as they were charged solely on the *institutio* which was upset, legacies were good *pro rata*, and manumissions, which of course could not be reduced, altogether[1]. Similarly, if he brought it only against one of several *heredes*, the will was valid *pro parte*[2].

The texts, on the case in which there were two or more *prima facie* entitled, but only one acted, are obscure and to some extent in conflict[3]. If the one who did not act was justly excluded or renounced his claim or withdrew, the better view seems to be that the will was valid *pro parte*, as in the last case. But what happened if one had simply not acted is not clear. According to one view the will was void; on another it was *pro parte* valid. In any case if the claimant failed he alone lost his benefit; the other was unaffected. If two claimed and one succeeded while the other failed, there is the same conflict in modern opinion[4].

In 542[5] Justinian made sweeping changes. In estimating the *pars* nothing was to count unless the claimant was actually *institutus* for a share, but if he was, all *mortis causa capiones* counted. In the case of children the exclusion would be treated as unjust, and the will as *inofficiosum*, unless it was on one of fourteen grounds, set out in the Novel, and the ground was stated in the will. If the rule was broken, the *institutiones* were void, but the minor provisions stood good, so that there would be a will with no *heres*. There were corresponding provisions for ascendants, eight grounds being stated, but brothers and sisters were left under the old law.

The rule requiring exclusion to be express clearly tends to assimilate omission and *exheredatio*, and there is some doubt as to the effect of the change. Some writers hold that after this novel, the rules of *querela* and *exheredatio* were fused, the new system superseding them both. But those who take this view are not agreed as to the proper way in which to state the result. On one opinion the real result was the survival of a system based on the principles of *querela*, and substantial disappearance of the law of *exheredatio*. Another opinion exactly reverses this. The new rules supersede the *querela*, and are a remodelled set of rules of *exheredatio*. The main practical difference would be that, if the rules are those of *querela*, the proceedings would have to be brought ordinarily within five years, while on the other view the claim would be barred only by the ordinary period of limitations, then 30 years. But the language of the novel itself seems in favour of the view that both sets of rules survived, that omission of *suus* or *emancipatus* was still remedied

1 31. 76. pr.; C. 3. 28. 13. 2 5. 2. 19; h. t. 25. The former is one of the famous *leges damnatae* and almost any conclusion can be drawn from one or other of the various propositions contained in it. 3 The chief texts are 5. 2. 8. 8, 16, 17, pr., 23. 2, 25. 4 See for various views, Windscheid, *Lehrb.* § 584, nn. 24–26, and literature there cited. Accarias, *Précis*, 1. 963. 5 Nov. 115.

by ordinary *hereditatis petitio* or *bonorum possessio contra tabulas*, the new rules applying only in cases which in earlier days would have given rise to the *querela*[1].

Querela inofficiosi donationis, dotis. As *donatio mortis causa* might be cut down like legacy under the *l. Falcidia*, it may be that the amount of such gifts was taken into account in arriving at the value of the estate for the purpose of estimating the *pars*. It is clear that *donationes inter vivos* were not. But Severus Alexander, in a case in which such gifts had been made on a large scale in order to defeat the claim under the *querela*, ordered the gifts to be cut down by half[2]. Legislation, beginning in 245, but mainly under Diocletian, laid down general rules for such cases[3]. The effect was that in cases both of wills and of intestacy[4] there was a machinery similar to the *querela*[5], by which immoderate *donationes* and *dotes* might be set aside. As it was all post-classical, we have no juristic discussion and the texts leave some questions uncertain. Some texts require, as in the *querela*, only *eventus*, *i.e.* that successors in fact suffer, others require intent as well[6]. It was the gift which was attacked, not the will, and the texts are not in agreement whether the gift was wholly revoked or only *pro tanto*—probably the real rule was the latter. It was presumably under the same time-limit and general conditions as the *querela*[7]. Justinian[8] established a system, applicable only where the donee was a *filius*, in which it is clear that the effect was to cut down the gift, but it is expressed as a new system and throws little light on the earlier rules.

CXVI. FAILURE OF WILL. A will validly made might nevertheless fail to operate. We have just considered one case, that of the *querela*. The expression, *testamentum irritum*, might be used to cover any of the cases, but, in practice, it was confined to two, that of a testator who suffered *capitis deminutio*, and that of a will under which no *heres* entered, which was also called *testamentum destitutum* or *desertum*[9]. Where a will failed in consequence of the appearance of *postumi* or the like, it was called *testamentum ruptum*, and this name was also applied to a revoked will[10]. This case must be considered. *Mancipatio* was essentially irrevocable, but there was nothing in this to prevent the testator from altering the written instructions which he had given to the *familiae emptor*.

1 For some account of the controversy see Windscheid, *Lehrb.* § 591. It is an old quarrel, see Haenel, *Dissensiones dominorum*, 454. 2 31. 87. 3. 3 Chief texts: C. 3. 29. 1, 2, 3, 4 (=Vat. Fr. 282), 5, 6, 7 (=Vat. Fr. 280), 8, 9 (=C. Th. 2. 20. 1); C. Th. 2. 21. 1 (=C. 3. 30. 1); Vat. Fr. 270, 271; D. 31. 87. 3; Nov. 92. As to revocation by donor where it appeared that legitim would be interfered with, see C. 3. 29. 5. 4 C. 3. 29. 3. 5 "*Iuxta*," "*ad instar*," "*ad similitudinem*," "*ad exemplum*," etc. 6 C. 3. 29. 1, 8; Vat. Fr. 270. 7 C. 3. 29. 6. 8 Nov. 92. 9 C. 2. 145–147; Ulp. 23. 1, 4; Inst. 3. 1. 7, 8. 10 Ulp. 23. 2. See as to the possibility of validity for certain purposes in a testamentum *irritum* or *ruptum*, *ante*, § CXII and below, p. 330, nn. 2, 6.

Hence arose the rule of classical law that a will could not be revoked at civil law except by making another[1]. Failure of the second, if it was validly made, did not revive the first, except by special imperial relief[2]. If, however, in the second will, the *institutio* was *ad certam rem*[3], the rule that the restriction was ignored was, in this case, set aside, in effect, by Severus, who provided that though the old will was revoked, the *heres* under the second was under a trust, *fideicommissum*, to give to those interested under the first will all but the things mentioned, with enough added, if necessary, to make up a quarter of the *hereditas*[4].

The praetor took a different line. If a will or its material parts had been destroyed by the testator, he would refuse *bonorum possessio* under it[5], and if a second will had been so revoked, he would give *bonorum possessio* under the will which this second will had revoked, at least if the revocation was with intent to revive the old will[6]. After the mancipatory will was gone there was a change. Honorius laid down the strange rule that a will should be revoked, *ipso facto*, by the lapse of ten years. His reasoning is not clear but apparently he held that a man must have changed his mind by that time[7]. A little later Theodosius provided that a will would be revoked by a second will, even if, in this, the proper formalities were not complied with, provided five witnesses were prepared to attest its genuineness, but this applied only where the *instituti* in the first will were not entitled on intestacy, while those in the second will were[8]. But it was only a revocation; the new document was not a will but was regarded as expressing the wishes of an intestate, which no doubt means that its main provisions were treated as *fideicommissa*. Justinian adopted this, but for the rule of Honorius he substituted the more rational enactment that a will could be revoked after ten years by a declaration, in court, or before three witnesses[9]. The praetorian rules were still operative.

1 G. 2. 144, 151; Ulp. 23. 2. 2 G. 2. 144. Any *institutio* which could possibly take effect would upset the earlier will. Thus the *institutio* of a *postumus*, which failed because in the event he proved to be an *extraneus*, would upset an earlier will, if he could have been a *suus*. See 28. 2. 9. 4. 3 See *ante*, § CIV. 4 Inst. 2. 17. 3. In 28. 5. 93 where a man, thinking his *heres* was dead, made another will, and gave this reason, and the *heres* was not dead, Severus and Caracalla declared the first will good, but the *heres* thereunder must pay the legacies in the second will. 5 G. 2. 151 a; D. 38. 6. 1. 8. A hiatus in the text of G. is supposed to have laid down that if under such a will the *scriptus* claimed, and no one was entitled on intestacy, it went to the *fiscus*. 6 37. 11. 11. 2. 7 C. Th. 4. 4. 6. 8 Nov. Theod. 16. 7; C. 6. 23. 21. 5. 9 C. 6. 23. 27. 2.

CHAPTER VIII

THE LAW OF WILLS (*cont.*). LEGACY, *FIDEICOMMISSUM*. SOLDIER'S WILL. SETTLEMENTS

CXVII. Nature of legacy, p. 331; Forms of legacy, *ib.*; *Sc. Neronianum*, 333; CXVIII. Joint legacies and lapsed shares, 334; *Leges caducariae*, 335; CXIX. Principal rules of legacy, *ib.*; *Cautio Muciana*, 336; personal capacity, 337; Restrictions on amount, *l. Falcidia*, 338; CXX. Vesting of legacy, *dies cedit, venit*, 339; CXXI. Failure of legacy, *Regula Catoniana*, 341; *Ademptio*, etc., 342; Failure of the will, 343; CXXII. Remedies of legatee, security, 344; Actions in classical law, 345; under Justinian, *ib.*; CXXIII. Special types of legacy, 346; Legacy of usufruct, 348; *Praelegatum*, 349; *Legatum partitionis*, *ib.*; CXXIV. *Fideicommissa*, *ib.*; Restrictions, 350; *fideicommissa hereditatis*, 351; *Sc. Trebellianum*, *ib.*; *Sc. Pegasianum*, 352; Justinian's rules, 353; CXXV. *Fideicommissa* of *singulae res*, *ib.*; Justinian's assimilation of *legatum* and *fideicommissum*, 354; Falcidian and Pegasian deductions by *fideicommissarius*, *ib.*; Cases of *alimenta*, 356; CXXVI. *Codicilli*, *ib.*; Soldiers' wills, 357; CXXVII. Creation of limited interests by will, 358; Family Trusts, 359; Justinian's restrictions, 360.

CXVII. The will, as we have hitherto been considering it, was a document (or declaration) by which the *hereditas* of a deceased person was transferred to a successor, who stepped into the shoes of the deceased. But it served other purposes. Some of these, manumissions, and appointments of tutors, have already been dealt with. We have now to consider gifts of property (in the widest sense) by way of "singular," not "universal" succession[1], legacies, together with *fideicommissa*, which last however will be found to present in one, indeed the most important, case, the characteristics of universal succession.

A legacy is a gift, chargeable only on a *heres*[2], usually of *res singulae*, having an assignable money value[3]. It must be in Latin, if contained in the will itself, as opposed to a confirmed codicil[4], till, in 439, it was allowed to make wills in Greek[5]. Even where it took the form of a gift of an aliquot part of the estate, it had nothing to do with universal succession; the legatee could not sue or be sued in respect of rights and liabilities of the estate. As we have seen, a legacy was void, in classical law, if it preceded the *institutiones*[6].

Forms of Legacy. In the classical law there were four forms[7].

1. *Per vindicationem.* "I give the thing to *X*." The proper words were "*Do, lego,*" but Gaius says that in his time it was agreed that "*sumito*"

1 Treating it here is illogical but convenient, avoiding repetition, see G. 2. 191. 2 So that if son or slave is made *heres* it cannot be charged on the *paterfamilias*, as a *fc.* can. Ulp. 24. 21. 3 Thus *manumissio* is not legacy. 4 *Post*, § CXXVI. 5 C. 6. 23. 21. 6 *Ante*, § CIV. 7 Antiquity disputed: nothing learnt from Cicero. The first two are no doubt much older than the others. The differences of opinion among the classical lawyers as to the effect of the others suggest that they were recent. The *l. Falcidia*, as cited by Paul in D. 35. 2. 1, seems to recognise only the two main forms.

or "*sibi habeto*" or "*capito*" served as well[1] and produced the same effect, which was to vest the thing in the legatee, so that he could "vindicate" it, to which fact, he says, it owes its name[2]. The legatee could bring a real action against anyone who held the thing, but, conversely, only the quiritarian property of the testator could be so left, and, except in the case of fungibles, the thing must have been his at the time of testation[3]. There were school dissensions as to this form of legacy. The Proculians held that the thing was a *res nullius* (not of course open to *occupatio*), till the legatee accepted or refused. But the Sabinian view prevailed, that it vested in the legatee on the entry of the *heres* and devested if he refused[4]. Thus, at least in the law as finally settled, he was entitled to *fructus* from *dies cedens*[5]. A more important divergence arose in the case of a conditional legacy. This could not vest in the legatee till the condition was satisfied. Meanwhile the Proculians held it a *res nullius*, the Sabinians holding that it belonged to the *heres*, who would thus get the fruits[6]. Apparently the Sabinian view prevailed, the acceptance being only so far retrospective as to annul alienations and charges created by the *heres*[7].

2. *Per damnationem.* The strict form was "*heres meus damnas esto dare*," but in classical law, "*dato*," "*dare iubeo*," "*facito*," "*facere iubeo*," or probably any other explicit command would serve[8]. This is in classical law the most important of the forms, since anything could be left by it, services, third persons' property, and *res futurae*[9]. It gave only a *ius in personam* against the *heres*[10]. Like most other obligations which rested on the words "*damnas esto*[11]," it had given a right, where it was for a *certum*, to *manus iniectio*, with double damages in case of denial, and though in classical law *manus iniectio* was gone, the double liability remained, whether the exact form "*damnas esto*" was used or not[12].

1 G. 2. 193; Ulp. 24. 3. **2** G. 2. 194; Ulp. 24. 7. **3** G. 2. 196; Ulp. 24. 7. Hence a modern controversy: was a legacy of *peculium* in this form valid if, as would usually be the case, its content had changed? Probably, for this purpose only, it was treated as a *universitas*. **4** G. 2. 195, 200; P. 3. 6. 7; D. 12. 1. 8; 34. 5. 15. **5** 30. 36. 2. **6** G. 2. 200. **7** 10. 2. 12. 2; 35. 1. 105; C. 6. 43. 3. 3. **8** G. 2. 201; Ulp. 24. 4. **9** G. 2. 197, 202, 203; Ulp. 24. 8; 24. 9; P. 3. 6. 10. **10** G. 2. 204; P. 3. 6. 17. **11** *Post*, § CCXII. **12** G. 4. 9. The forms make a difference on the question of position of the gift. If it is between two *institutiones* which operate, Paul says (P. 3. 6. 2) that it is good, if *per damnationem* (it is a direction to the first *institutus*), but only in proportion to the share of the first *heres* if it is *per vindicationem*. It is effectively charged only *pro parte*. If the first fails, the legacy fails: if the second, the legacy is good. But this seems to express republican law. The *ll. caducariae* provide (*ante*, § CXI; *post*, § CXVIII) that gifts which become *caduca* go to certain beneficiaries as *heredes*. Hence Ulp. says (Ulp. 1. 21) that if the second fails and the lapse goes to the first, the legacy is good, but if it goes to *legatarii patres*, they take as *heredes* and it will be as if both had operated. If the first failed the legacy would fail as in old law. He adds that some ignored this point and applied the old law. But the *ll. caducariae* and the rules of position are gone in later law.

3. *Sinendi modo.* "*Heres meus damnas esto Lucium sinere rem capere.*" This too gave only a *ius in personam*[1]. It does not seem to have been of great importance. Anything could be left by it which belonged to the testator or the *heres* at the time of death, as its words indicate, but Gaius says that the dominant view was that it could not apply to anything acquired by the *heres* after the death[2]. It gave only a personal action and, though the word *damnas* was used, we are not told that it was ever *in duplum*, perhaps because it was first used in matters for which there could be no *manus iniectio*. Gaius also speaks of a doubt, also due to the form, whether the *heres* was bound to make a formal conveyance, or it sufficed, even for a *res mancipi*, to let the legatee take it. The latter view prevailed[3].

4. *Per praeceptionem.* "*Titius rem praecipito*[4]." As the form shews, the legatee was entitled to the legacy before the estate was divided[5]. The schools disagreed as to the nature of this legacy[6]. The Sabinians, arguing from the name, held that it could only be to a *heres*, so that the mode of enforcement would be the *iudicium familiae erciscundae*. It must therefore be a thing in the *hereditas*, but it need not have been so when the will was made and it might be merely *in bonis*. The Proculians held that *praecipito* meant merely *capito*, and that it was a case of *vindicatio* and might be made to anyone. Gaius says, doubtfully, that Hadrian confirmed this doctrine. On the Proculian view, if it was to the *heres*, and had been quiritary property of the testator, it could be vindicated. If only *in bonis*, *familiae erciscundae* was applicable. If it was to an *extraneus*, only the testator's quiritary property could be so left, and it gave a *ius in rem*. Thus it still differed from the first form, in that the *res* might have been acquired after testation, and, if to the *heres*, in that it need not have been in quiritarian ownership at all.

The rule was simplified by the time of Ulpian who lays it down that only what could be left by *vindicatio* could be left in this way[7].

These rules were greatly modified by the *sc. Neronianum*[8] (A.D. 64). It provided that, where a gift was made in a form not suited to it (*minus aptis verbis*), it should be construed, if that would make it valid, as in the most favourable form, *i.e.*, *damnatio*, by which anything could be left. There were disagreements as to the scope of the enactment. Some held that it applied only to defects of form and not of capacity[9]. Some of the Sabinians, who held that *praeceptio* could be only to a *heres*, thought the *sc.* would not save such a legacy to an *extraneus*, but the wider

1 G. 2. 209, 213; Ulp. 24. 5. 2 G. 2. 210, 211, 212; Ulp. 24. 10. Not necessarily property at all. P. 3. 6. 11. 3 G. 2. 214; G. Ep. 256. 4 G. 2. 216; Ulp. 24. 6. 5 This form is the precursor of the *praelegatum* of later law, *post*, § CXXIII. 6 G. 217–223; Ulp. 24. 11; P. 3. 6. 1. 7 Ulp. 24. 11. 8 G. 2. 197; Ulp. 24. 11 a. 9 G. 2. 218.

interpretation prevailed[1]. The forms did not however lose their importance; each had its own rules, *e.g.* in case of lapse, and these still existed. In 339 it was enacted[2] that no importance was to attach to the exact use of words, which is understood to mean that, in deciding which type of legacy was meant, the intent was to be followed whatever the words used. Justinian provided that all legacies were to be of one nature and enforceable by the same remedies[3].

CXVIII. JOINT LEGACIES AND LAPSES. Legacies to two or more may be joint in two ways. They may be:

(i) *Re et verbis coniuncti* (*coniunctim*). "I give Stichus to *X* and *Y*."

(ii) *Re coniuncti* (*disiunctim*). "I give Stichus to *X*. I give Stichus to *Y*." A gift in the form: "I give Stichus to *X* and *Y* in equal shares" was really two distinct gifts and is not here material, though the donees are sometimes said to be "*verbis tantum coniuncti*[4]."

If a legacy to a single legatee failed from any cause the *heres* benefited (apart from the *ll. caducariae*), but in the case of joint gifts there were complications, due to the different rules, in the different forms, as to sharing among joint legatees. Thus the two sets of rules, *i.e.* as to shares and as to the effect of lapse, must be taken together.

In *vindicatio* and *praeceptio*, whether *coniunctim* or *disiunctim*, "*iure civili concursu partes fiunt.*" Each had a right to all, cut down by the other's right, so that if one failed the other benefited, not the *heres*[5]. On the same principle if a *res* was left to *A* and *B coniunctim*, and also to *C disiunctim*, if *A* or *B* failed *B* or *A* benefited, not *C*. If *C* failed, *A* and *B* benefited, taking the lapse as *disiunctim*[6]. If *A* and *B* failed, *C* benefited, if all three, the *heres*.

In *damnatio*, *coniunctim*, they shared, on presumed intent, but lapses went to the *heres*, his obligation being treated as separate, not solidary. In *damnatio*, *disiunctim*, each was entitled to all or its value; failure of one made no lapse[7]. In *sinendi modo*, the rules were the same except that some held that if it were *disiunctim*, the *heres* was released

1 G. 2. 218. Where a man left a *res*, *per vindicationem*, and sold it, this was not relieved against under the *sc.*, since if it had been originally left *per damnationem* and alienated there would be an *exceptio doli* against the legatee, G. 2. 198. There is some evidence that after this *sc.* the legatee *per vindicationem* had the same choice by juristic *interpretatio*, and could bring either a real or a personal action. 30. 84. 13; h. t. 95. But it is probable that these texts are interpolated and express the alternative given by Justinian. It is also possible that the texts originally referred to what seems to have been a common case, a gift made in both forms so as to avoid any difficulty. See the wills of Dasumius and C. Longinus Castor (Girard, *Textes*, 798 sqq.). In any case only the nature of the remedy was affected, not the extent of the right. 2 C. 6. 37. 21. 3 C. 6. 43. 1. As the forms had different rules in various matters, he had to choose between them. He adopts usually, but far from always, the rules of *vindicatio*. 4 D. 32. 89; 50. 16. 142. 5 G. 2. 199, 223; Ulp. 24. 12; P. 3. 6. 26. 6 30. 34. pr.; 33. 2. 26. 1. 7 G. 2. 205; Ulp. 24. 13. It would benefit the *heres*, since he would only have one legacy to pay.

by letting one legatee have the *res*, as his only duty was not to prevent his having it[1]. The point could not arise if the gift was *coniunctim*.

Except in the case of gifts void *ab initio*, as to a peregrine or person already dead, which continued to be treated as *pro non scriptis* the law was profoundly modified by the *ll. caducariae*. All lapsed gifts, *caduca* or *in causa caduci*[2], went to those who would have had them in earlier law, if they had the *ius antiquum*; failing these, to *collegatarii patres coniunctim*; failing these, to *heredes patres*; failing these, to other *legatarii patres*; and failing these to the Treasury[3]. Such windfalls need not be accepted, but carried their burdens[4]. Apparently a colegatee *disiunctim* did not count as a colegatee for this purpose[5]. The form was immaterial, so far as the *leges* applied. But if there were joint legacies *disiunctim* by *damnatio*, as each was entitled to all, there was no *caducum*. There are difficulties and obscurities about these rules. The changes made about the time of Caracalla, and when the empire adopted Christianity have already been considered[6]. Under Justinian the forms and the *leges* were gone. He restored the old *ius accrescendi* with some modifications[7]. Apart from joint gifts, a lapsed legacy went to the *heredes*, carrying its burdens with it, but if the legacy had been solely charged on a particular *heres*, the lapse went to him. All joint legatees took in shares. Lapses went, in first instance, to colegatees. If the gift was *coniunctim* they might refuse, but if they accepted they took also the burdens. If *disiunctim*, they must take, but the burdens failed. This rather strange distinction is rested on the view that the testator by making them *disiunctim* meant that no one was to be liable for more than his own burden[8]. In the case of *pro non scriptis* the old law remained; accrual was compulsory but, in general, burdens failed[9].

CXIX. Principal Rules of Legacy. In Justinian's law there was no longer need of formal words (*legis modo*[10]); so long as it was unambiguous the form of words and the place in the will were immaterial[11]. The law of conditions was much the same as in *institutiones*, and the preference for maintaining the gift and annulling the offending modality existed here also, though it had not the same justification, since failure of the gift would not imperil the will. The principle may be that it is reasonable to apply the same canons of interpretation to different parts

1 G. 2. 215. 2 As to this distinction, *ante*, § CXI. A conditional legacy was a *caducum* if the condition failed after testator's death. 35. 1. 31, altered. 3 G. 2. 206–208; Ulp. 24. 12, 13. As we have seen the windfall is treated as *hereditas*. 4 Ulp. 17. 3. 5 Modern opinions differ. This seems however to be what Gaius means, 2. 207, 208, and Paul, D. 32. 89, says the same. 6 *Ante*, § CXI. 7 C. 6. 51. 1. 8 h. t. 1. 11 g. 9 h. t. 1. 3, 3 a. As to merely *verbis coniuncti*, the express statement of Paul (D. 32. 89) and the general language of G. 2. 207 suggest that, under the *ll. caducariae*, they were treated as *coniunctim*. 10 Ulp. 24. 1; G. 2. 193. 11 P. 3. 6. 13; Inst. 2. 20. 34.

of the same instrument[1]. But though in general any condition which would avoid an *institutio* would avoid a legacy, the rule that a son could not be instituted on a condition not in his own power had no application to legacy. And though by Ulpian's time it was clear that impossible conditions and those grouped with them were struck out[2], the Proculians had held that they ought to vitiate the gift as in contract, and Gaius, himself a Sabinian, admits the distinction to be unreasonable[3]. *Causa* is not condition; a gift to a man for a stated reason which was not true would not avoid the gift, unless the court thought that it was intended as a condition; *falsa causa non nocet*[4]. And misdescription did not avoid the gift if it was clear who was to have it and what it was—*falsa demonstratio non nocet*[5]. The law as to what amounted to fulfilment, and what prevention excused non-fulfilment, was as in *institutiones*, but gifts of liberty were more favourably construed. In legacy if impossibility supervened after *aditio*, the gift failed; a manumission took effect[6]. In legacy prevention excused fulfilment only if it was by one interested in non-fulfilment. In manumission, prevention by anyone excused[7].

A negative condition, dependent on the act of the beneficiary, might if strictly construed make the gift nugatory, for it might not be certain till he died that he would not do the act. The *cautio Muciana*, introduced probably by Q. Mucius Scaevola, gave some relief. The arrangement was that the legatee took the gift at once, giving security for return if he broke the condition[8]. It applied in classical law only in legacy, and only to such negative conditions as were in the power of the legatee, and, probably, among these, only to such as must otherwise remain open for the legatee's life. In the Digest there are texts applying it to all negative potestative conditions, and others confining it to the class last mentioned[9]. Whether this represents a variable practice or the wider application is due to Justinian, as is the extension to *institutiones*, is matter of dispute[10]. In gifts of liberty there could be no *cautio Muciana*, for the manumission could not be undone. Where the act was indifferent in itself, there was a forced construction *favore libertatis*; "*si Capitolium non ascenderit*" was understood to mean "*cum primum potuerit*[11]." Where

1 As to reasons for extending the "*favor testamenti*" to legacies, see Hoffmann, *Kritische Studien*, 158. Conditions existed in legacies before they did in *institutiones*, but it is difficult to see why this rule should have developed for legacy. The language of Gaius shews that its application to them was still disputed (G. 3. 98). From D. 28. 7. 1 (where, though the passage is from Ulpian, it is probably Sabinus who is speaking) it seems to have been long settled in the case of *institutiones*. **2** 28. 7. 14; 35. 1. 3. **3** G. 3. 98. **4** Ulp. 24. 19; Inst. 2. 20. 31. **5** Ulp. 24. 19; Inst. 2. 20. 29, 30. **6** 35. 1. 94. pr.; 40. 7. 20. 3. **7** 28. 7. 3; h. t. 11; 40. 7. 3. pr. **8** 35. 1. 7. **9** *Ib.*; h. t. 72. pr., 2; h. t. 106. **10** See H. Krueger, *Mél. Girard*, 2. 1, for a hypothesis as to its origin and evolution. **11** 40. 4. 17. pr. But the same writer, Julian, elsewhere (40. 4. 61. pr.; 40. 7. 4. 1) says that such gifts are derisory and void. It is no doubt a question of intent.

it was not indifferent, there was no relief, and it may be for this reason that *conditio iurisiurandi*, remitted in other cases, was allowed in manumission[1].

Under Justinian much of the utility of the *cautio Muciana* was gone, in legacy, since he allowed resolutive conditions with somewhat similar security, and covering a wider field[2].

Dies incertus was treated as a condition, as in *institutiones*, but the extension of this principle to legacy seems rather late[3]. It may be noted that *dies incertus an, certus quando*, which is properly a condition and was so treated in *institutio* and legacy, was treated as *dies* in manumission[4]. *Dies certus* was allowed in legacy[5], and an uncertain day (*certus an, incertus quando*), certain to arrive within the lifetime of the donee, was treated here as *dies certus*[6]. Thus the result was reached that a legacy payable at death of legatee was valid, while one payable after the death of *heres* or legatee was void, "*ne ab heredis herede legari videatur, quod iuris civilis ratio non patitur*[7]."

There is not much difference, and Gaius says the distinction is unreasonable. The truth is that the Romans solved the puzzling logical question whether, at the moment of death, a man is alive or dead in the sense that he is alive. A legacy payable so many days before the death was void[8], probably as being "*praepostere conceptum.*" Justinian legalised all these, as he did resolutive conditions and gifts *ad diem*[9].

Modus is distinct from condition. A gift *sub modo* was an absolute gift with a direction as to its application, but, if the direction was positive, the legatee could not compel delivery till he had given security for its application[10]. If negative, it might be treated as a case for the *cautio Muciana*[11].

The rules of personal capacity were in general as in *institutio*[12], but it may be remembered that some types of beneficiary, *e.g.* municipalities, could receive legacies before they could be instituted[13], and the *l. Voconia* forbidding the *institutio* of women by *classici*, had no application to legacies. The case of legacy to one in the *potestas* of the *heres* created a difference of opinion. As a gift of his own property to a man was void, and a gift to a slave was practically one to his master, the difficulty is plain. Servius, ignoring the *regula Catoniana*[14], saw no objection to such a gift, but held that it failed if at the time when it vested the

1 28. 7. 8. 6, 7; 40. 4. 12. pr. **2** C. 6. 37. 26. **3** There is much controversy on this matter. See Brunetti, *Dies incertus*. **4** 40. 4. 16; 40. 7. 19. **5** 36. 2. 5. 1. **6** 36. 2. 4. **7** G. 2. 232; Ulp. 1. 20; 24. 16; P. 3. 6. 5, 6; Inst. 2. 20. 35; see *post*, § CXLIX. **8** G. 2. 232; cf. Inst. 3. 19. 14. **9** Inst. 2. 20. 35; C. 6. 23. 25; C. 6. 37. 26; C. 8. 37. 11. *Post*, § CLIV. Legacy "*si legatarius volet*," 30. 65. 1; "*si heres volet*," 32. 11. 7 (interp.). **10** 32. 19. **11** At any rate under Just. Nov. 22. 43. **12** No legacy to *postumus extraneus*, G. 2. 240, till Justinian, Inst. 2. 20. 28. **13** *Ante*, § CIII. **14** G. 2. 244; *post*, § CXXI.

"*honoratus*" was still in the *potestas* of the *heres*. The Sabinians held, on the principles of the *regula Catoniana*, that the gift was good if conditional, bad if simple. The Proculians held it bad in both cases, because, says Gaius, we can no more owe to one in our *potestas* conditionally than we can absolutely, which is giving the rule as a reason for itself, and ignores the distinction taken under the *regula Catoniana*. Justinian adopts the Sabinian view, adding the restriction, attributed to Servius, where the *honoratus* was still in the *potestas* when the right vested, which was probably also part of the Sabinian view[1].

But the fact that a slave is not the same person as his master led to some unexpected rules in this connexion. Thus a legacy of the property of *X* to the slave of *X* was absolutely good[2]. And no legacy to a slave was good unless it was of a thing which he could take if he was free. Thus a legacy to him of a right of way was void, for the land to which it must attach would not be his if he was freed[3]. The rule expressed by Paul that "*cum servo alieno aliquid testamento damus domini persona ad hoc tantum inspicitur ut sit cum eo testamenti factio, ceterum ex persona servi constitit legatum*[4]" had other applications. The rule as to *duae lucrativae causae* did not apply where *A* left a thing to *B*, and *C* made a *donatio* of it to *B*'s slave[5]. A legacy to a slave *post mortem domini* was good[6]. Where a will was upset by *bonorum possessio contra tabulas*, a legacy to a slave failed, though his *dominus* was a person legacies to whom would be saved[7].

Excessive legacies would tend to cause refusal of the *hereditas* and intestacy. After ineffective legislation in the republic[8], the problem was solved by the *l. Falcidia*, of 40 B.C.[9] Its main rule was that if legacies exceeded three-quarters of the estate they might be cut down *pro rata*[10]. The calculation was made as at the death, debts, funeral expenses, and the value of slaves freed, being deducted[11]. If a legacy was such as to be incapable of division, the legatee must refund proportionately[12]. If there were several *heredes* and legacies were specially

1 Inst. 2. 20. 32; Ulp. 24. 23. The converse case of legacy to one whose slave was *heres* gave no difficulty: it was valid whether simple or conditional, but failed if at *dies cedens* he was still in *potestas*. G. 2. 245; Inst. 2. 20. 23. The difference is that in the first case the legacy cedes at once on opening of will and the inheritance is also fixed on the master, so that he is inevitably the person entitled to the legacy. In the second case the identity is not inevitable, as the slave can be alienated before entry. In Ulp. 24. 24 it is supposed that the "*non*" is an error. **2** 31. 82. 2. It is treated as not affected by the Catonian in any way. **3** *Ib.*; 33. 3. 5. The contradictory 32. 17. 1 is probably corrupt. **4** 31. 82. 2. **5** *Post*, § CXCII; 30. 108. 1. **6** 30. 68. 1. **7** 37. 5. 3. 2. **8** *L. Furia*, date uncertain, forbade legacies of more than 1000 *asses*, with some exemptions, with *manus iniectio* (G. 4. 23) and fourfold penalty (Ulp. 1. 2). *L. Voconia* (168 B.C.) forbade any legacy to exceed what the *heredes* took, sanction unknown, probably nullity. Gaius (2. 225, 226) points out the defects of these laws. **9** 35. 2. 1. pr. **10** G. 2. 227; Inst. 2. 22; P. 3. 8; Ulp. 24. 32. **11** P. 4. 3. 3; D. 35. 2. 81. **12** D. 35. 2. 80. 1.

charged on particular *heredes*, the calculation was separately made for each, so that even where some legacies were cut down, more than one-quarter might remain with the *heredes*[1]. Conversely, the testator might direct that any particular legacy should or should not bear the loss, thus relieving or burdening the others[2]. The rule applied, at any rate in later classical law, to *donatio mortis causa*[3]. In classical law the testator might not forbid the *heres* to keep this quarter; a private agreement with that aim was void[4]. Apart from the military will, the only cases privileged from this reduction were one of a legacy of debt to the creditor, not exceeding the debt[5], and one of a slave, with nothing else, with a trust to free[6]. There were controversies as to the mode of computation of conditional debts, limited interests and so forth[7], complicated by the various types of legacy[8]. The *heres* was charged, in general, only with what he got as *heres*, not, *e.g.*, with a *praelegatum*[9]. The reduction was *ipso iure*, so that a legatee *per vindicationem*, where a case for the *Falcidia* arose, would be able to vindicate only a proportionate part of the thing[10].

It might happen that it was uncertain if, or to what extent, a deduction would be necessary. In that case the practice was to pay the legacy, taking security from the legatee for the proper refund in case the payment proved excessive[11].

The chief changes made by Justinian were that he allowed the testator to forbid the retention of a quarter[12], and excluded it altogether if the *heres* had not made an inventory[13].

CXX. Vesting of Legacies. The expressions *dies cedit* and *dies venit* were used, in connexion with legacies, to express two critical points of time in the acquisition of the legacy. The opposition is one of tense. *Dies cedit* means "the day is coming," *dies venit*, "the day has come." The use of different verbs makes a third term possible. The expression *dies cessit*, *cessisset*, *cesserit*[14] means that *dies cedens* is past, but not that *dies venit*.

At *dies cedens* the legacy "vested" with three principal effects. The gift became transmissible, so that, if it was of more than a life interest, the representatives of the legatee could claim the gift, though he had

1 35. 2. 77. **2** 35. 2. 64; h. t. 88. 2. **3** C. 6. 50. 5. **4** 35. 2. 27. **5** 35. 2. 5. **6** 35. 2. 33–35. **7** 35. 2. 73. 1 speaks of alternative modes of calculation. It might be estimated, market value of the gift as it is, or taken at value of the *res*, security being given for either event by *heres* or legatee. See Vassali (*Bull.* 26. 52 sqq.) who holds that the former system is due to Justinian; see 35. 2. 45. 1, 66. pr., 73. 2, 88. 3. **8** See, *e.g.*, 35. 2. 30, 36–38, 45, 66, 68, 73, 1 sqq., 82, etc. **9** 35. 2. 4. Some exceptions. **10** See 35. 2. 73. 5. Difficulties where a share lapses and its burden is carried over, 35. 2. 1. 13, 14; h. t. 78, etc. See Vangerow, *Pandekten*, § 535. **11** D. 35. 3. See Lenel, *Mél. Girard*, 2. 79, as to the working of this. **12** Novv. 1, 2. **13** *Ante*, § cx. **14** *E.g.* 36. 2. 31; 33. 5. 10.

not yet accepted[1]. It might determine the destination of the gift, for if the legatee was a slave it was his owner at *dies cedens* who could claim[2]. And it failed if the legatee was *incapax* on that day[3]. It determined what was left. If a flock or a *universitas rerum* of that type was left, the legatee was entitled to it, in general, as it was on that day[4]. So too, if two things were left together, of which one was clearly an accessory to the other, and the principal thing had ceased to exist on that day, the gift failed[5].

When *dies venit*, the legacy was recoverable by action, unless it was repudiated. It should be added that, at any rate in later law, *dies cedit* and, *a fortiori*, *dies venit* without the knowledge of the legatee[6]. It is noticeable that no time was fixed within which to claim. This is because in the view which prevailed, an inchoate right to the legacy was acquired by the legatee at *dies cedens*, though it devested, *e.g.* on repudiation. But actual acceptance had some importance; it was *e.g.* only this which prevented a legatee from attacking the will[7].

There were elaborate rules as to the occurrence of these days. In *legata pura* or *sub modo*, *dies cedit* on the death (or opening of the will), *dies venit* on the entry of the *heres*. In *legata ex die*, *dies cedit* at the death, *dies venit* at entry of *heres* or occurrence of the day, whichever was the later. In conditional legacy, *dies cedit* on occurrence of the condition, *dies venit* then or at entry of the *heres*, whichever was the later[8]. But certain legacies were under special rules. Thus legacy of a life interest (personal servitude), in which there was no question of transmission, ceded only at entry of the *heres*, and if there was *dies* only from the *dies*[9]. The same was true in *legatum*, with liberty, to a slave of the testator[10], as he could not be free, and thus no right could vest in him, till the *heres* had entered. In the case of personal servitude, the rule had the

1 Ulp. 24. 30; P. 3. 6. 7. Sommer, *Z.S.S.* 34, 394, arguing from 31. 45. 1 holds that *dies cedens* did not involve the existence of the liability. His explanation of 7. 3. 1. 4 seems inadmissible. In any case there is no doubt about the rules stated above in the text. **2** 30. 91. 6. In *institutio* the slave carries the gift with him to the moment of acceptance (*ante*, § CVIII). Both this and the distinction last above mentioned turn on the fact that legacy is acquired without any act of acceptance, while *hereditas*, apart from *necessarii*, is not (37. 11. 2. 9; *ante*, § CIX). **3** Ulp. 24. 30. **4** Inst. 2. 20. 20. **5** Inst. 2. 20. 17. But a good deal depends here on intent, which is the governing factor in these questions under wills. See 33. 7. 5. **6** See 36. 2 *passim*. "Vesting" does not imply that ownership passes to legatee—this cannot occur till the *heres* has accepted. G. 2. 195. **7** 34. 9. 5. pr. **8** Ulp. 24. 31. **9** 7. 3. 1. 2; Vat. Fr. 60; D. 36. 2. 2, 3. Hence the unfair result that fruits between death and entry go to *heres*. The non-transmissibility stated as the reason of the rule is hardly adequate for this (36. 2. 3). Elsewhere the same writer, (Ulp. D. 7. 3. 1. 2) explains it on the ground that usufruct, which consists in use, cannot exist till it can be enjoyed. Elvers (*Servitutenl.* 726) explains it on the ground that it is essentially conditional on the giving of security. But *dies cedens* does not await the giving of security. **10** Or if he himself is left *per vind.* 35. 2. 1. 4; 36. 2. 7. 6. 8.

practical effect that, even under Justinian, if it was to a slave the master could claim nothing if the slave died before *aditio* of the *heres*.

By the *ll. caducariae*, *dies cedit* not at the death, but only at the opening of the will[1]. The purpose of the rule, which Ulpian attributes to the *l. Papia*[2], Justinian to *scc.* based thereon, is obscure[3]. As it was also provided that wills should be opened as soon as possible after the death, it had little effect[4]. Justinian restored the old rule[5].

CXXI. FAILURE OF LEGACY. The requirements of a valid legacy have already been stated. The only point still to be mentioned in connexion with them is the *regula Catoniana*[6], to the effect that a gift which would have been *inutilis* if the testator had died at the moment of testation could not be validated by subsequent events. This is not identical with, or a mere application of, the wider rule that "*quod ab initio vitiosum est non potest tractu temporis convalescere*[7]," which avoids, *e.g.*, institutions of, or legacies to, a *peregrinus*[8]. Though in one sense wider, since it would avoid gifts which in classical law might in the opinion of some jurists eventually be valid, if they had been *institutiones*[9], it was in application very narrow. It did not apply to fundamental defects, but only to those of a less basic type. Of the few cases in which it is found applied, all but one were cases in which the gift would be quite valid but for some relation of the parties concerned (legacy to slave of testator or *heres*, legacy to a man of what was his[10]). But one text puts on the same level a legacy of materials of a house, which could not be left[11], so that it is difficult to specify the exact limits of application of the rule[12]. It did not apply to *institutiones* or to any legacy which "ceded" only on *aditio*, of which conditional legacies were the chief case[13], or to the disabilities created by the *l. Iunia* and the *ll. caducariae*[14].

If a legacy was given *pure* and was such that the *regula* avoided it,

1 Ulp. 24. 31. **2** *Ib.* **3** C. 6. 51. 1. 1 c. **4** P. 4. 6. 3. **5** C. 6. 51. 1. 1 c. It is possible that the postponement under the *l. Papia* did not apply where there was one *heres* only. So Pothier, ad 22. 6. 1. 4. See also Sommer, *Z.S.S.* 34. 394. **6** D. 34. 7 **7** 50. 17. 29. **8** Ulp. 22. 2; see *ante*, § CIII. For these rules it was indifferent whether the gift was simple or conditional. See also 32. 1. 1, 1. 5, 7. pr., 8. 1. In alternative legacies, where one of the two is in any way conditional, *dies cedit* only on arrival of the condition, or failure of it. 36. 2. 2. 14, 16, 25. etc. **9** G. 2. 123. See for this and similar cases, Machelard, *Règle Catonienne*, §§ 25–27. **10** Inst. 2. 20. 32. **11** 30. 41. 2. **12** Machelard says that the rule applied (*op. cit.* § 33) where "il n'y a qu'une incapacité transitoire de nature à s'évanouir d'un jour à l'autre." But a *peregrinus* is as likely to become a *civis*, *vivo testatore*, as a house is to be pulled down. Sommer (*Z.S.S.* 34. 396) holds that the rule assumes a gift "objectively and subjectively valid." It seems most probable that the proper application of the rule is to relative obstructions, due to the relation of the parties, and that the application to *materia aedibus iuncta* is an extension, late, like the prohibition itself, but out of keeping with the original principle. **13** 34. 7. 3, 4. **14** 34. 7. 5.

an *ademptio* of it under a condition which had the effect of making it subject to the contrary condition, did not remove it from the operation of the *regula*—an *ademptio*, being designed to lessen a legatee's right, was not to be so construed as to increase it[1]. But if a legacy originally conditional became *purum* by satisfaction of the condition, *vivo testatore*, the effect would apparently be to bring it within the rule. This gave rise to difficulties. Three cases are put; a legacy "if the legatee marry *X*," who at the time of testation was under the age of marriage, and he married her, *vivo testatore*; a legacy "if I die after such a date," and the testator did so die; a legacy to *X* of land which was his "if he alienates it in my life," and he did so alienate[2]. In all these cases it had become *purum* and, in strictness, if the testator had died when he made the will the gift could not have operated; in each case there was an obstruction. In all the cases the gift was valid; we are told that the rule is inaccurately expressed[3], but not how it should have been expressed. To make such gifts void would be to make all gifts under condition void, if the condition could not be satisfied at once, and was in fact satisfied *vivo testatore*[4]. The *regula* existed under Justinian[5], and applied then to *fideicommissa*; whether it did before Justinian is disputed[6].

A legacy validly given might fail owing to later events, the chief being:

(*a*) *Ademptio.* The proper method was an express statement in the will or a codicil, following the form of the gift, which destroyed it *ipso iure*[7]. But other causes adeemed it in effect by giving an *exceptio doli*, and in most of these cases the *ademptio* seems to have been *ipso iure* under Justinian. Such were extreme hostility arising between the parties, erasure of the gift, informal ademption in the will, alienation, unless, in later classical law, the circumstances shewed that there was no intent to adeem[8]. But in these tacit cases the revocation was ambulatory; if, *e.g.*, the hostility ceased, the gift revived[9], though mere repurchase would not revive a gift[10]. It may be added that giving the value of the thing to the legatee, *inter vivos*, was in general in substitution for the legacy[11], and that *ademptio* might be conditional or partial[12].

(*b*) *Translatio*, which is in effect *ademptio.* This is a change in the thing left, or a transfer to another legatee, expressed to be in substitution. The first gift was destroyed, even though the second gift failed[13].

1 34. 4. 14. **2** 34. 7. 1. 1, 1. 2, 2. **3** h. t. 1. pr. **4** This does not negative the rule that it became subject to the *regula* if it became *purum.* **5** D. 34. 7. **6** Machelard, *op. cit.* §§ 81 sqq. The rule is not referred to in the surviving texts of the classical lawyers. **7** Ulp. 24. 29; D. 34. 4. 2. **8** 34. 4. 3. 11; h. t. 16; h. t. 18; Inst. 2. 20. 12; G. 2. 198; P. 4. 1. 9. Pledging does not destroy it. P. 3. 6. 16. **9** 34. 4. 4. **10** h. t. 15. **11** 31. 22. **12** 34. 4. 2; h. t. 11; h. t. 32; C. 6. 37. 17. **13** 30. 34. pr.; 34. 4. 6; h. t. 20.

But if the second gift was conditional, this was conditional *ademptio*, so that if the condition failed the old gift stood, unless a contrary intent appeared[1].

(*c*) Death of legatee before *dies cedit*, or incapacity at that time[2].

(*d*) Debts, subject to the power of the testator to charge particular debts on particular beneficiaries[3].

(*e*) Operation of the *l. Falcidia.*

(*f*) *Ereptio.* The gift might be forfeited for *indignitas.* It went usually to the *fiscus*, but there were exceptions[4].

(*g*) Destruction of the thing. If this was not due to the *heres*, the legatee got nothing[5], as where a *servus alienus* left as a legacy was freed by his master[6]. But if the destruction was by the *heres* he must give the value whether he knew of the legacy or not[7]. If several things were left, destruction of one did not bar claim to the rest, unless they were principal and accessory, and the principal thing was destroyed before *dies cedit*[8].

(*h*) Acquisition of the thing *ex lucrativa causa.* If, after the will was made, the legatee acquired the thing by purchase, he could still claim its value, but not if he had it by *donatio* or under another will[9]. Thus where land was left to *X*, and after the making of the will he bought the *nuda proprietas* and received a gift of the usufruct, he could claim the value of the land, *deducto usufructu*[10]. If a thing was left to him under two wills, and he received its value under one, he could claim the thing under the other, but if he received the thing under the first, he had no claim under the second[11].

(*i*) Failure of the will. To this there were exceptions. If an *institutus* refused, in order to take on intestacy, or abstained for a price, legacies, etc., were good[12], as also if the will was upset by collusion[13], and apparently in all cases in which the *hereditas* passed to the fisc[14]. In case of partial failure, gifts, specially charged on the *institutio* which failed, were destroyed under the old *ius accrescendi*, but preserved under the *ll. caducariae* and Justinian[15], and it seems that, in later classical law, this was applied also in the cases to which *ius accrescendi* still applied, the accrual being regarded as a sort of substitution[16]. This would occur if the lapse went to one with *ius antiquum*[17], and in a legacy of usufruct,

1 34. 4. 7. **2** *Ante*, § CXX. **3** *Ante*, § CX. **4** *Ante*, § CXI. **5** 30. 47. 4, 5; Inst. 2. 20. 16. **6** 30. 35. **7** 31. 63. The rule that he is liable even in ignorance may be due to Justinian. **8** 33. 8. 12. This is a matter of interpretation and very fine lines are drawn. Where the gift was of *fundus cum instrumentis*, the *instrumenta* were accessories, but not where it was *fundus et instrumenta*. But the child of an *ancilla* was never an accessory. 33. 7. 1; h. t. 5; Inst. 2. 20. 17. **9** Inst. 2. 20. 6. *Post*, § CXCII. **10** Inst. 2. 20. 9. **11** *Post*, § CXCII. **12** 29. 4. 1; C. 6. 39. 1. **13** 49. 1. 14. **14** 30. 96. 1. **15** *Ante*, § CXI. **16** *Ante*, § CV. **17** *Ante*, § CXI. If all entitled

since it could not go to anyone but the person named[1]. If the gift which failed was *pro non scripto*, it did not ordinarily carry its burdens at any time[2]. It must however be remembered that all this depended on the intent of the testator; it was open to him to use words which shewed that the legacy was not to be payable unless it fell on one particular *heres*.

A second will revoked the first if it was validly made, even though it never in fact operated[3]. If invalid *ab initio*, it did not, and although legacies could be adeemed informally, a second *testamentum* which was *non iure factum*, though it omitted or altered the earlier gift, did not affect it[4].

(*k*) Repudiation by the legatee, which might not be *pro parte* and was irrevocable[5].

CXXII. REMEDIES OF LEGATEE. Apart from his rights of action, a legatee could claim, whether the legacy was immediate or deferred or conditional, that the person liable should give him security for due performance, unless the testator had prohibited this[6]. The security was not mere *cautio*, but *satisdatio*, which in general means personal surety[7]. If it was refused, the legatee could get *missio in possessionem* of the goods of the *hereditas* for custody[8]. He could not realise the estate except to sell what must be dealt with at once, or turn out the *heres*; the object, as we are unaffectedly told, was that he might so incommode the *heres* as to force him to give security[9]. If, whether security had been given or not, there was six months' delay in payment, Caracalla provided that a *fideicommissarius* might get *missio in possessionem* of the property of the person liable, in which case he might use and enjoy the property till he had satisfied his claim out of the fruits[10]. Justinian extended this to legatees[11]. In an early novel Justinian[12] gave legatees and others a still more drastic remedy. On application a *iudex* would decree fulfilment within a year. On failure the *heres* was excluded, except to the extent of a *pars legitima* to which he might be entitled, his rights passing to other beneficiaries who must give security. The order was, generally, first, substitutes, then *coheredes*, then *fideicommissarii here-*

to *caduca* refused them, *i.e.* failed to vindicate them, they went to the fisc, who on general principles would carry out the charges.

1 *Post*, § CXXIII. **2** C. 6. 51. 1. 3, "*nisi perraro.*" **3** *Ante*, § CXVI. **4** 32. 18. See for a suggestion of interpolation, Di Marzo, *Mél. Girard*, 2. 145. He holds that in the original form the rule was that if it was not in the second will it was adeemed "*nuda voluntate*," but if there was a change this was ignored, the revocation being conditional on the validity of the new gift: this being void the old gift stood. **5** P. 3. 6. 12. There can be no repudiation so long as the legacy is still *conditional* or *sub die*. 31. 45. 1. **6** Or the person liable is the *fiscus*; 36. 3. 1. pr.; h. t. 1. 18; h. t. 14. **7** 36. 3. 1. pr. **8** 36. 3. 1. 2; h. t. 1. 4; 36. 4 *passim*. **9** 36. 4. 5. pr. **10** h. 1. 16, 17. **11** "*Legatarios*" in the text is interpolated. See Mitteis, *Z.S.S.* 33. 206. **12** Nov. 1. 1.

ditatis, then other legatees, etc., then any freed slaves, then the *heres ab intestato*, not expressly disinherited, and then the fisc.

We have seen that in classical law the legatee had either an action *in rem* or one *in personam* according to the form of the legacy[1]. The action *in personam* was the *actio ex testamento*, a *strictum iudicium*, and we are told that it was for double damages *contra infitiantem*, at least if what was left was a *certum*[2]. If there were several *heredes*, and the legacy was charged on them generally, the legatee could bring his *actio ex testamento* (or his *vindicatio*) against each in proportion to his share. If the legacy was charged on some, but not all, the *heredes*, these were liable in the proportion of their shares *inter se*[3]. But if some of the *heredes* made liable were named personally, it appears that they were liable equally[4], though older lawyers took the view that they were liable *pro rata*[5], and the rule in the real action may have been either this, or that, if charged only on some of the *heredes*, the gift failed *pro parte*[6].

Justinian, by a sweeping piece of legislation[7], provided that all legacies were to have one and the same nature, and to be enforceable by the same remedies, as to which he established a new scheme. Every legatee was to be entitled to three distinct actions, between which it seems he must elect. These were the *actio in rem* (*vindicatio*, if it was a gift of property, *confessoria*, if it was a servitude), a personal action, *actio ex testamento*, against the person liable, and an *actio hypothecaria*, of which it was a new application. He provided that all the estate should be under a hypothec for each legacy, and that no *heres* should be liable for more than his share[8]. If, as may be the case, this restriction did not apply after partition, this gave the best remedy, for any given *heres* might not have the thing or part of it, so that *vindicatio* was not available against him, and by the personal action he would be liable only to his share. By this action the whole could be recovered from one. There were of course cases in which no real action was conceivable, *e.g.* a legacy of a *res aliena*, or of a service to be rendered, or a *legatum nominis* or *liberationis*[9], or of fungibles of which there were none in the *hereditas*.

1 *Ante*, § CXVII. 2 G. 2. 282; 4. 9; 4. 171; P. 1. 19. 1; Inst. 3. 27. 7, probably replacing an earlier liability to *manus iniectio*. Ulpian says (24. 33) that a legacy wrongly paid cannot be recovered. Gaius, more in accordance with principle, confines this to cases in which it is *duplex contra infitiantem* (2. 283). If there was no legacy at all, owing to ademption, Paul says it could always be recovered, P. 3. 6. 92. Cf. P. 1. 19. 1; Inst. 3. 27. 7. The allusion in Inst. 2. 20. 25 is to J.'s new rules. 3 31. 33; 45. 2. 17. 4 30. 54. 3. 124. 5 45. 2. 17. 6 The texts cited to prove this are not conclusive, see, *e.g.*, Pothier, ad 30. 81. 4 and Pampaloni, *Mél. Girard*, 2. 348. In this text, if it is so understood, there must be anachronism for Justinian, and there may be a point of construction involved: the words about value are usually omitted by commentators on the text, see Vangerow, § 52. 7 C. 6. 43. 1. As to the possible right of legatee *per vindicationem* to use the personal action; see *ante*, § CXVII. 8 G. 6. 43. 1. 5. 9 *Post*, § CXXIII.

It should be added that legatees could claim *bonorum separatio* in much the same way as creditors[1], and that Justinian, nominally generalising the double liability on denial, practically nearly abolished it, for while extending it to all kinds of legacy and *fideicommissum*, he enacted that it was to apply only where the beneficiary was the Church or a charity[2].

CXXIII. SPECIAL TYPES OF LEGACY. Certain types of legacy had special characteristics which need discussion.

Penal legacies. In classical law a legacy to *X* if the *heres* did a certain thing (a penalty for doing it) was void[3]. Justinian abolished the rule[4], and allowed the condition unless it was unlawful or immoral, when, on ordinary principles, it was struck out.

Legatum rei alienae. Anyone's property might be left, except the legatee's, and even his, if the legacy was conditional, so that the *regula Catoniana* did not apply, and it had ceased to be his at *dies cedens*[5]. The fact that the testator thought it was the legatee's would not avoid the gift, if it was really his own[6], but in any case if it was a *res aliena*, the legatee must shew that the testator knew it was not his own[7]. In that case the *heres* must buy it or give its value[8]. But a legacy of a thing incapable of ownership, *extra commercium*, was void[9].

Legatum generis and *legatum optionis.* The former was a gift of a thing of a particular kind, *e.g.* a horse, but not any particular horse. The legatee might choose, if there were things of the kind in the *hereditas*, but might not choose the best[10]. If there were none in the *hereditas*, the *heres* might choose one, but it must not be of the worst quality[11]. If a choice was expressly given, this was *legatum optionis*, and the legatee had free choice. If, however, the choice was to be by a third person and he failed to act, the legatee might choose, but might not, under Justinian, choose the best[12]. Till Justinian a *legatum optionis* was conditional on personal choice, at least to the extent that it failed if the legatee died without choosing. There are signs of dispute, and it is not clear that it was conditional for all purposes[13]. Justinian allowed successors to choose, and, if they disagreed, lot decided[14].

1 42. 6. 6. pr. **2** Inst. 3. 27. 7; C. 1. 3. 45. 7. **3** G. 2. 235; Ulp. 24. 17. The rule, attributed to Pius, seems to rest on the notion that benefits must not also be punishments. The conception has no application to appointments of *tutores*, and *favor libertatis* caused doubts in case of manumissions (G. 2. 236, 237). **4** Inst. 2. 20. 36; C. 6. 41. 1. **5** Inst. 2. 20. 4, 10; D. 30. 41. 2. **6** Inst. 2. 20. 11. **7** 22. 3. 21; P. 4. 1. 8; Inst. 2. 20. 4 (exception, C. 6. 37. 10). **8** *Ib.* **9** Inst. 2. 20. 4; D. 30. 39. 10. **10** 30. 37. pr.; h. t. 110; Inst. 2. 20. 22. This is Justinian's law, but from Ulp. 24. 14 it appears that in classical law, if it was *per damnationem*, the *heres* chose, just as, in the case of an alternative *obligatio*, *inter vivos*, the person liable had the choice (*post*, § CXCIII). The rule as to quality is probably not classical. **11** 30. 110. **12** Ulp. 24. 14; C. 6. 43. 3. 1 b. **13** 33. 5. 9; h. t. 19; 35. 1. 69; Inst. 2. 20. 23. The form of words might differ and it may be that the disputes turned on this. **14** C. 6. 43. 3. 1. Same rule where the *legatum optionis* was joint.

Legatum rei obligatae. A legacy of a thing pledged by the testator, or held by him subject to a charge or usufruct, was construed according to his knowledge. If the testator knew of the charge the *heres* must free it[1]. If he did not, the thing passed subject to the charge, but, in later law, the legatee when sued on the charge could claim cession of actions[2].

Legatum debiti. A legacy of the testator's debt, to the creditor, was void unless it, in some way, increased his right, *e.g.* was absolute, while the debt was conditional. If valid, it superseded the debt, but questions of intent were material[3]. It was not subject to the *l. Falcidia*, nor could a *fideicommissum* be imposed on it, except as to its excess value[4].

Legatum nominis was a legacy of debt due to the testator. If due from a third person, the legatee could require the *heres* to transfer his rights of action[5]. It failed if there was no debt or it was paid *vivo testatore*[6]. If it was due from the legatee (*legatum liberationis*), it was a defence to any action and entitled the legatee to a formal release[7]. A *legatum liberationis* might also be from a debt of the legatee to a third person; here the legatee could require the *heres* to procure his discharge[8].

Legatum dotis to the wife was valid, though it would usually be hers in any case. The point was that the legacy could be recovered at once, while recovery of *dos* involved delays[9]. A legacy of *dos*, simply, where there was none, was void, but a legacy of any property was not avoided, so decided Severus and Caracalla, merely because it was wrongly described as *dos*[10].

Legacy of an annuity for life was treated as a series of annual legacies of which the first was *purum*, the others were conditional on the legatee's living into that year. If the limitation to life was not expressed, the words *si vivat* were implied[11].

Legatum peculii, to an *extraneus*, entitled the legatee to it as it was at the death apart from the *ll. caducariae*, *i.e.*, *dies cedens*. He would get nothing but ordinary accretions after that. If the legatee was the slave, he took all additions of any kind, up to the time of entry, when he was free[12]. This also was *dies cedens*, but the rule did not depend on this, but on presumed intent. It indicates that in Julian's view[13] the *peculium* was an artificial unity, retaining that character in the case of the slave, but losing it at the death in the case of *extraneus*[14].

1 P. 3. 6. 8; Inst. 2. 20. 5. 2 C. 6. 42. 6. This has no application to the cause of legacy of a thing subject to usufruct, 31. 66. 6. 3 30. 28. pr.; Inst. 2. 20. 14. 4 32. 7. 2; 35. 2. 1. 10. A legacy to one who is in fact a creditor is not of course necessarily a legacy of the debt. 5 30. 105, and, if this is not done, an *actio utilis* in later law. C. 6. 37. 18. 6 30. 75. 1; 34. 3. 31. pr. 7 Inst. 2. 20. 13. 8 Inst. 2. 20. 21. 9 *Ante*, § XL. 10 Inst. 2. 20. 15. *Falsa demonstratio non nocet*, *ante*, § CXIX. 11 33. 1. 4, 5. 8. Death would end it though it was for a term not yet expired. A promise of an annuity was differently handled, *post*, § CLIV. 12 Inst. 2. 20. 20. 13 15. 1. 57. 1. 14 We are not informed as to the case of conditional legacy.

Legatum ususfructus had many peculiarities. It did not cede before entry[1]. When acquired through a son or slave it failed, in classical law, on his death or, in the case of a son, *capitis deminutio*[2], provided this occurred after *dies cedens*[3]. As a gift of land included a gift of the usufruct, it follows that, if the land was given to *A* and a usufruct to *B*, *A* and *B* shared the usufruct, of which there were in fact two gifts[4]. We have also noted the practice of *repetitio*, to avoid loss by *capitis minutio* or non-use[5]. But the most striking peculiarities were in the law of accrual. It does not seem to have been affected by the *ll. caducariae*[6]; the classical texts treat the old law of accrual as still operating in this case[7], and it was substantially unchanged under Justinian[8]. There were other exceptional rules. In general the rules of lapse applied only where the gift failed altogether, but in usufruct (left *per vindicationem*) there was accrual between joint usufructuaries, even where the lapse occurred after enjoyment had begun[9]. Further, it was said "*personae adcrescere, non portioni*," the chief effect of which was that, if one of joint fructuaries had lost his share by non-use, and another share fell in, he could still claim accrual out of that. This accrual however would not cover any part of that which he had lost, though that or some of it would be vested in the man whose share had now fallen in[10]. These rules are no doubt connected. The rationale given by Ulpian[11] for the first is that each is on the gift entitled to the whole (*concursu partes fiunt*), so that if one disappeared, the other had all. He notes that the rule would apply in any other case in which "*concursu partes fiunt*" and that there were cases in usufruct in which there was no such accrual, as there were distinct gifts of parts[12]. For the second rule he gives the reason of Celsus and Julian that "*ususfructus cottidie constituitur et legatur, non ut proprietas eo solo tempore quo vindicatur*[13]." This hardly agrees with the rule that, in *legatum ususfructus, dies cedit* once for all, as Ulpian himself seems to note, and it would seem to make unnecessary the precaution of repetition already adverted to[14]. The underlying notion seems to be that, not being a *res corporalis*, usufruct had no real existence till it was enjoyed—*ex fruendo consistit*—what was lost by non-use was only what had been acquired by enjoyment, not all rights under the legacy, from which the loser was only excluded by the existence of the other.

1 *Ante*, § CXX. 2 *Ante*, § L; Vat. Fr. 57. 3 Vat. Fr. 62. 4 33. 2. 19. Similarly as *fructus* cannot exist without *usus*, if there is a legacy of *fructus* to *A* and of *usus* to *B*, *A* shares in the *usus*, of which there are two gifts. P. 3. 6. 24, 25. 5 *Ante*, § CVI. 6 *Ante*, § CXVIII. 7 Vat. Fr. 75 sqq. 8 D. 7. 2. No doubt due to its personal character: a life estate could not vest in any but the named person. 9 7. 2. 1. 3; Vat. Fr. 77. 10 7. 1. 32. 1; 7. 2. 10, etc. 11 Vat. Fr. 78, quoting Neratius and Celsus. 12 Vat. Fr. 78, 82; D. 7. 2. 1. pr. 13 7. 2. 1. 3. 14 *Ante*, § CVI.

If that other ceased, the loser could claim his share by accrual, though not what he had once lost[1].

Praelegatum was legacy to a *heres*, meaningless if there was but one. It was the old *legatum per praeceptionem* freed of its doubts. As the *res* was in part his, as *heres*, the legacy was void, so far as it was charged on his share[2]. Thus where *A* was *heres* to one twelfth and *B* to the rest, and a *praelegatum* was left to them equally, *B* would get only one-twelfth of it and *A* the rest[3]. Where a praelegatee was also under a *fideicommissum hereditatis*, he could keep only that part of the legacy which was not void[4].

Legatum partitionis. Legacy of an aliquot part of the *hereditas*[5]. The legatee was called *legatarius partiarius*. The purpose of this ancient institution is not certainly known; it may have been to evade the rule of the *l. Voconia* against *institutio* of women[6]. The legatee was in no sense *heres*. He did not represent the deceased; he could not bring *hereditatis petitio* or *familiae erciscundae*, or sue or be sued as *heres*. But as he was entitled to a part of each claim, and liable to a part of each debt, it was usual to enter into agreements (*stipulationes partis et pro parte*) with the *heres* that the *heres* should hand over the right part of what came in, and that the legatee would refund the right part of what creditors recovered from the *heres*[7].

CXXIV. *Fideicommissa*. The primary purpose of these was to evade the restrictions on *institutio*[8]. In the republic they were not enforceable, but rested on the good faith of the *heres*[9]. Augustus ordered them to be carried out in a few cases, not by the ordinary courts, but by the administrative authority of the consuls, in some cases because the testator had asked the beneficiary to carry them out "*per salutem principis*," in others because of glaring perfidy. They were soon recognised as legal institutions and a special praetor, *praetor fideicommissarius*, was

1 There was evidently much controversy among the classical lawyers, to some extent on the general rules, but mainly on their application to a number of complex cases, see Vat. Fr. 75 sqq. Naturally there has also been much controversy among modern commentators. See Elvers, *Servitutenlehre*, 727–734; Vangerow, *Pandekten*, § 554; Windscheid, *Lehrbuch*, § 645 (who refers to earlier literature). As to the effect of a *legatum* of *nuda proprietas*, the usufruct remaining with the *heres*, see Pampaloni, *Mél. Girard*, 2. 331 sqq. 2 Ulp. 24. 22. 3 30. 34. 12. 4 36. 1. 19. 3. Where one of two *heredes* has a joint legacy with two others, not *heredes*, he can claim only one-half of his third, so that the two others will share five-sixths. 30. 34. 11; h. t. 116. 5 Ulp. 24. 25. 6 Girard, *Manuel*, 946. 7 G. 2. 254, 257; Ulp. 25. 15. School dispute on the question whether he was entitled to the things themselves or only to their value, 30. 26. 2. When Justinian fused legacy and *fideicommissum* (*post*, § CXXV) it seems that *l. partitionis* would be merged in *fideicommissum hereditatis*. But it is still treated in the Digest as a distinct institution, though the *stipulationes partis et pro parte* do not appear. 8 See the cases in Cicero, *de fin.* 2. 17. 55; 2. 18. 58. 9 The cases enforced rightly or wrongly by Verres seem to have been all with public objects with provision for forfeiture on failure to perform.. Cicero, *Verr.* 2. 1. 10; 2. 2. 14; 2. 2. 25.

appointed to deal with them[1]. They are not necessarily connected with codicils, but one Lentulus, having made Augustus his *heres*, with others, imposed *fideicommissa* on him and others, by codicil. Augustus ordered them to be carried out and then asked the opinion of lawyers whether codicils ought to be legally recognised. Opinion was in favour, and when Labeo made them, they were definitely recognised as legal[2]. *Fideicommissa* thus were not a praetorian institution; they were *iuris civilis*, juristic creations. The relations between *heres* and *fideicommissarius* were handled by the *praetor fideicommissarius*. But the case was different as between *fideicommissarius* and debtors and creditors of the estate. He was not *heres*, and here occurred intervention of the ordinary *praetor*. At first, *fideicommissa* could be created by codicil, only if there was a will[3], but, before Gaius, the further step had been taken of allowing codicils in which they were imposed on the *heres ab intestato*[4]. But it was still held that if there was a will, codicils failed, if the will failed[5], but Severus and Caracalla provided that, even where there was a will, an unconfirmed codicil could create *fideicommissa*[6]. There were no rules of form, and thus they might be oral[7].

At first there were few restraints, but these were gradually imposed. Peregrines, for whom they seem to have been introduced, were early excluded, and Hadrian forfeited to the fisc anything so given to them[8]. The *sc. Pegasianum* subjected them to the *ll. caducariae*[9], and Hadrian forbade *fideicommissa* in favour of *postumi extranei* or *personae incertae*[10]. But Gaius gives a formidable list of distinctions which still existed[11]. They might benefit a wider class, *e.g.* Junian Latins and women barred by the *l. Voconia*[12]. Freedom could be given to *servi alieni* in this way, and a direction could be given that slaves under 30 should be freed at that age[13]. They might be in Greek[14], in an unconfirmed codicil, at any point in the will[15], and *post mortem heredis*[16]. Where a son or slave was made *heres*, a *fideicommissum* could be charged on the *paterfamilias*, though a legacy could not[17]. No technical words were needed. Any direction or words would suffice—*volo*, *rogo*, *te daturum scio*, etc.—but there was no *fideicommissum* if it was clear that the testator meant it to be quite discretionary, *e.g.*, *si volueris*[18]. A *fideicommissum* might not,

1 Inst. 2. 23. 1. **2** Inst. 2. 25. pr. **3** Arg. the language of Inst. 2. 25. pr., 1. **4** G. 2. 273; Ulp. 25. 4; P. 4. 1. 4. **5** 29. 7. 16; h. t. 3. 2. A *fc.* in a will which did not appoint a *heres* was bad as the document was a nullity. G. 2. 243; Inst. 2. 23. 2. See however, as to *clausula codicillaris*, *post*, § CXXVI. **6** P. 4. 1. 10; Inst. 2. 25. 1. **7** P. 4. 1. 5, 6; Ulp. 25. 3. **8** G. 2. 285. Probably as they had been used to benefit *deportati*, Huschke, ad l. **9** G. 2. 286. **10** G. 2. 287; Ulp. 25. 13. **11** G. 2. 268–283; Ulp. 25 *passim*. **12** G. 2. 274, 275. **13** G. 2. 272, 276; Ulp. 2. 10. **14** G. 2. 281; Ulp. 25. 9. **15** G. 2. 270 a; Ulp. 25. 8 **16** *Ib.* **17** Ulp. 25. 10. **18** G. 2. 249; Ulp. 25. 1, 3; P. 4. 1. 5, 6; D. 30. 115; 32. 11. 2, 7. It might be conditional, G. 2. 250.

however, be given *poenae causa*, in classical law[1], nor could anyone make a *fideicommissum* who had not *testamenti factio*[2].

It might be charged on any person who took a benefit by will or on intestacy, not merely the *heres*, even on a *fideicommissarius*[3], and, as it might be *post mortem*[4], even on the *heres* of the *heres*, thus providing a means of making successive gifts of the property.

The action was always *in simplum*, not as in some cases of legacy, *in duplum*, and if it was not due, *condictio indebiti* always lay for recovery[5]. Interest was due from *mora*, which was not the case in legacy, except *sinendi modo*[6]. As the case was tried by *cognitio* before the *praetor fideicommissarius*, an administrative procedure, not by formula[7], it could be heard at any time, even when the ordinary courts were not sitting.

Fideicommissum of the *hereditas* was the most important case. It might be charged on a *heres* (*heres fiduciarius*) or on a prior *fideicommissarius*[8], but of course not on a mere legatee. It might be of the whole or of a part[9]. In the former case, the *heres* being technically still *heres*, and liable for the debts, it was at first usual for him to make a formal sale of the *hereditas* to the fideicommissary at a nominal price. This was followed by stipulations, *emptae et venditae hereditatis*, the *heres* undertaking to hand over all assets, and to allow the fideicommissary to sue in any actions, as *procurator* (or *cognitor*) *in rem suam*, the *fideicommissarius* undertaking to recoup anything the *heres* was compelled to pay, and to undertake any necessary defence[10]. If the *fideicommissum* covered only a part, the stipulations were made *partis et pro parte* as in *legatum partitionis*, but there was no question of *procuratio* to sue, or be sued[11]. This system was unsatisfactory, since the *heres*, if he was to get no benefit, might refuse to take, and so destroy the *fideicommissum*, and if either was insolvent, the *stipulationes* would be poor protection.

A first attempt at a better system was the *sc. Trebellianum*, of probably A.D. 56[12], which provided that the agreements should not be necessary; the handing over of the *hereditas*, effected by any expression

1 Ulp. 25. 13. **2** Ulp. 25. 4; D. 30. 2. **3** G. 2. 271. **4** *Post*, § CXXVII. **5** G. 2. 282, 283. **6** G. 2. 280. **7** G. 2. 278, 279; Ulp. 25. 12. **8** G. 2. 270, 277. It must be on an actual beneficiary. A legacy of *dos* to wife could not be subject to any *fc.* P. 4. 1. 1. It might be imposed on a *postumus*, P. 4. 1. 2. A man gave all his property to an *emancipatus* by *don. int. viv.* stipulating that the son would restore on demand or at his death to the father if alive or to his nominee. The father, *moriens*, sent an "*epistula fideicommissaria*" to the son telling him to give a sum to *X* and to free *Y*. The son was neither *heres* nor *bonorum possessor*. The *fcc.* are binding. This is based on a rescript of Pius (32. 37. 3). The principle appears in 39. 77. The *fc.* is binding on the *heres*. It is thus *pro tanto* a release of the obligation to restore. The son is thus a beneficiary and *fcc.* can be imposed on any beneficiary on the death. **9** G. 2. 250. **10** G. 2. 251, 252. **11** Arg. G. 2. 254 in fin. **12** See Girard, *Manuel*, 947.

of intent, should vest the property in the *fideicommissarius*, as praetorian owner, and the actions available at civil law, to or against the *heres*, should pass to and against the *fideicommissarius*, the *heres* having an *exceptio restitutae hereditatis* if he was sued, and being met by one if he sued[1]. If only part was transferred, the actions passed *pro rata*[2]. The *fideicommissarius* had also a *hereditatis petitio utilis*[3]. The *sc.* did not affect the civil law liability; like many *scc.* it was a direction to the magistrate[4]. He was to give the necessary actions and defences. Thus the *heres* was still technically liable, and entitled, subject to *exceptio*, and the actions of and against *fideicommissarius* were *utiles*. The *sc.* speaks only of the actions available at civil law; those conferred by the praetor he could deal with, without authority, and we are told that they too passed, and all obligations, natural and civil[5].

This did not work well. *Heredes* seem to have still refused and destroyed the *fideicommissum*; possibly they demanded payment for complaisance. At any rate a further remedy was found in the *sc. Pegasianum* of about A.D. 73[6]. It provided that the *heres rogatus* could keep a quarter, as in legacy, under the *l. Falcidia*. If he refused to enter he could be compelled, taking no benefit and incurring no liability, actions passing as under the Trebellian. The entry was not dispensed with, but compelled, no doubt by magisterial *coercitio*[7]. If the *heres* entered voluntarily and there was no case for deduction, the Trebellian applied. If he entered and deducted, the Trebellian did not apply and stipulations *partis et pro parte* were needed[8]. If there was a right to deduct, but it was not exercised, the texts conflict on the question whether the stipulations were needed or not[9]. It should be added that the rules applied separately to *heredes pro parte*, as under the *l. Falcidia*[10].

It was usual, perhaps necessary, to declare under which *sc.* the surrender was made[11]. This is the basis of Paul's view, with which others disagreed, that if more than three-quarters were left, but the *heres* did not mean to deduct, he could make his surrender under the Trebellian, so that actions would pass *ipso facto*[12]. The contrary view presumably rests on the proposition of the Pegasian, which can be gathered from

1 G. 2. 253. **2** G. 2. 255; P. 4. 2. **3** G. 2. 253. **4** See G. 2. 253; D. 36. 1. 1, 2. *Ante*, § v. **5** 36. 1. 41. pr. **6** G. 2. 254, 256; Ulp. 25. 14 sqq.; P. 4. 3; on the lines of the *Falcidia*, P. 4. 3. 3. **7** G. 2. 258; Ulp. 25. 16; P. 4. 4. 2, 4. *Missio in possessionem* by decree if *heres* failed to appear, P. 4. 4. 3. **8** G. 2. 257; Ulp. 25. 14, 15; P. 4. 3. 2. This curious rule seems to rest not on a rational basis, but, as Paul and Ulpian suggest, on something in the Pegasian itself. Probably the language of Gaius reflects that of the *sc.* which may have provided that *fcc.* should be cut down "as in legacies." In that case there could be no question of actions passing. **9** G. 2. 257; Ulp. 25. 14; P. 4. 3. 2. If he paid when he might have deducted there was no *condictio indebiti*: it could not be said not to be due, P. 4. 3. 4. **10** G. 2. 259. **11** See, *e.g.*, Ulp. 25. 14. **12** P. 4. 3. 2.

Gaius[1], that the Trebellian was to apply only if the *fideicommissa* covered less than three-quarters.

Justinian simplified the system, repealing the Pegasian, and grafting its rules of compulsory *aditio* and right to cut down on to the Trebellian, of which he declares his rules to be a recast[2]. He thus got rid of the notion that the case was to be dealt with as one of legacy, and actions now passed wholly or *pro rata*, as the case might be, with no need for stipulations. In a Novel he allowed the testator to forbid the retention of a quarter[3].

Where the testator, in directing transfer, reserved to the *heres* a thing worth one-fourth or more, instead of a share, the *heres* kept it and was treated as a legatee, all actions passing. If it was worth less, he could have it made up. Before Justinian this was a case for the Pegasian, and stipulations would be needed. Under him the actions passed in proportion to the necessary supplement[4].

CXXV. *Fideicommissa* of single things were less important. They could be charged on any beneficiary[5]. If charged on a *heres* they were liable to be cut down under the Pegasian[6], but presumably not if charged on a legatee, there being no question of avoiding intestacy. There was no question of compulsion to enter on account of such *fideicommissa*, or of transfer of actions. Anything could be so left which could be left by *damnatio*[7]. If there was a *fideicommissum* to buy a *res aliena* and give it, the thing must, according to Gaius, be bought or its value given, as in *legatum per damnationem*, but he remarks that some held that, if the owner refused to sell, the gift failed[8]. Freedom might be thus given to a *servus alienus*, either by directing the *heres* to buy and free, or by giving the owner something and directing him to free. In the latter case he was bound if he accepted. In the former the gift failed if the owner refused to sell[9], till Justinian provided that it should still operate if it ever became possible to buy the man[10]. Gaius says that if a legacy was given and a *fideicommissum* imposed, this was void as to any excess over what the legatee took[11]. But this was true only where they were commensurable quantities. A man who received a gift of money with a *fideicommissum* to hand over a *fundus* could not, after acceptance, refuse to carry out the trust because the land was worth more[12]. Finally, it is to be noted that *fideicommissa* of *singulae res* gave only a *ius in personam*[13].

1 *Locc. citt.* 2 Inst. 2. 23. 7, "*exploso sc. Pegasiano*" to get rid altogether of the irrational interpretations of the wording. See p. 352, n. 8. 3 Arg. Nov. 1. 2. 2 in f. 4 Inst. 2. 23. 9. 5 G. 2. 260; Inst. 2. 24. 1. 6 G. 2. 254; Inst. 2. 23. 5. 7 Ulp. 25. 5. 8 G. 2. 262; *ante*, § CXXII. 9 G. 2. 263, 265. In the case of manumission there could be no question of giving the value. 10 Inst. 2. 24. 2. 11 G. 2. 261. 12 D. 31. 70. 1; 35. 2. 36. pr. 13 P. 4. 1. 18.

Justinian, by a sweeping enactment[1], declared that for the future there should be no difference between legacies and *fideicommissa* of single things, but each kind of gift was to have all the advantages of the other. In discussing the *regula Catoniana*[2] we saw that this is not easy to interpret. In *legatum per vindicationem* the legatee was entitled to *fructus* from *aditio*, as the thing was then his; in *fideicommissa*, from *mora*; in legacy by *damnatio* only from *litis contestatio*[3]. The first and most favourable of these rules was never applied under Justinian, though ownership passed at once. Again, till Justinian, *fideicommissum* had in the main been construed like legacy by *damnatio*. Thus if it had been made to two, *disiunctim*, each was entitled to the whole[4], but under Justinian the rule of *vindicatio* was applied and they shared[5]. In his new system Justinian had a general leaning to the rules of *vindicatio*, but he often departed from them and adopted the rule he thought most rational, whether it tallied or not with the notion of giving both forms the advantages of each. There were some respects in which legacies had an advantage which was extended to *fideicommissa*. Thus ownership now passed at once, apart from modalities. And the rule giving double damages for denial, and refusing *condictio indebiti*, in gifts to the Church and charities, applied both to legacy and to *fideicommissum*[6].

But there remained an ineffaceable difference in the case of gifts of freedom. A *servus alienus* could be freed by *fideicommissum* but not by direct gift, and *fideicommissa* of liberty to slaves of the testator were preserved[7], though logically these ought to have been construed as direct gifts. The point was that one freed directly was a *libertus orcinus*, having no living patron—one freed by *fideicommissum* was the *libertus* of the person who carried it out[8].

There remain one or two difficult points, postponed for convenience.

If a *fideicommissarius* was himself subject to a *fideicommissum* the question arises how far he could deduct the *quarta Pegasiana* or *Falcidia*. The texts in the Digest have been so altered that it is difficult to say what the answer is. On the whole the rules seem to be as follows. If the *heres* could not have deducted anything, the *fideicommissarius* could deduct nothing. If the *heres* might, but did not, the *fideicommissarius* might, at least if the *heres* refrained in order that he might. If the *heres* had deducted, so could he, unless he was a freedman of the deceased, or there was evidence that the testator did not mean him to have such a right. The principle seems to be that as the right of the

1 C. 6. 43. 1; h. t. 2; Inst. 2. 20. 3. 2 *Ante*, § CXXI. 3 G. 2. 280; C. 6. 47. 4 (interp.). *Damnatio* gives a *strictum iudicium*, G. 2. 204; see *post*, § CCXXIX. 4 Vat. Fr. 85. 5 C. 6. 51. 1. 11. 6 Inst. 4. 6. 19, 26. 7 Inst. 2. 24. 2. 8 G. 2. 266, 267; Ulp. 2. 8.

fideicommissarius was derived from the *heres*, he could have no right which the *heres* had not[1].

If there were legacies and the *heres* had handed over the whole estate, could the *fideicommissarius* deduct the Falcidian quarter? The relative titles shew the difficulty of this question[2]. It must first be determined whether the testator meant legacies to be charged on *heres* or on *fideicommissarius*, the presumption being in favour of the latter rule, if the transfer was to be immediate. If they were to be chargeable on the *heres*, legacies and *fideicommissa* were treated as a whole and, if necessary, cut down *pro rata*, the *heres* keeping a quarter and there being no question of further deduction. If the *heres* entered under compulsion a *fideicommissarius* of the whole might cut down legacies to three-quarters. If they were to be chargeable on *fideicommissarius*, his *fideicommissum* was regarded as being of the whole, less the legacies. The *heres* kept one-quarter—the rest was distributed *pro rata*. Thus if the estate were 4, legacies were 3, and there was a *fideicommissum* of the whole, the *heres* kept one-quarter and of the rest the legatees took three-quarters, the *fideicommissarius* the rest. If the *heres* entered only under compulsion (*coactus*), the *fideicommissarius* would also get the one-quarter the *heres* would have had. There was a governing rule that the fact that *heres* entered under compulsion would not entitle legatees to more than they would have had if he had entered voluntarily. If *heres*, entering voluntarily, refused the one-quarter, the *fideicommissarius* would not benefit at cost of legatees, unless there was evidence that he refrained in order to benefit the *fideicommissarius*[3]. Where it was a *fideicommissum* of part there were very complex cases.

Paul tells us[4] that in any case of *fideicommissum*, if the *heres* sold the property, the *fideicommissarius* could get *missio in possessionem* against a buyer who had notice of the trust, and the *possessio* would actually be given to him, *potestate praetoris*[5]. Justinian abolishes this system as ineffective and obscure, substituting a general hypothec in all cases of legacy or *fideicommissum*[6], and, as we have seen, making the *fideicommissum* vest the ownership in the beneficiary so that the *heres* had no right in the thing. If the *fideicommissum* was conditional or *ex die*, satis-

1 Chief texts, 35. 1. 43. 3; 35. 2. 25. 1, 32. 4 and 5, 47. 1; 36. 1. 1. 17, 1. 19, 57. 2, 65. 11 and 12, 80. 11. 2 D. 35. 2; 36. 1; C. 6. 49, 59. 3 For discussion and reference to chief texts, Poste's *Gaius*, ed. Whittuck, 256 sqq. Refusal of *heres* to enter even under Justinian's scheme may be a rational act. If the estate is insolvent and the fact is discovered only after entry, the *fideicommissarius* may refuse the gift and the *heres* will be liable—*semel heres semper heres*. His remedy against fideicommissary, even though the latter had previously agreed to accept, may be illusory. The inventory will protect the *heres*, but if he is to get nothing it is not worth while, as he will have to deal with all the claims. 4 P. 4. 1. 15. 5 43. 4. 3. pr., giving usucapion possession. 6 C. 6. 43. 3; Nov. 39. pr.

faction of the condition or arrival of the *dies* avoided any alienation or charge which the *heres* might have effected.

In the classical law it was common to leave lands as security for legacies of *alimenta* and the like. Papinian says that this is in effect a *fideicommissum* of the land, entitling the beneficiaries to the above *missio in possessionem*[1]. Modestinus construes in the same way a simple gift of land to provide *alimenta*[2]. But by his time a better security had appeared. Severus and Caracalla recognised, as an existing institution, an actual pledge of property for this purpose, probably confined to this kind of provision[3], and this would be valid as against any buyer, with notice or not. If the land was not enough there was a claim against the *heres* to make up the deficit[4], and presumably any surplus would go to him[5]. Justinian allowed such a pledge for any legacy over all or part of the *hereditas*, but it was of little importance, in view of his more general provision in the same enactment[6] in which this is mentioned.

CXXVI. *Codicilli.* In this connexion, these are informal documents dealing with disposal of the estate on death. Their early history has been considered[7]. The main point to notice here is the distinction between confirmed and unconfirmed codicils. Even in the latest law the latter could do nothing but create *fideicommissa*[8], while a codicil confirmed by will, even by anticipation, could do anything that a will could, except dispose of the *hereditas*[9]. Under Justinian confirmation need not be in express words, but might be implied[10]. A codicil was for most purposes treated as forming one document with the will[11]. It could be made by anyone with *testamenti factio*, and *postliminium* validated one made in captivity[12]. At first no form was needed. Constantine required the same number of witnesses as for a will, where it imposed a *fideicommissum* on the *heres ab intestato*[13]. Theodosius laid down the same for all codicils[14]. Justinian required five[15], but provided that, though there were no, or not enough, witnesses, the *fideicommissarius* having first sworn to the good faith of his claim (*iusiurandum calumniae*) might put the person, supposed to be charged, to his oath that the deceased had never mentioned such a thing to him. If he would not take it he must carry out the *fideicommissum*[16].

A will which failed, as such, could not be interpreted as a codicil.

1 33. 1. 9. Paul's final remark refers to refusal of *heres* to give security. **2** 34. 1. 4. **3** 13. 7. 26. pr.; 34. 1. 12. **4** 34. 1. 12. **5** Arg. 34. 1. 4. pr. med. The contrary decision here is due to the fact that it is construed as a gift of the property. **6** C. 6. 43. 1, 2. **7** *Ante*, § CXXIV. **8** Ulp. 25. 11; 29. 7. 3. 2. **9** Inst. 2. 25. 1, 2; Ulp. 25. 8. **10** 29. 7. 5. **11** 29. 7. 2. **12** 49. 15. 12. 5; 29. 7. 6. 3; and at death, 29. 7. 7. pr. **13** C. Th. 4. 4. 1. **14** C. Th. 4. 4. 7. 2. **15** C. 6. 36. 8. 3, interp. **16** Inst. 2. 23. 12; C. 6. 42. 32. A man might make more than one codicil, Inst. 2. 25. 3.

A text of Ulpian leaves it uncertain whether this rule could be displaced by general evidence of intention[1], but other texts and an enactment of Theodosius suggest that it had been allowed to evade it by a direct expression in the will of a wish that if it failed as a will it should be good as a codicil. He provided that if there was such a clause (*clausula codicillaris*), the *institutus* might choose whether he would take it as a will or as a codicil, but, except in the case of certain relatives, he might not change his mind[2].

The difference between a confirmed and an unconfirmed codicil means little under Justinian, legacies and *fideicommissa* being assimilated. Direct gifts of liberty could not be given by unconfirmed codicil, and it is not clear that *tutores* could thus be fully appointed.

Military Will. The privileges attaching to the will of a soldier or naval seaman[3] are a growth of the first century of the Empire, their scope being settled by the earlier classical lawyers, building on vague rescripts of several emperors[4]. The privilege lasted all the time of military or naval service, till Justinian limited it to the period of actual service with the colours[5]. It confirmed, subject to intent, wills made before the service began[6], and a will validly made during service remained valid for a year after discharge unless this was for misconduct[7]. All privilege then ended, except that the fact that a condition could not be satisfied within the year did not affect the validity of the will[8].

The chief privileges are these. No form was needed, but Trajan provided that there must be some evidence other than the word of the claimant[9]. A *miles* could "test," even though deaf and dumb[10]. He could institute from or to a certain day, and the *clausula codicillaris* was implied[11]. He was not bound by the rules of *testamenti factio*[12], or *exheredatio*[13], or the *querela*[14], or the *Falcidia*[15], or the *Pegasiana*[16], and the restrictions, on *institutio*, of the *ll. caducariae* and the *l. Iunia* did not apply to his will[17]. He could revoke his will, at civil law, by any expression[18]. He could substitute without a will[19], and even make a pupillary *substitutio* to an *emancipatus* or a *pubes*, but in such cases the *substitutio* covered only what came from him[20]. He could be partly testate[21]. *Capitis deminutio minima* did not affect his will (even, in later

1 29. 7. 1. 2 C. Th. 4. 4. 7 = C. 6. 36. 8; D. 29. 1. 3; 28. 3. 12. 1; C. 7. 2. 11. 3 37. 13. 1. 1. This title specifies precisely the persons to whom the privilege applies. It includes all persons officially present in the camp, whether soldiers or not. 4 29. 1. 1; Inst. 2. 11. 1. 5 G. 2. 106; C. 6. 21. 17. 6 Inst. 2. 11. 4. 7 29. 1. 25, 26; Ulp. 23. 10. 8 29. 1. 38. 9 G. 2. 114; Inst. 2. 11. 1. 10 29. 1. 4; Inst. 2. 11. 2. 11 29. 1. 3 (corrupt); h. t. 15. 4. 12 G. 2. 109, 114; 29. 1. 13. 2. 13 29. 1. 7, 8, 33. 2; 37. 12. 1. 4. 14 5. 2. 27. 2; C. 3. 28. 37. 15 29. 1. 17. 4. 16 C. 6. 21. 12. 17 G. 2. 110, 111. 18 29. 1. 15. 1, and see h. t. 19. pr. 19 29. 1. 15. 5. 20 29. 1. 5; h. t. 41. 4. 21 29. 1. 6.

classical law, if it occurred in the year after service ceased), nor did *media* or *maxima*, where it was a military punishment[1]. There were however some respects in which his will was subject to ordinary law. He could not institute an *incerta persona*, till others could[2]. He was bound by the *ll. Aelia Sentia* and *Fufia Caninia*[3]. An *institutio captatoria* was void[4]. A *captivus miles* could not make a will[5].

If the *miles* was a *filiusfamilias*, the power applied, even under Justinian, only to *bona castrensia* and *quasicastrensia*, not to *adventitia*[6].

CXXVII. LIMITED INTERESTS AND SETTLEMENTS[7]. The desire to "found a family," to secure that the "family property" should remain in the hands of descendants in perpetuity, existed in Rome as elsewhere. The question thus arises how far this was possible—how far a testator could "settle" his property so as to determine its devolution in the future. Apart from *fideicommissa* the power seems to have been little in the time of Gaius. No *incerta persona* could be instituted *heres* or receive a legacy and thus, though a testator could create a series of usufructs, they must all be to existing persons, or at least to persons already conceived, so that property could not be effectively settled in this way for more than existing lives and the period of gestation. The right to institute *postumi* was not a real extension of this power. All *postumi* instituted, whether *sui*, who could be instituted at civil law, or *extranei*, who could get *bonorum possessio*, must have been born or conceived at the time of the testator's death[8]. The power to institute them was not primarily intended to increase the power of testation and settlement, but to prevent the intestacy which would otherwise result from the agnation of a *postumus*. The rule as to *postumi extranei*, an analogous extension, carries the matter no further for the present purpose[9], the possibility of holding over *delatio* for more than the period of gestation does not seem to have been contemplated.

Fideicommissa however afforded a means of going further in this direction. They could at first be made in favour of *incertae personae*,

1 29. 1. 11, 22, 23; 28. 3. 6. 13; Inst. 2. 11. 5. There were many other privileges. 2 Inst. 2. 20. 25. 3 29. 1. 29. 1. 4 C. 6. 21. 11. 5 29. 1. 10. They were subject to other ordinary rules. 6 Inst. 2. 11. 6. 7 The practice of requiring the devisee, where he was not a descendant, to take the name of the testator, is ancient. See Cicero, *ad Att.* 7. 8. 3. For some account of these family settlements, Buckland, *Equity in R.L.*, 83 sqq. 8 37. 9. 10; 38. 7. 5. 1. 9 The primary purpose of this praetorian extension is not quite clear. It may have been in order to provide for the posthumous children of *emancipati*, or a mere development from the rule, recognised at civil law, that the slave of a *postumus extraneus* might be instituted, for this is involved in the *institutio* of *servi hereditarii*, and is clearly recognised by Labeo for the similar case of the *institutio* by a third party of a slave forming part of the *hereditas* the person entitled to which is a *suus heres* yet unborn, 28. 5. 65. But it is more probable that it rests on the fact that it was not always possible to say beforehand whether a child of a certain woman would be a *suus* or an *extraneus* of the testator. See the cases discussed in 28. 2. 9.

and, as there could be *fideicommissa* on *fideicommissa*, it was possible to burden each successive beneficiary with a trust to hand over the property at his death to his son, and so on in perpetuity[1]. We know indeed that such things were done. The will of Dasumius, made in A.D. 108, is still in existence[2]. It gives lands to *liberti*, with no power to sell or pledge them, with a right of accrual or survivorship, and a direction that on the death of the last survivor the lands are to go to *posteri* on the same terms. The last of these is to have the power of alienation. This is substantially a complete perpetuity. It is not possible to say whether such things were usual or not. The will, or the copy which we possess, is inscribed on marble, a permanent record made perhaps on account of the permanent nature of the relations set up. In any case Hadrian forbade *fideicommissa* in favour of *incertae personae*[3], so that the power ceased.

Thereafter testators inserted in their wills directions not to alienate, usually referring to specific properties[4]. If these were valid they would produce much the same result, but Severus and Caracalla provided that any such direction was a nullity, unless it was combined with a *fideicommissum*[5]. Such a *fideicommissum* would usually be for members of the family, and the Digest gives[6] many illustrations of such family trusts. They could not however be perpetual: they were not, it would seem, binding in classical law except on donees alive at the testator's death and their immediate issue[7]. Such restrictions seem to have had a certain operation *in rem*, *i.e.* they not merely imposed a duty on the *heres* and his successors, but they vitiated any sale by the fiduciary, at any rate if there was an express prohibition of sale[8]. In the absence of such a prohibition, there was the *missio in possessionem* against a buyer with notice already dealt with, abolished by Justinian as ineffective and obscure[9]. Under Justinian, as we have seen, all property subject to a *fideicommissum* was by that fact rendered inalienable[10].

But there was another change under Justinian, of much greater importance. Gifts of all kinds could now be made to *incertae personae*[11],

1 *Fideicommissa* for transference to other than issue at death were usually in absence of issue, and if this limitation was not expressed, it was implied in later classical law. 35. 1. 102; C. 6. 42. 30. 2 Girard, *Textes*, 798; Bruns, 1. 304. 3 *Ante*, § CXXIV. 4 See Declareuil, *Mél. Gérardin*, 135 sqq. for a study of the social conditions which produced these trusts. He thinks they originated in arrangements for tombs and the like enforced usually by *multae*. 5 30. 114. 14. 6 30. 114. 15; 31. 67. 3; h. t. 88. 16; 36. 1. 76, etc. 7 31. 32. 6; 32. 5. 1; h. t. 6. pr., etc. 8 31. 69. 1; 32. 38. 3, etc. But see Beseler, *Beiträge*, 2. 77 on 30. 114. 14. Security could be required from any person taking under such a *fideicommissum*, to carry out its further purpose, 31. 67. 6; 32. 36. 7. 9 *Ante*, § CXXV; P. 4. 1. 15; C. 6. 43. 3. 2. This *missio* was not apparently available against devisees, who indeed, as Declareuil points out (p. 142), were subject to the trust. 10 *Ante*, § CXXV; C. 6. 43. 3. 2a. At about the same time he made the testator's prohibition of alienation operative *in rem*, C. 4. 51. 7. 11 *Ante*, § CIII; C. 6. 48. 1

but as *institutiones* were still confined to persons conceived at the time of the death[1], and *ususfructus sine persona esse non potest*[2], neither of these could well be used to establish perpetuities. But, as in the time before Hadrian, *fideicommissa* were available and were used for the purpose. It was possible to direct the *heres* to hand over the property on his death to his son, to direct the latter to do the same and so on for ever. The only difficulty was the quarter which the *heres* might keep. But it was easy to reserve enough for this, and in any case Justinian allowed the testator to override this[3]. In a Novel[4], Justinian states and decides a case of this kind. Hierius had given specific estates, each to a different son, on the terms that he was not to alienate it away from his name and family. Those who had issue were to leave it to them, the shares of those without issue going to the survivors on the same terms. In a codicil[5] he gave land to a grandson, on similar terms, but adding a direction that it was to remain for ever in the family, thus, unlike the will, creating a perpetuity. The grandson obeyed the directions, but his son left the property, under conditions which occurred, to his wife and mother jointly. A surviving *heres* of the original testator claimed the property on the ground that the wife and mother were not of the family. The decision was that, for the purpose, they were, so that there had been no breach. Justinian then decided, or rather enacted, that it had been going on long enough, that the present holders might do as they liked with the property, and that for the future no such prohibition was to hold good for more than four generations[6].

1 C. 6. 48. 1. 2. 2 Vat. Fr. 55; 45. 3. 26. 3 *Ante*, § CXXIV. 4 Nov. 159.
5 It is not improbable that Hierius' will was made before the enactment authorising gifts to *incertae personae* (p. 359, n. 11) and the codicil after. 6 This became the common law of "fideicommissary substitutions" in the countries governed by Roman Law. See Strickland *v.* Strickland, 1908, App. Ca. 551.

CHAPTER IX

THE LAW OF SUCCESSION. INTESTACY. *BONORUM POSSESSIO*. SUCCESSION NOT ON DEATH

CXXVIII. Intestacy, general notions, p. 361; CXXIX. Succession under the XII Tables, 363; CXXX. The Praetorian Scheme, 366; CXXXI. Imperial changes before Justinian, 368; *Sc. Tertullianum, ib.*; *Sc. Orphitianum*, 369; Further changes, 370; CXXXII. The Scheme of the Institutes, 371; The system of the Novels, *ib.*; CXXXIII. Succession of the father, 372; Distinction between reversion of *peculium* and *hereditas*, 375; CXXXIV. Succession to *cives liberti, ib.*; *L. Papia Poppaea*, 376; Justinian, *ib.*; Property of Junian Latins, 377; Property of those *in numero dediticiorum, ib.*; further effects of distinction between reversion of *peculium* and *hereditas*, 378; CXXXV. Account of working of *Bonorum possessio, ib.*; *B. P. contra Tabulas*, 379; *secundum tabulas*, 380; *Unde liberi, ib.*; *unde legitimi, ib.*; *unde X personae*, 381; *unde cognati, ib.*; other cases, *ib.*; under Justinian, 382; CXXXVI. Machinery of scheme, *ib.*; *Ex edicto* and not *ex edicto*, 385; CXXXVII. Remedies of *bonorum possessor cum re*, 386; CXXXVIII. Remedies of *bonorum possessor sine re*, 389; CXXXIX. *Bonorum Possessio*, when *cum re*, 391; authority which makes it *cum re*, 393; CXL. Advantage of *bonorum possessio sine re*, 394; reason for granting *B. P. sine re, ib.*; *Bonorum Possessio Decretalis*, 395; CXLI. Universal succession not on death, 396; *Adrogatio, ib.*; *Manus*, 397; *Cessio in iure hereditatis*, 398; *Adsignatio liberti, ib.*; CXLII. *Addictio bonorum libertatis causa*, 399; *Publicatio, ib.*; *Sc. Claudianum*, 400; *Bonorum Venditio, ib.*

CXXVIII. The subject of Intestacy is, in one sense, or even two senses, of minor importance. Long before classical times intestacy had become unusual, indeed a misfortune, and as early as Plautus[1] a feeling had developed which has been called a horror of intestacy. The very artificial state of the law of succession on intestacy may account for the desire to make a will, but hardly for the intensity of this feeling. There have been many attempts to explain it, but they are little more than conjectures: here as elsewhere it is difficult to be sure of the historical origin of a social sentiment. Maine[2] suggests that *emancipatio* is really a reward, but has the unfortunate effect of excluding the son from the succession, for which the will provides a remedy. Another explanation is that the stern Roman mind saw a duty and a responsibility involved in the right of testation. It is said also that the plebeians prized the right of testation as their most striking triumph over the patricians, and that what had been a plebeian became, with plebeian domination, a Roman sentiment. But none of these explanations seems enough to explain the intensity of the feeling, and it may be that, as has also been said, the feeling is at bottom religious: a *heres ab intestato* could, by *cessio hereditatis*, shift the *sacra* to the care of another, uninterested person, a *heres ex testamento* could not[3].

1 *Curculio*, 5. 2. 24. 2 *Ancient Law*, 222. 3 See *e.g.* Accarias, *Précis*, 1. 840. The fact that the will can do many things besides appoint a *heres* is also cited, but, like the other explanations, is not adequate.

A second point of view from which the subject can be regarded as unimportant is that of its juristic value. Apart from a few main principles, it is a mass of detail, throwing little light on other parts of the law, and for this reason it will be treated briefly.

Many of the subsidiary rules of succession applied to succession on intestacy as well as to succession by will, *e.g.* the rules as to *beneficium abstinendi*, *spatium deliberandi*, inventory, *fideicommissa*, *hereditas iacens*, *ius accrescendi*, *sc. Pegasianum*, and so forth[1]. But the rules of the *ll. caducariae* had here no application[2]. Even if they had applied, they would have been of less importance, since almost all relatives were so far excepted that they could take their share, and, at least in the case of *ingenui*, the *heres* on intestacy was a relative. But they did not apply; thus, where an agnate refused, accrual existed in favour of the others in the same degree, whether they were married or not[3], while under a will they would have been excluded from sharing in *cáduca* or the like. And, in a case of intestacy, there could be no question of a *servus heres necessarius*.

In relation to *collatio bonorum* it is to be observed that, while the old system applied in intestacy, it had, as has been said, lost most of its importance in later law. But a new kind of *collatio* appeared. The old *collatio* had turned on the notion that the *emancipatus* had means of acquiring property, denied to the *filiusfamilias*, but *collatio dotis*, which might be required from a daughter in *potestas*[4], introduced two new ideas: the person making *collatio* might be in the family, and the fund out of which it was made commonly came from the father. Hence the new form of *collatio*. It was a gradual growth: as we find it under Justinian it was a rule that any descendant claiming in succession to any ascendant must bring in for division (*conferre*) anything which had been received from the father by way of *dos* or *donatio propter nuptias*, or with a view to setting him up in life[5]. Till Justinian it had applied only on intestacy, but in a novel he extended it to wills: the descendant could not claim the gift without bringing in these previous benefits[6].

The succession might not be immediate on the death. The significant date was not the death, but that on which the succession "opened," the date on which it was clear that there would not be any *heres* under any will[7]. It is plain that this might not be till long after the death. A *heres institutus* might refuse only at the end of the *spatium deliberandi*, or it might be long before it was clear that the condition on an *institutio*

1 G. 2. 157, 158; Inst. 3. 2. 7; C. 6. 30. 22. pr., 1 a; Ulp. 26. 5; D. 36. 1. 1. 5. 2 Ulp. 17. 1. 3 P. 4. 8. 24; Ulp. 26. 5. 4 D. 37. 7; C. 6. 20. 5 C. 6. 20. 17. 6 Nov. 18. 6. The unsatisfactory reason for the extension is assigned that the testator in the hurry of making his will may have forgotten these gifts. For the earlier legislation on this form of *collatio*, C. 6. 20. 17–21. 7 Inst. 3. 1. 7; Coll. 16. 3. 1–3; D. 38. 16 2. 6.

would not be fulfilled. The importance of the opening of the succession was that the person entitled at that date took, though he may not have been the nearest at the time of death[1]. If *A*'s brother survived him, but died before the *heres institutus* had refused, his cousin might be *A*'s nearest agnate, though he was not when *A* died. But the date of death was material in another way: no one could succeed on intestacy unless he was born or conceived at the time of the death[2]. *Postumi* could claim, as under wills, and we are told that one, in respect of whom *anniculi probatio* or *erroris causae probatio* was made or completed after the death, had the same right[3]. A child given in adoption might be emancipated and so become an *emancipatus* of the deceased after the critical day. It does not appear that he had any claim[4].

The rules of succession on intestacy provide a mass of detail, undergoing constant change, the changes being nearly all in one direction. A system resting absolutely on agnation was gradually superseded, at first under the praetor's edict, but, at least as early as Hadrian, through express legislation, by one in which natural blood relationship was more and more regarded, till in Justinian's final legislation, in the Novels[5], there was no longer any trace of the old civil law notions.

The earliest rules we know are those of the XII Tables, and though in the Empire these were largely superseded, the later changes are scarcely to be understood without knowledge of them as a starting-point. Indeed it was not till Justinian's final legislation that all trace of them disappeared.

In the Institutes the order established by the XII Tables is adopted as the basis of treatment, and an attempt is made to state the development of the law by discussing the changes made in each class in turn, with the substitution of cognatic succession for that of the *gentiles*. But for brevity and clearness it seems better to take the law in periods, a method which coincides closely in effect with that of treatment of the changes in relation to the agency by which they were effected, for the praetorian changes were almost over when imperial changes began[6].

CXXIX. Succession to *Ingenui* under the XII Tables. The order of succession is:

1. *Sui heredes*[7]. These were such persons as, having been in the *potestas* of the deceased, became *sui iuris* by his death. It was immaterial whether they were natural or adoptive[8]. Grandchildren by a son, and

1 G. 3. 11; Inst. 3. 1. 7. 2 37. 9. 7. pr.; 37. 11. 3. 3 G. 3. 5; Coll. 16. 2. 5. 4 *I.e.* under the classical law of *adoptio*. If the nearest agnate adopted between the death and the opening of the succession and then refused, it does not appear that the *adoptatus* had any claim, even under the praetor's rules, either in classical law when it would have benefited the adoptor, or later. 5 Novv. 118, 127. 6 Of course, the praetorian changes were not all made at one time. 7 Inst. 3. 1. 1. 8 G. 3. 2; Coll. 16. 2. 2.

remoter issue generally, through males, were *sui heredes* if the intervening links were dead or out of the family, and they took the share that their father would have taken[1]. *Postumi* were included and, as we have just seen, there were other cases of a similar type, *e.g.* children in respect of whom there had been *anniculi* or *erroris causae probatio*, since the death[2]. On the same footing was a son, who having been *in mancipio* to a third person, after a first or second sale, was released from it after the father's death[3]. If it had been after the third sale, the agnatic tie being destroyed, there would be no claim[4]. As we have already seen, *sui heredes* were *necessarii*: they were *heredes* without any question of acceptance, and they could not refuse. They were indeed not so much acquiring a new property as succeeding to the administration of what was in a sense theirs already. This is indeed, we are told, the import of the name *suus heres*[5]. It is noticeable that the XII Tables do not expressly lay down the right of succession of *sui heredes*: it is assumed in the famous text: "*si intestato moritur cui suus heres nec escit, agnatus proximus familiam habeto*[6]." The fact that they were called *sui heredes* implies that there were other *heredes* who were not *sui*. These were probably the *heredes scripti* under the Comitial will, though this is controverted[7].

2. *Proximus Agnatus*. This right is expressed in the text above printed. We have considered the definition of agnation: it will be recalled that it is the tie connecting those related to each other, naturally or by adoption, by legitimate descents from a male through males, unbroken by *capitis deminutio*[8], including *postumi*. The nearest agnates, if more than one, took equally (*per capita*): there was no representation[9]. Unlike the *sui*, agnates had discretion to accept or refuse[10]. They were not *heredes* till actual acceptance, which was no doubt in early law by formal *cretio*, but in the law of the Empire it is clear that informal *pro herede gestio* did as well, and probable that *cretio* was unusual.

It will be seen that the *agnati* are not described as *heredes*: the words are not "*heres esto*," but "*familiam habeto*." This is usually interpreted to mean that the agnate did not at first become *heres*: he was not personally liable for debts or *sacra*, and when in course of time he did so become liable he came to be considered as *heres*. This view is indeed

1 G. 3. 8, by *iuris interpretatio*, G. 3. 15. 2 G. 3. 5; Coll. 16. 2. 3 G. 3. 6; Coll. 16. 2. 6. 4 As to some other cases see Accarias, *Précis*, 1. 1158. 5 G. 2. 157; Inst. 2. 19. 2. See as to this, Karlowa, *R.Rg.* 2. 880. 6 XII Tables, 5. 4. Bruns, 1. 23; Girard, *Textes*, 14. 7 *Ante*, § c. 8 It may be created by *capitis deminutio*, *e.g.*, *adrogatio*, *adoptio* and even *legitimatio*. For the case of *captivi*, *restituti*, etc., Accarias, *op. cit.* 1. 1165 9 G. 3. 15; Inst. 3. 2. 5. 10 Inst. 2. 19. 5; 3. 2. 7; G. 3. 12.

controverted[1], but in any case the *agnatus proximus* was *heres* long before the time with which we are concerned.

The word "*proximus*" had a limiting effect: it was only the nearest agnate who had any right under the XII Tables. If he refused, the right to claim did not pass to the next[2]. On the other hand, the nearest took, however remote: there was no arbitrary limit of remoteness such as we shall see in the praetorian scheme. But, late in the republic, a remarkable restriction appeared; the rule that no woman could succeed as an agnate except a *consanguinea*, a sister, a rule which had the effect of keeping the property on the male side of the family[3] and was, so far, an expression of the agnatic idea, and an exception to the general tendency of change. The rule was said to be based on "*Voconiana ratio*" and is obviously similar in principle to the rule of the *l. Voconia* (B.C. 168) by which a person in the first class of the *census* was forbidden to institute a woman as his *heres*[4]. It is a civil law rule, but nothing is known as to the date of its appearance. The earliest reference we have is by Gaius, but it was clearly no novelty[5]. It is Paul who attributes it to *Voconiana ratio*[6], and his language suggests, but does not prove, that it was subsequent to the *l. Voconia*[7].

3. *Gentiles.* The XII Tables, after dealing with *proximus agnatus*, said: "*si agnatus nec escit, gentiles familiam habento*[8]." This rule was so early obsolete—there is no trace of it in classical law—that we need say little of it. We need not therefore discuss the nature of a *gens*, or the question whether the *gentiles* took in common or as individuals[9]. All that we need say is that from the language of the text it seems that it was only in the total absence of agnates that the *gentiles* took, not in case of their refusal, and that it is not quite clear that they were regarded in strictness as *heredes*. There is evidence from Cicero[10] that the case was rather looked at as one of return to a common stock, a conception which also colours some of the texts which deal with agnatic succession[11].

The language of the XII Tables is interesting from another point of

1 Lenel, *Essays in Legal History*, ed. Vinogradoff, 120 sqq., holds that the words *heres esto* were avoided lest they should make the agnate a *necessarius*, that he was a true *heres*, but became so only when he had actually taken possession of the property. See, however, Bonfante, *Bull.* 27. 97 sqq.; Buckland, *L.Q.R.* 32. 97 sqq. 2 Inst. 3. 2. 7. 3 The rule might seem to exclude agnates altogether where it applied, for a remoter male would not be *proximus agnatus*. But in fact the point of view is that women agnates are excluded altogether: *consanguinei* are by the lawyers treated as a distinct and prior class (see *e.g.* 38. 16. 2. pr., 1) so that agnate means male agnate. 4 *Ante*, § CIII. 5 G. 3. 14. See also Inst. 3. 2. 3 a "*media iurisprudentia...imperiali sanctione anterior.*" 6 P. 4. 8. 20. 7 See Karlowa, *R.Rg.* 2. 883. 8 XII Tables, 5. 5; Girard, *Textes*, 14; Bruns, 1. 23. 9 See Karlowa, *R.Rg.* 2. 884; Cuq, *Manuel*, 717. 10 *De Or.* 1. 39. 176. 11 Cuq, *Institutions juridiques*, 1. 390, who besides literary texts cites 31. 69. pr.; 38. 10. 10. pr.

view: it expresses a striking principle of the old law of succession. It admits neither *successio graduum* nor *successio ordinum*. If the nearest in a class did not take (a point which could arise only in connexion with agnates, for there was no question of refusal among *sui heredes*) the text expressly excludes the next: *proximus agnatus familiam habeto*. These words give no right to any but the *proximus*, and whether, as some hold[1], the agnatic succession was introduced by the XII Tables, or not, that enactment was always regarded as expressing the fundamental law of the matter. Thus there was no *successio graduum*. So also, if we are to follow the text, a refusal by the agnates did not let in the *gentiles*: it was only if there were none that the *gentiles* came in: *si agnatus nec escit*. There was no *successio ordinum*. As we shall see, the methods of later law were different.

CXXX. The Praetorian Scheme of Succession. It must be borne in mind that the praetor could not give the *hereditas*. What he gave was *bonorum possessio*: his edict declared that in the absence of a will he would give *bonorum possessio* to claimants under certain rules and in a certain order. The nature and efficacy of this *bonorum possessio* will be considered later[2]. For the present we are concerned only with the order. This is:

1. *Liberi*. These included *sui heredes*, *emancipati*, children of deceased *emancipati*, children left in a family from which the deceased had passed by *emancipatio*[3], in fact, substantially, those persons who could claim *bonorum possessio contra tabulas* if a will failed to provide for them[4]. It did not cover children given in adoption and still in the adoptive family. In the praetorian scheme the distribution among *liberi* was necessarily a more complex matter than that among *sui* at civil law. When the praetor admitted *emancipati*, it is obvious that their claims and those of any children they had left in the family would clash. Logically it would seem that the rule should have been that if the emancipated son claimed, his children should be excluded. But they were *sui*, and a special edict so far respected their right as to make them share with their father[5]. It is a remarkable fact that this rule was not laid down till the time of Julian: it is the only clause which he is known to have added to the edict[6]. The rule had the result that, as the coming in of the father injured no *heres* except his own children, since he merely took part of their share, he had no *collatio* to make in respect of other *sui*, but only as against these children[7].

1 *E.g.* Muirhead, *Roman Law*, § 32. 2 *Post*, §§ CXXXV sqq. 3 Ulp. 28. 7, 8; Inst. 3. 1. 9 sqq. 4 Not exactly the same class. It did not cover children given in adoption and still in another family, though these under certain conditions could get the benefit of *bonorum possessio contra tabulas*, 37. 4. 8. 11; *ante*, § CXIII. 5 37. 8. 1. pr.; h. t. 3. 6 37. 8. 3. 7 37. 8. 1. pr. in f.

2. *Legitimi.* As its name shews, this class covered those only who had a statutory claim. The main case was the agnate, but there were many others, details of which will be considered later[1]. As in this class only those with a civil claim were admitted, there was no question of *successio graduum*: refusal by the nearest agnate did not let in the next, though, according to Gaius[2], some jurists, inspired no doubt by the praetor's practice in *cognatio*, took the contrary view. But it was no part of the praetor's policy to extend the operation of the agnatic idea[3].

3. *Cognati.* In the absence of claimants under earlier heads the praetor gave *bonorum possessio* to the nearest cognates[4], ignoring the *gentiles*. Cognation was, broadly speaking, any kind of blood relationship. It covered therefore relatives through females, agnates who had not claimed as such, those who would have been agnates, but for an *emancipatio* or the like, children given in adoption, female agnates remoter than sisters, and even illegitimate children, in succession to the mother or her cognates, or *vice versa*, or to each other[5]. Although *cognatio* was a natural tie, it covered even adoptive relatives so long as the artificial agnatic tie existed, but, if that was broken by *emancipatio* or the like, the cognatic tie also was destroyed[6], even where the breach occurred after the death, but before the claim[7].

The nearest cognate was entitled, and if there were more than one they shared *per capita*[8]: there was no question of representation of deceased *cognati* by their children. But there was an arbitrary limitation of remoteness, based no doubt on the principle of the excepted cases under the *l. Furia testamentaria*[9], and the *l. Cincia*[10]. No one could succeed as a cognate who was beyond the sixth degree of relationship, or, in one case, the seventh, that of second cousins once removed, *i.e.* the child of a second cousin[11].

In this case the praetor allowed full play to *successio graduum* and *ordinum*. If the *legitimi* refused, the cognates might claim, *successio ordinum*[12]. It might well happen that those included in one class might also be covered by another, so that they had two chances to claim. Thus, *sui* who had failed to claim as *liberi* might still be entitled as *legitimi* or

1 *Post*, § CXXXV. 2 G. 3. 28. 3 As to *b. p. unde decem personae*, *post*, § CXXXV. 4 38. 8. 1. pr. The somewhat confusing language of Inst. 3. 6. 11, 12 appears merely to mean that some persons who are cognates, but not the nearest, may nevertheless be entitled in preference to the nearest cognates, *e.g.* remote descendants, *unde liberi*, cousins, *unde legitimi*. If, however, they fail to claim under these heads within the time allowed, the priorities of *cognatio* will apply. 5 38. 8. 2; h. t. 5. *Milites* could not marry while on service: if they purported to do so, children had no right of succession to the father. But Hadrian allowed them to claim as *cognati*. See the rescript in Girard, *Textes*, 195. 6 38. 8. 1. 4. 7 38. 8. 1. 6, 7; h. t. 3. 8 38. 8. 1. 10. 9 G. 2. 225; Vat. Fr. 298 sqq. 10 *Ante*, § XCI. 11 38. 8. 1. 3; h. t. 9; Inst. 3. 5. 5. 12 38. 9. 1. pr.

cognati[1]. As to *successio graduum* he applied in general, apart from the case of *legitimi*, the same principle. If the nearest *cognati* allowed the time to pass, or if they refused, the next *cognati* might claim[2].

4. *Vir et uxor*[3]. In the absence of claims of blood relatives the praetor gave *bonorum possessio* to husband and wife reciprocally. This applied essentially to civil marriage without *manus*, since a wife *in manu* came under the head of *liberi*. But the law of succession before Justinian went no further. *Dos*, and *donatio ante nuptias*, frequently supplemented or replaced by a legacy of usufruct[4], no doubt did what was necessary. We have already considered Justinian's rules as to widows without *dos*[5].

It must be noted that the foregoing is merely an outline of that part of the praetor's scheme which dealt with *ingenui*, and, even so, it is incomplete. The actual order, later to be considered[6], is much more complex.

CXXXI. Imperial changes before Justinian. Apart from *privilegia* such as that by which Claudius gave a mother who had lost her children their property[7], the enactments as to *causae probatio*, etc.[8], creating fresh classes of *sui*, and the legislation affecting succession to *liberti*, to be considered later, there was no intervention by legislation till the second century.

The earlier law of succession on intestacy is stated almost entirely from the point of view of the *paterfamilias*, the rules of succession to a woman being, in fact, implicit in what is said. The results arrived at were so unjust that it is not surprising to find that the legislation which now began was largely concerned with the case of claims of, or to the property of, women. The earliest of this legislation dealt with succession between mother and child.

Sc. Tertullianum. At civil law a mother, if not *in manu* of her husband, had no claim, and, even at praetorian law, she was only a cognate. This enactment, under Hadrian[9], dealing however only with mothers who had the *ius liberorum*, much improved her position. The *ius liberorum* rests on her having had three children (in the case of a *libertina*, four) by separate births, it being immaterial whether they survived or not[10]. The order of succession established by the senatusconsult[11] was (1) *sui heredes*, and those grouped with them, *i.e. liberi*; (2) the father, whether *parens manumissor* or not, provided he was not in another family; (3) consanguineous brothers and sisters, taking together; (4) mother and sisters, the mother taking half. The deceased child need not

1 38. 9. 1. 11. 2 38. 9. 1. 6; h. 1. 10. Not where a prior cognate had accepted, and received *restitutio in integrum*, h. t. 2. In such a case there was a *caducum*. 3 38. 11. 1. 4 See, *e.g.*, Vat. Fr. 58, 69, 86–88. 5 *Ante*, § CXIV. 6 *Post*, § CXXXV. 7 Inst. 3. 3. 1. 8 *Ante*, § XXXV. 9 Inst. 3. 3. 2. 10 P. 4. 9. 1; 4. 9. 9. 11 Ulp. 26. 8.

have been legitimate[1], and the mother did not lose her right by a *capitis deminutio*[2]. These rules were changed from time to time[3]. Constantine improved the mother's position; in particular he gave her a reduced share even if she had not the *ius liberorum*[4], and there was further legislation of similar tendency in A.D. 369 and 426[5].

While the order under the *sc.* differed widely from that under the earlier rules, it left these unaffected. The *sc.* in no way superseded the older law, on which the rules, a direct creation of the enactment, in no way depended. There were near relatives who had rights of succession who were not mentioned in the *sc.* What rule was to be applied if, in the given case, there were such persons? The answer to questions of this kind is to be found in two governing principles which controlled the operation of the enactment. The first was that it was to be applied only where the claimants were those whom it mentioned, *i.e.* not if there existed a claimant not mentioned in its order, who would, apart from it, take before any person entitled under its provisions[6]. The second, even more important, principle was that the enactment was not meant to give any person other than the mother any greater rights than he or she had under earlier law[7]. If in the given case there were persons who, on the terms of the *sc.*, would be preferred to the mother, the enactment was not applied: the earlier law governed.

These principles are freely illustrated in the texts, but the cases must be handled cautiously, because of the uncertainty whether the decision is that of the original author or has been edited by Justinian in view of his changes. In one case a grandfather emancipated a grandson, who died, leaving surviving his father and mother and this grandfather. The grandfather as *parens manumissor* had the prior claim apart from the *sc.*, and even under it the father excluded the mother, so that the common law applied and the grandfather took, as *parens manumissor*—quasi patron[8]. A man died leaving a mother, an agnatic cousin, and a father who had been given in adoption in another family. Agnates were not mentioned in the enactment, as recorded, but the reference to brothers and sisters was understood as amounting to exclusion of remoter agnates[9]. It follows that the mother excluded both the agnates and the father, who, being in another family, was not preferred in the *sc.*[10]

Sc. Orphitianum[11]. Children had no civil law right of succession to their mother and were only cognates under praetorian law. This enact-

1 Inst. 3. 3. 7. 2 Inst. 3. 4. 2. 3 Inst. 3. 3. 3. 4 C. Th. 5. 1. 1. 5 C. Th. 5. 1. 2; h. t. 7. For Justinian's changes, *post*, § CXXXII. 6 Inst. 3. 3. 3, "*scilicet cum inter eos solos de hereditate agitur.*" 7 See, *e.g.*, 38. 17. 2. 20. 8 38. 17. 5. 2. 9 See Inst. 3. 3. 5, "*legitimae personae.*" 10 38. 17. 2. 17. 11 Ulp. 26. 7; Inst. 3. 4.

ment, of A.D. 178[1], gave them the first claim in succession to the mother. It was indifferent whether they were legitimate or not, provided they were freeborn[2], and the right was not lost by *capitis deminutio*[3].

Where a woman died leaving both mother and children there might be difficulties in applying these two *scc.* If there was a person with a claim which, under the original scheme of the Tertullian, was preferred to that of the mother, *e.g.* a brother, the children took the property as of course, for, as brothers excluded the mother, the Tertullian did not apply and the Orphitian gave the succession to the children. But if there was no other claim than those of mother and child, their rights were equal under praetorian law, both being cognates, and neither had any right at civil law. The Tertullian standing alone would give the property to the mother (for the children of a woman were not *liberi* in the technical sense), while the Orphitian standing alone would give it to the children. Accordingly they shared, until, in the later Empire, it was provided that children should succeed to the mother notwithstanding anything in the *sc. Tertullianum*[4].

It is at first sight surprising that the simple rule that children can succeed in first instance to the mother comes historically later than the provision for what must have been a rarer case, that of the mother succeeding to her children. The explanation is that the two pieces of legislation rest on quite different ideas. The Tertullian is a late part of the elaborate legislation for the encouragement of marriage of which the *ll. caducariae* are the best known part. The Orphitian, on the other hand, is an early part of that legislation which ultimately superseded the agnatic idea altogether, so far as intestacy was concerned.

The *sc. Orphitianum* gave no rights to remoter issue. This was remedied by legislation of A.D. 389, which provided, on the one hand, for grandchildren of a man through a deceased daughter, and on the other, for grandchildren of a woman through a son or a daughter. In the first case they were to take two-thirds of the share their mother would have taken, as against surviving *sui heredes*, and three-quarters of the estate as against agnates. The rule was similar in the second case, except that it is not clear that there was any deduction for surviving children of the grandmother, though there was for agnates[5].

The law of agnation underwent a change consistent with the course of earlier legislation, though not with the true principle of agnation. Anastasius (A.D. 491–518) allowed emancipated brothers and sisters to succeed as agnates, subject to a deduction if there were unemancipated persons of the same class[6]. The terms in which Theophilus tells us of this

1 Inst. 3. 4. pr. 2 Inst. 3. 4. 3. 3 Inst. 3. 4. 2. 4 C. 6. 55. 11. 5 C. Th. 5. 1. 4. 6 Inst. 3. 5. 1.

deduction are obscure[1], but it seems to have been of one-third. The rule applied of course only to brothers and sisters by the same father, and it did not benefit children of deceased brothers and sisters[2].

CXXXII. The Rules of the Institutes. The changes made by Justinian, before the great reform in the Novels, can hardly be called a system. A number of small changes were made, always in the direction of rationalisation, but they were unsystematic and tentative and may well have rendered the law even more confusing and complicated than it was before. The chief changes were the following:

Grandchildren of or through a woman now took the whole estate as against agnates, and the rule was extended to great-grandchildren. There was still a deduction of one-third in favour of *sui heredes*[3].

The *sc. Tertullianum* was remodelled. The *ius liberorum* was dispensed with and the mother shared with the brothers, taking a *pars virilis*, instead of being excluded by them[4].

The exclusion of female agnates beyond sisters was abolished[5], and in this class *successio graduum* was introduced—if the *proximus* refused, the next could take[6]. The deduction in the case of emancipated brothers and sisters claiming with agnates was removed[7] and the right extended to their children, to brothers and sisters by the same mother, and to their children[8].

The most significant change was the recognition of *cognatio servilis*. Even in classical law, in interpreting wills, the word "*filius*" had been held to cover a son now free but born in slavery, where this seemed to be the testator's intent[9], but such persons had no right of succession on intestacy. Justinian however provided that a freedman's children were to exclude the patron, whether they were freed before or after or with the father, or born free, and similar rights of succession were given to them[10] *inter se*, and to the parents to them, but no further.

The System of the Novels[11]. About ten years after the publication of the Institutes, a completely new system of rules was introduced, with the definite aim, as Justinian tells us, of doing away with the unfair distinctions between male and female which filled the old law of succession. The rules shew a complete breach with old notions: there is no word of *sui* or *agnati* or *cognati*. The rules look modern and have indeed found their way, of course much modified, into many modern legislations[12]. The order of succession may be shortly stated as follows:

1 Ad Inst. 3. 5. 1. 2 Inst. *ib.* 3 Inst. 3. 4. 1; C. 6. 55. 12. 4 Inst. 3. 3. 4; h. t. 5; C. 8. 58. 2. 5 Inst. 3. 2. 3; C. 6. 58. 14. 6 Inst. 3. 2. 7. 7 C. 6. 58. 15. 1. 8 h. l. 2. 9 28. 8. 11. 10 Inst. 3. 6. 10; C. 6. 4. 4. See Nov. 18. 5 as to a limited right of succession to children by a *concubina*. 11 Novv. 118, 127. 12 The English rules of distribution of personalty, though statutory, are based on these rules, through the ecclesiastical law.

1. Descendants, without distinction of sex, remoter issue taking their deceased parents' share.

2. Ascendants, the nearer excluding the more remote. If there were several in the same degree, but in different lines, each line took half, irrespective of number. Brothers and sisters of the whole blood shared with ascendants, and it seems that in this case all took equally. Children of deceased brothers and sisters represented their parents if there survived a brother or sister with whom to take, *i.e.* the right of representation was allowed if there was some existing person who kept the class alive. Thus if *X* left a father[1], a brother, and a nephew by a deceased brother, each took a third. If *X* left a father and a nephew, the father took all. If he left only a number of nephews by different brothers and sisters, all dead, the nephews took equally: if a brother survived, what did not go to him was divided *per stirpes*.

3. Brothers and sisters, with the same rule of representation.

4. Half brothers and sisters, with the same rule. But if there were half brothers or sisters and also children of deceased brothers or sisters, the latter took.

5. The nearest relatives, whoever they were, *per capita*, with no question of representation.

6. Husband or wife reciprocally[2].

If there was no claim, the property passed to the *Fiscus*, subject to the claims of creditors, but this is not a case of succession.

CXXXIII. It will be convenient to place here, by way of appendix, some account of the rights of succession of the father, or *paterfamilias*, in the various possible circumstances.

1. The father of one who died in *potestas*. Apart from the cases of the *adrogatus impubes*, and the *adoptatus* under Justinian, already sufficiently stated[3], there are only the cases of *peculia castrense* and *quasi-castrense* and *bona adventitia* to be considered. The actual destination of the *peculia castrense* and *quasi* has been considered[4], and the only point we need touch on is the question whether, under Justinian, the father, if he took them, took them as *peculium* or as *hereditas*. Justinian says that it was "*iure communi*." Does this mean as inheritance, which, it is said, had before Justinian's time become the method of treating *bona adventitia*[5], or does it mean that, in absence of preferred claims, they reverted as *peculium*? The main arguments in favour of the former view are the fact, if it be a fact, that *bona adventitia* were already so treated, that the

1 Nov. 127. 1. 2 Not stated in the Novel, but dealt with in Bas. 45. 5. 3 *Ante*, §§ XLIV, XLV. 4 *Ante*, § XCIX. 5 This appears to be inferred from Nov. Theod. 14. 8 = C. 6. 61. 3, which can be interpreted the other way, indeed that is the most natural interpretation. C. Th. 8. 18. 4 says that the father takes them *iure patrio* (339). In C. Th. 8. 18. 10 (426) the attitude is the same.

words do not suggest that the father was to take in any way different from that in which the children took, and that the beneficiaries are called *parentes*, and not *patresfamilias*. In favour of the other view are the texts in the Digest, which treat it as reversion of *peculium*[1], and the fact that Theophilus in his commentary on the Institutes so regards it[2]. But both these may possibly be mere survivals of obsolete doctrine, and neither view can be considered certain.

In relation to *bona adventitia* there was no question of succession till the fifth century. If the child died they reverted to the *pater* as *peculium*, and perhaps continued to do so in absence of preferred claims till Justinian. But by the time of Theodosius the fund covered all successions from the mother, all successions and gifts from a maternal ascendant, and gifts from husband and wife of the child[3]. There were provisions reserving to children of any marriage on death of either parent what had come from the other parent by way of *dos*, *donatio*, or other gratuitous acquisition[4]. Theodosius provided that all these were to go to the children of the deceased child as *hereditas* and not to *pater* or *avus* as *peculium*[5]. In 472 brothers and sisters were also preferred, with distinctions as to whole and half blood[6]. Justinian extended the rule to all acquisitions other than those from the *pater*, and in his time it is clear that it was succession, for he provided that if the father was himself in *potestas*, it was he who took it, and not the *avus*: in the hands of the father it was *bona adventitia*[7].

2. The case of an *emancipatus*. If the father manumitted him, he had the rights of patron (quasi-patron), if there were no children, till Justinian also preferred brothers and sisters to him[8], while also providing that all emancipating fathers should have the rights of *parens manumissor*[9]. If there were children but they were disinherited, he had, like the patron, *bonorum possessio* of the whole (or half if there was a will), but this right did not extend to his *liberi*[10]. If there was an *extraneus manumissor*, the father had no civil claim, but in the absence of children he had the first claim, *unde decem personae*[11], at praetorian law.

If the grandfather was *parens manumissor* the quasi-patronal right was with him, so long as he lived. The father's position if the *emancipatus* survived the grandfather is not clear. Analogy suggests that there was no question of the rights of *liberi patroni*. He was not *tutor legitimus* as they were, and the right above mentioned to *B.P.* of a half, in certain

1 30. 44. pr.; 41. 1. 33. pr., 1. See Monro, *De furtis*, 65. 2 Ad Inst. 2. 12. pr. 3 Gifts from a betrothed put on same level later, C. 6. 61. 5. 4 C. Th. 3. 8. 2; C. 5. 9. 3. In 339 it was provided (C. Th. 8. 18. 4) that if the child died under 6, the successions were to go back to the line from which they came. 5 Nov. Theod. 14. 6 C. 6. 61. 4. 7 C. 6. 60. 3. 1 (interp.). 8 C. 6. 56. 2 (interp.). 9 Inst. 3. 9. 5. 10 37. 12. 1. pr., 5; h. t. 3; *post*, § CXXXIV. 11 *Post*, § CXXXV.

events, did not apply to him[1]. As an *emancipatus* had no agnates, the father would be the nearest cognate, so that, on principle, in the absence of children he would share with the mother, but there is evidence that the Edict preferred him, as *pater*, to the mother, in this case[2]. This may have been "*unde decem personae*," which on that view applied wherever the father was not *parens manumissor*, and preferred father to mother. This is more or less confirmed by the fact that, as, under Justinian, all *emancipatio* by the father was held to be done in such a way as to give civil succession[3], the only case in which, in the absence of children, the father would have *bonorum possessio* as opposed to *hereditas* would be where the grandfather had emancipated[4].

3. Where the grandfather had emancipated the father, but not the son, his *nepos*. Here the father had only cognatic right and was excluded by agnates. The same seems to be true if he had been given in adoption[5], or both had been emancipated.

4. Where either was emancipated by the *avus* and afterwards re-adopted[6]. If the father was emancipated and, later, readopted, the *nepos*, having become a *suus heres* of the *avus*, did not lose the position, and thus, on the death of *avus*, he was not in his father's *potestas*[7]. The father re-entered the family as an adoptive son[8]. The *nepos* was not a *suus* of his father, but if the *nepos* died after the death of *avus* we are not told the father's right of succession[9]. At the worst he was an agnatic brother[10], but most probably, though no longer father for the purpose of *potestas*, he was still the nearest agnate[11]. The case of the *nepos* emancipated and readopted does not seem to be dealt with. If adopted as *nepos*, and son of his father, which needed the father's consent, the civil relation was no doubt re-established for all purposes. But if readopted as a son, his successoral relations to his own father are obscure[12].

The readopted father or son might die still in *potestas* of the *avus*. If the son died leaving *p. castrense*, etc., this went to the *avus* as *peculium* before Justinian: under him, its destination depends on the meaning of *iure communi* above discussed. As *peculium* the *avus* would take it. As *hereditas* it seems probable that it would go to the father notwithstanding the emancipation and readoption, and would be *bona adventitia* of his, whichever of them had passed out and back[13]. *Bona adventitia*, on the

1 37. 12. 1. pr., 5; h. t. 3; *post*, § CXXXIV. 2 37. 12. 1. 6; 38. 17. 2. 15 sqq., not an adoptive father, 38. 17. 2. 17. 3 Inst. 3. 9. 5. 4 See 38. 17. 5. 2 and especially 38. 16. 10. 5 38. 17. 2. 17; h. t. 18. 6 It was only adoptive children who might not be readopted, 1. 7. 12; h. t. 37. 1. 7 1. 7. 41. 8 38. 6. 1. 7. Not quite for all purposes, h. t. 4. 9 *Nepos* could claim *unde liberi*, arg. 38. 6. 4. 10 Unless readopted as a *nepos*, 38. 6. 1. 7. 11 Arg. 38. 16. 12. 12 They were agnates, probably the nearest, but the son could probably claim, *unde liberi*. 13 If the father died the son would presumably take, *unde liberi*.

views adopted above, would go to the *avus* before Justinian, apart from prior claims of children; under Justinian to the father[1].

The distinction between reversion as *peculium* and *hereditas* was of considerable importance, in the following, and other, ways:

(*a*) As *peculium* there was no question of *aditio*: it belonged to the *paterfamilias*, though of course he could abandon it, as he could any property.

(*b*) As *peculium* it would not render him liable for debts, except within the limits of the edicts *de peculio*[2], etc. As *hereditas* it would render him absolutely liable on acceptance.

(*c*) As *peculium* there was no general action for recovery of it from holders without title: the *peculium* was not a *universitas* for this purpose. Each thing must be vindicated specially. As *hereditas* there would be *hereditatis petitio* to recover it as a whole[3].

(*d*) As *peculium* theft of it after the death would be ordinary *furtum*: as *hereditas*, wrongful taking before acceptance was not *furtum*[4].

(*e*) If the father was under *potestas*, as *peculium* it would go to the grandfather, as *hereditas* it would go to the father, in whose hands it would be *bona adventitia*, as it did not come from the *paterfamilias*.

CXXXIV. Succession to Freedmen. *A. Cives Liberti.* As, at any rate till Justinian, such persons could have no relatives but children, the early law is simply stated. The order established by the XII Tables was (1) *Sui Heredes*, (2) *Patronus*, (3) *Liberi patroni*[5]. A *liberta* could of course have no *sui heredes*. The right of the *liberi patroni* was not inherited from the patron: it was an independent right, expressly created by the Statute, so that the fact that a child was disinherited or had refused his father's succession did not bar him[6]. For the same reason *extranei heredes* of the patron had no claim[7]. The *libertus* could make any will he liked as against the patron[8], but the will of a *liberta* needed his consent, so that as she could have no *sui*, he could not be excluded save by his own act[9].

The praetor, in giving *bonorum possessio*, somewhat improved the patron's position. Born *sui* and *emancipati* excluded him (if the *libertus* had not disinherited them, in which case they were wholly excluded), but not *adoptivi*: against these and a wife *in manu* the patron was entitled to one-half, as he was against any outside claimant under a will[10].

1 Nov. Theod. 14, where the word used is *liberi*. If it was the father who died, *lucra nuptialia* went to the *nepos* (with other *liberi*) after 439 and all the *bona adventitia* did under Justinian. 2 *Ante*, § XXIII; *post*, § CLXXXIV. 3 *Ante*, § CX. 4 *Ante*, § CVII; *post*, § CXCVI. 5 G. 3. 40; Ulp. 29. 1, 4; Inst. 3. 7. 6 G. 3. 58; D. 37. 14. 9. pr. See *post*, § CXLI, for another effect in the case of *Assignatio libertorum*. 7 G. 3. 58. 8 G. 3. 40; Ulp. 29. 1. 9 G. 3. 43. It will be remembered that *libertae* could make wills with consent of *tutor*, at a time when an *ingenua in legitima tutela* could not. 10 G. 3. 41; Ulp. 29. 1.

Sons of the patron had the same right, but not a *patrona* or a *filia patroni*[1].

The *l. Papia Poppaea* (A.D. 9) established, as part of the machinery for encouraging marriage and increasing the birth-rate, a very elaborate scheme, of which it is not necessary to state the details[2]. The rights varied according as the claimant was a patron, patroness, or son or daughter of a patron. In the case of patron and his son the rights varied according to the wealth of the *libertus*, in the other cases according as the *patrona*, etc., were themselves *ingenuae* or *libertinae*, and according to the number of their children, the rights of a *patrona* being greater than those of *patroni filia* with the same number of children. They varied also according as the deceased was a man or a woman with similar subordinate variations. A notable characteristic of this legislation was that it gave what were, on the face of them, praetorian rights. It declared, for instance, that an *ingenua patrona*, mother of two children, was to have the edictal rights of a patron[3]. It is surprising to find express legislation dealing in praetorian conceptions in this way[4], a state of things which leaves no doubt that *bonorum possessio* on intestacy was at this time ordinarily *cum re*. Notwithstanding the disappearance of other penalties on childlessness, this legislation seems to have survived till Justinian substituted a simpler scheme.

The order laid down by Justinian in a verbose enactment[5] is (1) *Liberi*, whether *sui* or *emancipati*, but not *adoptivi*; (2) *Patronus* or *patrona*[6]; (3) *Liberi patroni*, not *adoptivi*, but including those emancipated or given in adoption; (4) *Cognati* of the patron to the fifth degree, *per capita*, with *successio graduum*. If the *libertus* possessed less than 100 *aurei* his will was good against the patron, but if he had that sum then, unless he had children, and left the *hereditas* to them, or they could upset the will, the patron could claim a clear third, free of charges, and issue of the patron, so far as great-grandchildren, had the same right.

It will be remembered that Justinian admitted *servilis cognatio*, so that the *liberi* of the *libertus* would include those born in slavery, if now free[7]. The succession of *liberi patroni* was still independent of the patron's right. Thus if there were two patrons, both dead, leaving children, the

1 G. 3. 46. As to the case of *Bonorum possessio tum quem ex familia patroni, post*, § CXXXV. 2 Chief texts, G. 3. 42–53; Ulp. 29. 3–7; Inst. 3. 7. 2. 3 G. 3. 50; Ulp. 29. 6; see also G. 3. 47, 52. 4 It may be due to the notion that direct alteration of the legislation of the XII Tables was not permissible. There is no trace till long after the *l. Papia* of direct legislation modifying the law of succession on intestacy. The *l. Voconia* did not affect intestacy. The rule excluding women agnates (*ante*, § CXXIX) was not legislation but *interpretatio*: from Inst. 3. 2. 3 it seems to be older than *bonorum possessio unde cognati*. 5 Inst. 3. 7. 3; C. 6. 4. 4, reconstructed from the Basilica. 6 The patron's right may be renounced and is subject to the mutual rights of succession of parents and children noted *ante*, § CXXXII; C. 6. 4. 4. 1, 11. 7 C. 6. 4. 4. 11; Inst. 3. 6. 10.

children would all take equally, not *per stirpes*[1]. And, if one of the patrons had left only grandchildren, the surviving children of the other would take all[2].

B. Junian Latins. Here there was no question of succession: on the death of the Latin he became a slave, and his goods, by an express provision of the *l. Iunia*, reverted to the patron[3], or, if he was dead, to his *heredes* whoever they were. Thus a disinherited child took nothing, and of course the Latin's children had no claim. It must however be remembered that it was so easy for a Latin so to arrange his marriage that he and his family should all be *cives* that the case would not be common.

The *sc. Largianum* (A.D. 42) modified this system without benefiting the child of the Latin. It provided that, if the patron were dead, any issue of his not disinherited *nominatim* might take to the exclusion of the *extranei heredes*[4], with the practical effect of giving a claim to those disinherited by the *ceteri* clause and to issue who had refused their share in the patron's estate[5]. It is difficult to see the reason of the change, and as these persons could have had no claim to *peculium*, the case looks rather like inheritance. Gaius repudiates this, but shews that there were disputes on some points[6]. *Liberi patroni* took in proportion to their shares in the patron's *hereditas*, under the *l. Iunia*. What they took by virtue of the *sc.* they took equally, and some held that where it came into operation all was divided equally[7]. On the dominant, though not undisputed, view, grandchildren through a daughter, and children of a *patrona*, could not claim under the senatusconsult[8].

Trajan enacted that if a Latin acquired *civitas* by imperial rescript, without the patron's assent, the latter's rights remained[9]. The man's *civitas* was so far recognised that he might make a will: he must indeed institute the patron for the whole, but might substitute for the case of his refusal[10], but the will was probably not good against *liberi patroni*, if the patron died before the testator. Hadrian excepted the case in which, having so acquired *civitas*, he afterwards underwent a process which would have made him a *civis* for all purposes, *e.g.*, *anniculi probatio*. The rule did not strictly apply to him as he was no longer a Latin, but Hadrian ruled that gaining the inferior status should not bar him from obtaining the better. The whole institution was obsolete under Justinian[11].

C. Persons *in numero dediticiorum*. Their children could have no claim. The property went to the patron, and there was no power of

1 C. 6. 4. 4. 19 b. 2 h. l. 19 a. This enactment retains the language of the old system: the case is not handled in any extant Novel. 3 G. 3. 56; Inst. 3. 7. 4. 4 G. 3. 63. 5 G. 3. 65–67. 6 G. 3. 64 sqq. 7 G. 3. 70. 8 G. 3. 71. The argument is that the *sc.* talks about children not disinherited, which is inappropriate to such cases. 9 G. 3. 72. 10 *Ib.* in f. 11 See Inst. 3. 7. 4.

testation[1]. Subject to this it may be said that there were no special rules. If the manumission would have made him a *civis*, but for the misconduct which caused him to be a *dediticius*, the property went to the patron, as that of a *civis libertus*. If it would otherwise have made him a Latin, the property went to the patron as that of a Latin, *i.e.* as *peculium* reverting[2]. Presumably claims posterior to those of the patron himself were admitted in this case as in that of an actual Latin.

Some practical effects of the distinction between succession and reversion of *peculium* have been considered in the case of a son's *peculia*[3]. Of others which could occur only in the case of a freedman, Gaius[4] cites several, of which a few may be mentioned here by way of illustration. The patron's *extranei heredes* might have a claim if it were reversion, but not if it were *hereditas*: the patron's *heredes* had, as such, no claim if the freedman outlived the patron. If there were two patrons taking as *heredes*, they shared equally, taking it as *peculium* they took in proportion to their shares in the man, which might not be equal. If one of two patrons were dead, the other took all, in *hereditas*: in the other case he shared with representatives of the dead patron. If both were dead, leaving children, all would take *per capita*, if it was succession: each patron's share would go to his children in the other case. If one had left children and the other only grandchildren, Justinian says the surviving children would take all if it were succession[5]. This would not be so in case of reversion of *peculium*. These *dediticii* no longer existed under Justinian.

CXXXV. THE SYSTEM OF *BONORUM POSSESSIO*[6]. The working of an ordinary case of succession at civil law, the remedies of the *heres*, the steps to be taken, and so forth, are in the main simple, but the corresponding rules in a case of praetorian succession were of such a special kind that a general account of the system must be given. It is not within the present purpose to consider the origin of *bonorum possessio*[7], and many other controversial topics can only be lightly touched on. The subject of discussion is the ordinary praetorian succession, *bonorum possessio edictalis*, not *b. p. decretalis*[8].

The praetor granted *bonorum possessio* to claimants in an order which was not that of the civil law. If, as it happened, the receiver of a grant of *bonorum possessio* was also entitled at civil law, his *possessio* would be effective succession—*bonorum possessio cum re*. If, however, he was not entitled at civil law, it might be effective against the *heres* or

1 G. 3. 75. 2 G. 3. 76. 3 *Ante*, § CXXXIII. 4 G. 3. 57 sqq. 5 Inst. 3. 7. 3; see also G. 3. 60. 6 See Leist in Glück's *Erläuterung*, Serie der Bücher 37, 38. 7 See Moyle, *Inst. Just.* 471 sqq.; Danz, *Geschichte des R. R.* § 176; Costa, *Storia*, 468; Girard, *Manuel*, 809. 8 As to this latter, *post*, § CXL.

not, *cum re* or *sine re*. The circumstances in which it was one or the other will be considered later.

Where *bonorum possessio* was given to one also entitled at civil law it was said to be given *iuris civilis confirmandi* (or *adiuvandi*) *gratia*. If given to others with the *heres*, it was *supplendi iuris civilis gratia*, *e.g.* where an *emancipatus* came in with *sui*. If given in disregard of a civil law claim, it was said to be *corrigendi* (or *emendandi* or *impugnandi*) *iuris civilis gratia*, *e.g.* where it was given to cognates to the exclusion of the *gentiles*[1].

There was a system of priority or order of claims, and a certain time was allowed within which each of these claims might be made. If a person had not claimed within the right time he was excluded, and if there were no others in the class who could still claim, the next claim could come in: but as we have seen, a person might conceivably have a claim under more than one head, so that though he had failed to claim in the first place he might still have an opportunity of coming in. This was governed by the *edictum successorium*, which laid down the principle that where one class was barred by time or repudiation, the next could claim, and fixed the time for each class[2]. It might, however, chance that he would have stood alone under the first head, but would now have to share with others, *e.g.* a *suus* who had not claimed, *unde liberi*, coming in, *unde legitimi*[3].

In administering the estate the first question to be asked was whether there was or was not a will. And if a will was produced, it could not be acted on, under a system which imposed restrictions on testation, unless it was clear that there was no one entitled to object to its provisions. Accordingly the first *bonorum possessio* was

A. Bonorum possessio contra tabulas. We have seen where this was available among *ingenui* in general, and have noted cases in which the omission of one of the *liberi*, admitted, to share with him, any children given in adoption, and thus not entitled to claim on their own account[4], and the case of those who, having obtained their "legitim" under the will, could not complain, but would get their full share under *bonorum possessio contra tabulas*[5] if someone else effectively claimed it. It was also available to patron or *liberi patroni* whose rights were dis-

1 Inst. 3. 9. pr., 1; G. 3. 41; D. 1. 1. 7. 1; 37. 1. 6. 1. 2 D. 38. 9. See h. t. 1. 11. 3 A grandson would in that case have to share with brothers and sisters. There are however difficulties and it is contended by Beseler, *Beiträge*, 4. 158, that classical law did not admit this further claim. 4 *Ante*, § CXIII; 37. 4. 8. 11, possibly a rule of late law. 5 37. 4. 3. 11. If a child given in adoption is instituted and accepts, *iussu patris adoptivi*, and is afterwards emancipated, he can claim *contra tabulas*, as he has not had the benefit, h. t. 10. 2, 3. Conversely an *emancipatus praeteritus* who is adrogated before claiming, loses the right, h. t. 3. 6. Cf. 38. 6. 9.

regarded[1]. The resulting state of things was not quite intestacy. Some parts of the will were good, *e.g.*, *exheredationes* and legacies to near relatives[2], so that this *bonorum possessio* must be stated as a distinct case and cannot be fused with *unde liberi*. If there was no one who could thus attack the will, there was

B. Bonorum possessio secundum tabulas[3]. This involved the production of a will which satisfied the praetorian requirements of form, whether it satisfied those of civil law or not[4]. Here two things must be noted. This *bonorum possessio* could be claimed notwithstanding the existence of an outstanding condition on the *institutio* of the claimant (on his giving security to those entitled in his default), who would thus not be entitled to make *aditio* on the *hereditas*, as such[5]. And this *bonorum possessio* required a written and sealed document, while the mancipatory will might conceivably be oral[6]. But in later law this *bonorum possessio* could be claimed under an oral[7] will. If there was no such will or none claimed under one, the case was one for:

C. Bonorum possessio ab intestato. Here there was a lengthy list of cases set out in order of priority.

(i) *B. p. unde liberi*. The word "*unde*" here as in other cases is not part of the Edict. It is used by the jurists in referring to "that part of the Edict in which" *liberi* (etc.) are entitled to claim[8]. We have already considered what persons can succeed under this head[9]. The only things that need be observed are that a child who was entitled to upset a will, but failed to claim *b. p. contra tabulas*, and had thus let in claimants under the will, could not afterwards obtain a valid grant *unde liberi*, and that if no one had claimed under the will, so that he could still come in, *unde liberi*, he must make good all gifts which would have been good if he had claimed *contra tabulas*[10].

(ii) *B. p. unde legitimi*. This applied to all cases of statutory claim, *e.g.* to agnates and those entitled in later law to claim with them, to the patron and his children, the *parens* or *extraneus manumissor*, and to cases under the Tertullian and Orphitian, and their later extensions[11]. As it covered all who were *heredes* at civil law, it availed to *sui* as well as remoter claimants, so that if a *suus* had not claimed *b. p. unde liberi* and no others had claimed it, he might still be entitled to come in under this head to the exclusion of agnates, if he was nearer in

1 37. 14. 10. **2** *Ante*, § CXIII. **3** As to the many cases in which this was available, *ante*, § CI. **4** G. 2. 119 sqq. **5** 37. 11. 6; *ante*, § CIV; *post*, § CXXXVI. **6** *Ante*, § C. **7** *Ante*, § C in f. **8** Lenel, *E.P.* 343; D. 38. 6. 2. **9** *Ante*, § CXXX. **10** 29. 4. 6. 9; 38. 6. 2. So where one entitled by will and on intestacy claims only in intestacy, 29. 4. 1. pr. And he must make *collatio* (37. 6. 9), which he would not have had to do if he had taken under the will. **11** 38. 7. 2, 3.

degree[1]. This he would not necessarily be: a son is nearer than a brother, a great-grandson is more remote.

(iii) *B. p. unde decem personae.* This was a special case. Where an *ingenuus* in being emancipated had been finally manumitted by the *extraneus* without remancipation to the father, the *extraneus* was *heres*, and therefore, *prima facie*, entitled to *b. p. unde legitimi.* But the praetor by a special clause in the Edict preferred certain near relatives to him. The list and order, *inter se*, are given twice, not quite identically[2]. They are roughly descendants, ascendants, and brothers and sisters of the whole or half blood. As this mode of *emancipatio* could not occur under Justinian, the institution was extinct[3].

(iv) *B. p. unde cognati.* This was a purely praetorian[4] creation: we have already considered what persons it covered[5]. It need only be noted that those entitled to claim as *legitimi* who had failed to do so, might still be, alone or with others, the nearest *cognati*[6].

(v) *B. p. unde familia patroni* (*tum quem ex familia*[7]). The purpose of this is not certainly known. It appears at first sight to give rights only to persons who might have come in earlier, which is of so little use that it can hardly be the right explanation. Of the various explanations, that of Lenel[8] is supported by some textual authority. It is that the class includes a *patronus* who has been *capite deminutus*, emancipated children of the patron, and perhaps the *parens manumissor* of the patron. The praetor did give these a right[9] (they had none at civil law), and there is no other obvious place for them. But there is the difficulty that such texts as certainly refer to this case do not hint at any but the civil law meaning of "*familia.*" It is therefore also held that it refers to agnates of the patron, who have no civil law claim, and of whom Theophilus says that they come in here[10]. A long text discussing the word "*familia,*" from a work commenting on these edicts, says "*communi iure familiam dicimus omnium agnatorum*[11]." But there is no direct reference to the case of *libertus*: it is not clear why the praetor should have admitted agnates of the patron, and neither

1 38. 7. 2. pr.; 38. 16. 12. **2** Coll. 16. 9. 2; Inst. 3. 9. 3. **3** It is strange that this *b. p.* is stated after *unde legitimi*, of which in the only case in which it could occur it takes precedence. It is therefore supposed by Lenel, *E.P.* 343, arguing from Ulp. 28. 7, that it was not an independent clause in the Edict giving a definite class of *b. p.*, as Justinian states it, but a proviso in *unde legitimi.* **4** 38. 8. 1. **5** *Ante*, § cxxx. **6** But as agnation was recognised however remote, and cognation was limited, an agnate might be too remote to claim as a cognate, 38. 8. 9. pr. And where the agnation was adoptive and had ceased there was no *cognatio.* **7** "*tum quam*," "*tamquam*," etc. As to the proper reading Lenel, *E.P.* 344. **8** *E.P.* 345. **9** 38. 2. 2. 2; h. t. 23. pr. **10** See Roby, *Rom. Priv. Law*, 1. 278. **11** 50. 16. 195. 2. For this view and some suggestions, Accarias, *Précis*, 1. 1222.

Gaius nor the historical part of Justinian's enactment[1] refers to any such right.

(vi) *B. p. unde patronus patrona liberi et parentes eorum.* There is some evidence that this obscure case refers to manumission by one who is himself a freedman[2], and on that view this clause gives a right of succession to the patron's patron, and the issue and ascendants of the latter. This interpretation is supported by the language of Justinian's reorganising enactment[3], but it is not free from difficulties[4].

(vii) *B. p. unde vir et uxor.* In the absence of relatives the praetor gave *bonorum possessio* to the husband or wife of the deceased, as the case might be[5]. This applied (like *unde liberi* and *unde legitimi*) to *ingenui* and *libertini* alike[6], but it is strange in view of this that the right of cognates of the patron was postponed to it.

(viii) *B. p. unde cognati manumissoris.* In this last grade the praetor gave *bonorum possessio* to *cognati* of the patron[7] to the fifth degree.

There was another case of edictal *b. p.* which cannot be placed in this scheme, as it was a single provision of the Edict applying to diverse cases. This was *bonorum possessio uti ex legibus*[8]. There were cases in which *b. p.* was given by statute: we have adverted to this peculiarity in dealing with succession to freedmen under the *l. Papia Poppaea*[9], the best known case. It was placed in the Edict after the others, but detached, some subsidiary provisions being interposed. Not much is known of it, but we are told that no previous grant of *b. p.* prevented a grant under this head[10].

Under Justinian the order was simplified. *Unde decem personae* was obsolete. *Unde familia patroni, unde patronus patrona,* and *unde cognati manumissoris* were brought under *unde cognati,* so that on intestacy there were left only *unde liberi, unde legitimi, unde cognati* and *unde vir et uxor,* with the exceptional *uti ex legibus*[11]. The change would seem to have had the effect of changing the relative positions of *unde vir et uxor* and *unde cognati manumissoris.* Apart from this the placing of several degrees under one head was of small importance. They were still in the same order: the claim of a later, if an earlier refused, was presumably now *successio gradus,* not *ordinis.* The claims of cognates of the patron were still confined to five degrees[12].

CXXXVI. Before entering on the actual working of this system it is

1 C. 6. 4. 4. 2 Coll. 16. 9. 1. 3 C. 6. 4. 4. 23. 4 Lenel, *E.P.* 346. 5 D. 38. 11; Inst. 3. 9. 3, 7. 6 As did *unde cognati* under Justinian, Inst. 3. 6. 10; C. 6. 4. 4. 7 Inst. 3. 9. 3, 6; Coll. 16. 9. 1. 8 38. 14; 37. 1. 6. 1, in f.; Inst. 3. 9. 8. As to the application of this to *municipia* succeeding to their freedmen, Lenel, *op. cit.* 348. 9 *Ante,* § CXXXIV. 10 38. 14. 1. 1. One who could claim under this head could also claim *unde legitimi,* 38. 7. 3. 11 Inst. 3. 9. 8. 12 C. 6. 4. 4. 14 e, f.

convenient to recall certain matters already mentioned. Though the praetor's order was not that of the civil law there were points of agreement. In some cases he admitted only those with a civil law claim (*e.g.*, *legitimi*). In others he admitted those who had no such claim, to share with those who had (*e.g.*, *unde liberi*). In others he excluded those with a civil law claim (*e.g.*, *gentiles*). It must be remembered also that it did not follow that a person who had obtained a valid grant of *b. p.* would in the long run be entitled to keep the property: there was such a thing as *bonorum possessio sine re*. What this meant and how it came about we shall consider later.

Bonorum possessio was granted by the praetor to claimants in a certain order, and a fixed number of days was allowed within which the claimant in any class must apply. In general the time allowed was 100 days, but in the case of ascendants and issue, whether claiming under a will or on intestacy, a year was allowed[1]. The days were *dies utiles*[2], and in each *bonorum possessio* the time ran only from the expiration of that allowed for the previous claim[3]. These facts had important results.

(i) Only those days counted on which a demand for *b. p.* could lawfully be made. This does not mean much, for the praetor heard and granted such applications *de plano*, and without the use of the formal words, *do, dico, addico,* which involved an actual sitting of the court[4].

(ii) The days ran only from the time when the claimant was *certus* of his right, *i.e.* on matters of fact[5], and was able to take the necessary steps.

(iii) If, after time had begun to run, he became *incertus* of his right, in the same sense, or became incapable of acting, the running of the time was suspended[6].

(iv) As a corollary, the times for different members of the same class might expire at very different times[7].

It appears therefore that in a case in which there was no will, and there were no near relatives, who claimed, it might be a long time before remoter claims, *e.g. vir et uxor*, could be put in. This might indeed be so, and the resulting inconvenience led to the adoption of a number of devices for shortening the time. Thus if a particular class was non-existent, the time for that class would be disregarded, so that if, for example, a man had died intestate and unmarried, a *b. p. unde legitimi*,

1 Inst. 3. 9. 9; D. 38. 15. 2. 4; h. t. 4. 1; 38. 9. 1. 11, under whatever class they are actually claiming. 2 38. 15. 2. pr.; Inst. 3. 9. 11. 3 37. 1. 9; Inst. 3. 9. 10. 4 38. 15. 2. 1. 5 37. 1. 10. As to children and *furiosi*, see Accarias, *Précis*, 1. 1259, n. 3. 6 37. 1. 10; 38. 15. 2. pr. See Roby, *Rom. Priv. Law*, 1. 265. 7 Inst. 3. 9. 11.

given at once, would be valid[1]. Again, if all the members of any class repudiated the right, the time for that class stopped at once, and claims by the next class became admissible, the repudiation being irrevocable[2]. In the case of those who had an *annus utilis*, the person entitled in the next place could, *urgentibus creditoribus*, ask them in court if they repudiated. They need not answer, but if they did, and repudiated, and there were no others of the class[3], the next in order could claim. So too if a whole class died out while its time was running, or was excluded from any cause, the same effect followed[4]. But if any single member of a class died or repudiated, the effect in intestacy, and, apart from the *ll. caducariae*, under wills, was to cause accrual in favour of other members of the class[5]. The general result is that in an ordinary case no very long time would elapse before the claim, however remote, could come in.

It must however be remembered that any *bonorum possessio* could in fact be given at any time. The praetor gave it on application, without serious enquiry, to anyone who set up a *prima facie* claim, on *ex parte* evidence. The praetor knew nothing about the facts. But such a grant would be a mere nullity, for all purposes, unless the person to whom it was made was the person or one of the persons entitled to it at that time, *i.e.* as the technical expression ran, unless he had it *ex edicto*, in accordance with the terms of the edict.

The demand for *bonorum possessio* would be made to the magistrate and granted by him. It is sometimes spoken of as a judicial proceeding, but in classical law, though there may possibly have been formal terms in which the application must be made[6], there is little of the judicial about it, whatever may have been the case in earlier days. Even a slave could obtain a grant[7] for his master, though it is a commonplace that he could take no part in judicial proceedings. In later law, though not in classical law, the magistrate might grant it without any formal application at all, any evidence of intent being enough, and the class of magistrates who might grant it extended as time went on[8]. On another point of detail in Justinian's law, there is dispute. He tells us that there was no longer any need to demand *bonorum possessio*; it could be obtained by any expression of wish[9]. The question is whether this means that there was now no need to go before the magistrate. That is the

1 38. 7. 2. pr.; 38. 9. 1. 6. 2 38. 9. 1. 6. 3 38. 9. 1. 12. 4 38. 9. 1. 8. 5 38. 9. 1. 10. 6 The view that there was a form rests on Theoph., *ad Inst.* 3. 9. 10 (which only shews that there must have been express claim), C. 6. 59. 1, 2 (which say the claim was made *sollenniter*) and C. 6. 9. 9 (which though in its present form it refers to this may originally have had to do with *cretio*). 7 37. 1. 7, which also says that it may be given without demand. See also the demand by messenger, Girard, *Textes*, 809. It may be that in Justinian's law there was no difference between obtaining *b. p.* and *aditio hereditatis*. See Biondi, *Legitimazione processuale nelle azioni divisorie*, 39 sqq. 8 Inst. 3. 9. 10. See Accarias, *Précis*, 1. 1258. 9 Inst. 3. 9. 12.

natural meaning of his words and would put the matter on the same footing as *aditio*. But as he says that the rule was laid down by earlier Emperors, and such a rule certainly was not, it is usually held that all he means is that, as was already the law, no particular words were needed, and the grant might be made by any magistrate[1]. The truth is that while the grant was essential to further proceedings, it had no other significance. The real question at later stages would not be merely whether there was a grant, but whether the grant was *ex edicto*. Usually there was no enquiry: it sufficed that the claimant shewed a *prima facie* case, or even less. Thus on proof that there was a will, *b. p. secundum tabulas* could be given without opening it[2], though it was impossible to know that the claimant was entitled under it. It follows that it might often be given to a person not entitled to it and such cases are recorded[3]. Thus it might be given under a forged will or one that had been revoked, or on intestacy where there really was a will, the praetor being told that there was none. *Legitimi* might, innocently or wilfully, allege falsely that there were no *liberi*, or that their time had expired, or that they had repudiated. In all these cases the *bonorum possessio* obtained, not being *ex edicto*, granted, that is, to one not at the time entitled to it under the Edict, was worthless: it did not enable the grantee to go any further. It was merely like the issue of a writ to one who had no sort of claim. The grantee would not succeed in the interdict *quorum bonorum*, or be able to use effectively any of the edictal remedies[4].

It is plain that as *bonorum possessio* was granted without serious enquiry, a grant to one not entitled to it, a grant not *ex edicto*, did not bar a grant to one entitled to it, in the same or any other class, and, presumably, one who had a grant made out of due season was not thereby barred from applying later for a valid one. As these later grants would also be without enquiry, the rule practically was that no grant was a bar to another grant, though we shall see shortly that this meant little. It should be added that a grant to one of a class was not a grant to all. Each person who wanted *b. p.* must ask for it[5]. Hence arose cases of accrual. If, *e.g.*, one of several *liberi* had received a grant, and the others allowed the time to expire without taking steps, he would have *bonorum possessio* of the whole[6].

1 See 37. 1. 7. pr.; C. 6. 9. 8; C. 6. 9. 9. For different opinions, Girard, *Manuel*, 886, Moyle, *Instt. Just.* ad Inst. 3. 9. 3; Leist, in Glück's *Erläuterung*, 38. 2. 314; Accarias, *Précis*, 1. 1279. 2 37. 11. 1. 2. A conditionally *institutus* can get *b. p. sec. tab.* This of course may be valid, *ex edicto*, but as it may not be *cum re* as the condition may fail, a substitute may require security. P. 5. 9. 1; D. 2. 8. 12; 37. 11. 6; 46. 5. 8. 3 *E.g.* C. 8. 2. 1, 2. 4 See 37. 5. 5. 3. 5 The application need not be made personally. *Paterf.* can apply for *infans* child (at least in later law), a *tutor* for his ward (though he cannot repudiate), an "*actor*" for a municipality, and a representative duly appointed for anyone. 37. 1. 3. 4; h. t. 7, 8, 16; 38. 9. 1. 4. 6 37. 1. 3. 9; h. t. 5

Where *bonorum possessio* had been granted to anyone in accordance with the terms of the Edict, *ex edicto*, it could not be validly granted to anyone else, adversely to him (which means, practically, to anyone in a different group), while the grant stood[1]. Such a second grant might be made, but it was a nullity: it could not be *ex edicto*. A valid grant *unde liberi* did not bar other *liberi* from getting a grant, but it rendered nugatory any grant *unde legitimi*, unless and until all valid grants *unde liberi* were revoked. Thus it may be said, with truth, but in different senses, that one grant of *bonorum possessio* barred another, and that it did not.

CXXXVII. The claim and grant of *bonorum possessio* operated somewhat like *aditio* at civil law: they entitled the beneficiary to take steps to recover the property, but did not of themselves give him possession of it. This is a question of, *inter alia*, physical control, and the grant could not give him this; there was no magic in it. Thus we have now to consider in what ways it was made effective. We must remember that there were two kinds of valid *bonorum possessio*, *cum re* and *sine re*. We shall deal first with *bonorum possessor cum re*, the true praetorian successor. His remedies and liabilities were as follows:

1. He might proceed by the interdict *quorum bonorum*[2], of which it is important to note the exact effect. It was by no means a universal remedy. It applied only to matters of which possession was possible, or at least, *possessio iuris*, as in usufruct[3], and thus it was not a means of recovery of debts. But it has a still more important and less obvious limitation. It was available only against those who held *pro herede*, *i.e.* who claimed to be *heredes*, or who refused to state any title at all[4]. Thus it was of no use against a holder who claimed to have bought the thing[5], and thus to hold it *pro emptore*. On the other hand as against a holder *pro herede*, or *pro possessore*, it was available not only as to what he possessed, but as to things which he had fraudulently ceased to possess, and even things he had usucapted[6]. It must be remembered that under Hadrian *usucapio pro herede* was made ineffective against claimants of the *hereditas* whether it had been in good or in bad faith.

To recover under the interdict, the mere issue of which, like a grant of *bonorum possessio*, was made as of course, without real enquiry, the *bonorum possessor* must shew that he was entitled to it, and it was at this point that the validity of the grant of *b. p.* to him would be con-

1 The case of *uti ex legibus* is no exception: if this is valid, the other one is not. 2 43. 2; C. 8. 2; G. 3. 34; 4. 144; Inst. 4. 15. 3. 3 See 43. 3. 1. 8, which gives *quod legatorum*. 4 43. 2. 1. pr. 5 See *ante*, § CX, in *hereditatis petitio* where a similar rule held. 6 43. 2. 1. pr.; C. 8. 2. 2. But it was not available if he had had *possessio* before, since the grant, G. 4. 144.

sidered. The wording of the interdict brings this out. It orders that the goods be handed over to the claimant who has a grant of *bonorum possessio ex edicto*[1], *i.e.* in accordance with the Edict. If for instance the grant was *unde liberi*, then it must appear that he was one of that class, that the grant was made within the proper limits of time, that there was no previous valid grant to one or more of another group, still in force, that the goods formed part of the estate of the deceased, and that the defendant set up no title otherwise than as *heres*.

This interdict, like all possessory interdicts, was merely provisional[2]. If the claimant proved his right to the interdict against the defendant, the goods were, as the result of procedure which does not here concern us, handed over to him. No question of title was thereby determined. It did not follow that he would be able to keep the property in the long run. The whole legal effect was that anyone who wished to recover the property from him must bring the appropriate action against him and prove his case.

Before leaving this interdict reference must be made to another interdict of similar type, but less importance, called *quod legatorum*[3], available to the *bonorum possessor* against one who had taken possession of property, alleging a legacy of it to him, without the consent of the *bonorum possessor*. The *bonorum possessor* must, under this interdict, give security for the restoration of the legacy if it should prove to be due[4].

2. He was entitled to the *hereditatis petitio possessoria*[5]. This was a praetorian extension of the *hereditatis petitio* of the *heres*. Like the interdict it was available only against holders *pro herede* or *pro possessore*, and it covered the various *iura in rem* of the estate, of which the defendant had possession (or *possessio iuris*), and, to a limited extent, debts[6]. The action had the same general rules as the *hereditatis petitio*, which has already been considered[7]. To recover under it the plaintiff must shew that he had a grant of *bonorum possessio*, and that it was a valid grant, but he need not shew that it was *cum re*, though, if it was not *cum re*, he would fail if the defendant was the *heres*[8]. The judgment in this action differed in force from that on the interdict. It was not merely provisional; like that on the actual *hereditatis petitio* it was final, dealing not merely with the question of possession, but also with that of substantive hereditary right. As it called for the same proof as the interdict, covered

1 43. 2. 1. pr. 2 See Ubbelohde, *Die erbrechtlichen Interdicte*, 8 sqq. 3 As to alleged availability of this remedy to *heres*, as such, *post*, § CCXLIX. 4 Lenel, *E.P.* 436; 5 D. 5. 5. As to difficulties of formulation, Lenel, *op. cit.* 177. 6 *Ante*, § CX. 7 *Ante*, § CX; D. 5. 5. 2, "*tantundem consequitur bonorum possessor quantum superioribus civilibus actionibus heres consequi potest*"; 37. 4. 13. pr. 8 This is not expressly stated but may be inferred from 37. 10. 3. 13.

the same property, and more, for the interdict dealt only with what could be in some sense possessed, lay against the same persons and gave a definitive result, it is not easy to see, at first sight, why a *bonorum possessor cum re* ever preferred the interdict. The following considerations will explain the matter.

(*a*) A *bonorum possessor* did not always know whether he was *cum* or *sine re*. The texts speak of *b. p.* as being granted *cum* or *sine re*[1], but it was not so stated in the grant, and it was possible that no party concerned might know which it was. As, in the case of *b. p. sine re*, if the opponent was the *heres* the possessor would fail in the *hereditatis petitio possessoria*, but win on the interdict, he would, if there was any doubt, bring the interdict, leaving the *heres* to proceed against him afterwards by *hereditatis petitio*. If, for instance, an *extraneus* was claiming under a praetorian will, he might know that in fact no one had claimed *bonorum possessio contra tabulas*, but this did not prove that there was no child; there might well be one who was content to rest on his civil law claim. The *bonorum possessio* would be no answer to *hereditatis petitio* brought by such a child, but it would give the *bonorum possessor* the advantage of the position of defendant. So also, he might not know whether the opponent was actually the *heres* or not; this was indifferent in the interdict. Similar doubts might arise in a number of ways.

(*b*) Till Hadrian, *hereditatis petitio* was not available against one who had fraudulently ceased to possess. The interdict was. Nor does *hereditatis petitio* seem to have applied to things of which the holder had completed *usucapio*[2].

(*c*) The interdict being prohibitory, the procedure involved *sponsiones*. The payments under these were actually enforced; they were not merely formal[3]. Thus success in the interdict might involve a profit.

(*d*) Even in later law, the interdict had the advantage of being subject to restrictions in the matter of appeal[4].

3. If, having obtained the possession, he was now sued by the *heres* by *hereditatis petitio*, he had of course no defence at civil law, but he had an *exceptio doli*[5].

4. He could recover property of the estate held by persons claiming by some title other than inheritance, who were thus not to be reached by the interdict or the *hereditatis petitio possessoria*. His remedy in this case was an *actio fictitia* in which the fiction was that he was *heres*; the *iudex* was directed to condemn, if the plaintiff would be entitled "*si heres esset*[6]."

5. He could sue and be sued on account of debts by actions with a

1 *E.g.* Ulp. 28. 13. 2 The *heres* might have completed *usucapio* since the death, see 5. 3. 19. 1. 3 *Post*, § CCL. 4 C. Th. 11. 36. 22. 5 G. 2. 120. 6 G. 4. 34.

similar fiction[1]. These would cover the cases in which the *heres* himself could sue or be sued in respect of events since the death, so that they formed a complete scheme.

Here however there is a difficulty. Gaius gives us the *intentio* of the actions under this and the last head, and this says nothing about the fact that the plaintiff is a *bonorum possessor*. What then was there to prevent anyone from bringing such actions against a debtor, since the question whether the plaintiff was *bonorum possessor* or not was not put in issue? The fact of the grant would no doubt be on record, and the *formula* would not be issued except where there was one. But it might not be *ex edicto*, and the fact that the grantee was not really entitled to it would not be brought out till the interdict or the *petitio* had been tried, while there is nothing to shew that these *actiones fictitiae* could not be brought in the first instance. The way in which this very material point was raised is not certainly known. Lenel holds[2] that it was by means of an *exceptio bonorum possessionis non datae*, mentioned by Paul, which though he does not state its application seems suitable for the present case[3].

6. The acquisition of possession under the interdict or the *petitio* did not of itself confer *dominium*, though Ulpian, in the Digest[4], uses language inconsistent with this. The *bonorum possessor* would become *dominus* by *usucapio*; in the meantime he had the protection available to other praetorian owners. Under Justinian, *bonorum possessio* and *hereditas* were almost fused, and the two systems of remedies coexisted almost as alternative remedies for the same end. There was no longer such a thing as praetorian ownership, so that these distinctions ceased to exist[5].

CXXXVIII. We can now turn to the *bonorum possessor sine re*, one who had a valid grant, *i.e.*, *ex edicto*, but who was not one of those whom the praetor would, in the long run, protect against the civil law *heres*. His rights and liabilities can be scheduled as in the other case.

1. He had the interdicts *quorum bonorum* and *quod legatorum*, and, so far as these are concerned, he was in the same position as the *bonorum possessor cum re*. The interdicts were effective as against even a true *heres* or legatee[6].

2. He had *hereditatis petitio possessoria* against anyone who held

1 G. 4. 34; 3. 81 (imperfect). 2 *E.P.* 178. 3 44. 1. 20. It seems surprising that if, *e.g.*, a creditor of the estate brings action against a person entirely unconnected with the matter, his only answer should be an *exceptio*. In practice the *formula* would be issued only where there had been an apparent grant, and the *exceptio* would raise the question whether the grant was valid. 4 37. 1. 1. See also 50. 16. 70 (Paul). 5 Thus texts in the Digest give *Quod legatorum* to the *heres* as such. See *post*, § CCXLIX. As to the possibility of *b. p. sine re* even under Justinian, *post*, § CXXXIX. 6 G. 4. 144.

pro herede or *pro possessore*, except the true *heres*. The *intentio* indeed did not in terms exclude the latter, for we have seen that where the *b. p.* was *cum re* this action was effective against the *heres*, and at the time of issue of the formula the praetor would not ordinarily know which it was. Though we have not the actual *formula* it seems fairly clear that the *heres* met the claim by an *exceptio*, which is thought by some writers to have been an *exceptio doli*[1].

3. If the *heres* sued him by *hereditatis petitio*, he had no reply, and the action would cover all the property he had recovered by any of his various remedies or without litigation—in fact everything which he held as *bonorum possessor*, and, in some cases, what he had made away with[2].

4. He had the same *actiones fictitiae* against debtors and detainers of property as if his *b. p.* were *cum re*, being of course liable to be called on by the *heres* to restore what he had received, as just stated. This situation raises a curious question. If a *bonorum possessor* had thus handed over what he had received, he was still a *bonorum possessor*, *ex edicto*, since the grant was valid and had not been revoked. Logically he might still sue debtors. There is no authority, but analogy suggests that he would be met by an *exceptio doli*.

5. He might be sued by creditors as if *cum re*. If, having paid debts, he was ejected by the *heres* he could deduct from what he handed over the amount of these payments[3]. If he was sued after the *heres* had recovered from him, he had, presumably, an *exceptio*. Here too a difficulty might arise. If, having a grant of *bonorum possessio*, he paid debts out of his own pocket, intending to recoup himself when he got in the estate, his expectation might be disappointed: the *heres* might step in and recover the assets from those who were holding them, so that nothing reached the hands of the *bonorum possessor*. Could he claim an indemnity from the *heres*? It was not a case of *negotiorum gestio*, for he was acting on his own account[4]. It may be that as he was still *bonorum possessor*, he could put pressure on the *heres* by recovering the property from him by the interdict, and then, when sued by him by the *hereditatis petitio* or any proprietary action, could set off the amount of the debts paid.

6. He could usucapt in the same way as the *bonorum possessor cum*

1 Accarias, *Précis*, 1. 1269, citing 37. 11. 11. 2, where however it was not a valid *b. p.* See as to formulation of the action, Lenel, *E.P.* 177 sq. 2 Like any other possessor of *res hereditariae*, *ante*, § CX. 3 5. 3. 31. 4 *Post*, § CLXXXV. (The texts are however not quite clear on the *actio negotiorum gestorum* where *A* manages *B*'s affair thinking it his own.) Some texts suggest, but do not prove, that he had *condictio indebiti* (12. 6. 2). There is however the difficulty that a *bonorum possessor ex edicto* is liable for debts, so that it is not an *indebitum*. The fact that in the long run he gets no benefit out of it does not alter that and make his act a payment in error of what was not due.

re, but was liable to have his *usucapio* interrupted by the intervention of the *heres*.

CXXXIX. We have now to consider when *bonorum possessio* was *cum re* and when *sine re*. The *heres* and the *bonorum possessor* might of course be the same person. A *suus heres* was entitled to *bonorum possessio unde liberi*. A claimant under a formal mancipatory will was commonly entitled, since sealing was usual, to *b. p. secundum tabulas*. An omitted *suus* could proceed either by *hereditatis petitio* or by *b. p. contra tabulas*[1]. An agnate had *hereditatis petitio* or *b. p. unde legitimi*.

In Justinian's time every *bonorum possessio* was normally *cum re*, a fact which explains the existence of doubts on some points in *b. p. sine re*. The *heres* was usually the person entitled to *bonorum possessio*, and he might proceed either by *aditio* and *hereditatis petitio*, or by demand of *bonorum possessio* and the foregoing remedies. The difference was chiefly one of form. The Digest, though it gives titles to *quorum bonorum* and *hereditatis petitio possessoria*, says, in these titles[2], only a word or two about each, which indicates that they still existed but had lost their importance. But some cases might give difficulty even under Justinian's law.

(i) For those entitled in both ways it mattered little in which form they cast their claim. Though the limits of time were not the same, if too late for one, they could fall back on the other. But there were still cases in which *bonorum possessio* was the only course, and here, if the time had gone by, total exclusion would result even under Justinian. Such cases were few. The praetorian will was in effect obsolete. The enactments extending the class of *legitimi* expressly gave all the rights of agnates, *i.e.*, *hereditas* as well as *bonorum possessio*[3]. On the other hand Justinian expressly confined *emancipati* and *emancipatae*, who attacked a will, to *bonorum possessio contra tabulas*[4], and *unde cognati* and *unde vir et uxor* remained, it seems, purely edictal[5].

(ii) If one entitled to *bonorum possessio* let his time pass (at least if he was the whole of a class) it is clear that the person next entitled could come in[6]. On intestacy, the *sui* relying on their civil law right, might not claim *bonorum possessio unde liberi*. When their time had expired, could the agnates, etc., claim, *unde legitimi*? They could under the old law, though of course it would be *sine re*, and there seems to be

1 The *hereditatis petitio* would be better, for *b. p. contra tabulas* left some of the provisions of the will standing, *ante*, § CXIII. 2 D. 5. 5; D. 43. 2. 3 See Inst. 3. 2. 4; C. 6. 58. 14. 6, etc. 4 C. 6. 28. 4. 6; Vangerow, *Pand.* § 515. The reason probably is the existence of the obligation of *collatio*. 5 No alteration is made in the position of these by any legislation of Justinian, before Nov. 118. After this, *cognati* were *heredes*, but *vir et uxor* are not mentioned and presumably remain on the old footing. 6 38. 9. 1; 38. 15. 1. 1.

nothing in the Digest or Code to prevent their still doing so. But if they could there would still be cases of *bonorum possessio sine re*[1], though the Digest expressly says that *bonorum possessio* is the right of getting and retaining the goods[2]. In view of this, and as the *Corpus iuris* nowhere says, even where such a statement might have been expected if it was true, that *quorum bonorum* was available against the *heres*, it is generally held that the interdict was now in such a form that it was ineffective against the *heres*[3]. It seems more probable however that while the interdict, or rather the possessory action which has taken its place[4], was still formally available, it would be paralysed by an *exceptio doli*, so that practically this was not *bonorum possessio* at all. This would explain the fact that Justinian, in discussing the interdict *quorum bonorum*, omits the words "*qui heres est*," which are in Gaius[5], leaving the words "*qui putat se heredem esse*."

In classical times every *bonorum possessio* was *cum re* if the claimant was *heres* or there was no *heres*, and thus any *bonorum possessio* might be *cum re* in some circumstances. In other cases various *bonorum possessiones* were *cum* or *sine re* according to epoch (for there is much historical change) and circumstances, of which circumstances the praetor would not, and the parties might not, be informed when the grant was made.

Bonorum possessio[6] *contra tabulas* was, no doubt, *cum re* in the time of Gaius though this is not expressly stated: the language of many texts could not possibly have been used if there were normal cases in which it was *sine re*. The system of *collatio bonorum* would be unintelligible if the *bonorum possessio* of *emancipatus omissus* was *sine re*, liable to be defeated by the *institutus*. And the restriction laid down by Pius[7] on what a woman might take would not have been necessary, if she did not keep what she took. It seems clear that it was *cum re* when Julian revised the Edict, since the *bonorum possessor* was liable for some legacies under that system[8]. *Collatio* was discussed by Cassius, a century before Hadrian[9]. There is evidence that it was *cum re* when obtained by a patron or his issue in the time of Cicero, in a case in which it was not based on a civil law claim[10]. On the whole it seems that this *bonorum possessio* was *cum re* by the beginning of the Empire.

Of *bonorum possessio secundum tabulas* there were many cases. If the will was valid at civil law the *bonorum possessio* would of course be

1 Windscheid, *Lehrb.* § 532, n. 6, cites 37. 4. 14. pr.; 37. 5. 15. 2; 37. 6. 10. 2 37. 1. 3. 2. Put down to Ulp. but no doubt altered. Cf. Ulp. 28. 13. 3 Accarias, *Précis*, 1. 1280; he compares Inst. 4. 15. 3 with G. 4. 144 and Inst. 2. 17. 6 with G. 2. 148, 149. 4 *Post*, § CCLII. 5 G. 4. 144; Inst. 4. 15. 3. 6 As to all these cases, see Girard, *Manuel*, 901. 7 *Ante*, § CXIII. 8 37. 5. 2, *ante*, § CXIII. 9 37. 6. 2. 5. 10 *In Verr.* 2. 1. 48, Girard, *op. cit.* 882, n. 2.

cum re. Under an ordinary praetorian will, the *bonorum possessio* would be *cum re* if the *instituti* were the *heredes* or there were no *sui* or *legitimi*[1]. If there were adverse claims of agnates, it seems to have been *sine re* till Pius made it *cum re* against them, though it is possible on the texts[2] that it may have already been *cum re* as against agnates remoter than *frater et patruus*. Hadrian made it *cum re* where the only defect was that there was a *postumus praeteritus* who had died before the testator[3]. Where the defect was that it was a woman's will made without consent of her *tutor fiduciarius* the enactment of Pius made it *cum re* whether it satisfied civil law rules of form or not, but if the *tutor* was *legitimus*, it was still *sine re*[4]. Other cases of this *bonorum possessio* are discussed[5], but enough has been said to shew that there were many factors to be considered, of which the praetor could not be informed when he issued the interdict, and that up to the end of the classical age this *bonorum possessio* was often *sine re*.

Unde legitimi, *unde cognati*, and *unde vir et uxor* were at all times normally *cum re*. They excluded none but the *gentiles*, who were disregarded. If, however, these *bonorum possessiones* took effect merely because earlier claimants, entitled at civil law as well, had not troubled to claim *bonorum possessio*, the *bonorum possessio* would be *sine re*, if the other claimants had made, or, having still time, afterwards made, *aditio*. If however they had renounced or were excluded by lapse of the *spatium deliberandi*, the *bonorum possessio* would be *cum re*[6]. Similar distinctions must be taken in regard to the *bonorum possessio* of the patron and his relatives, in succession to a freedman. We know that the *l. Papia Poppaea*[7] gave statutory basis to some of them, which indicates that they were normally *cum re*.

We are not told that *unde liberi* was *cum re*, but as *contra tabulas* was, from early times, and this case affects nearly the same persons, is also subject to *collatio*, and is older, it may be assumed that this too was *cum re*. It is, *a priori*, probable that *unde decem personae* was *cum re*, and this view is confirmed by the language of Ulpian, to the effect that the XII Tables gave the *hereditas* to the *extraneus manumissor*, but the praetor, on grounds of equity, preferred the *decem personae* to him[8].

It was not always the praetor who made a particular *bonorum possessio cum re*. In the case of the *postumus praeteritus* who was in fact dead, it was Hadrian[9]. In *bonorum possessio secundum tabulas*,

1 Ulp. 23. 6; G. 2. 119. 2 G. 2. 120; Coll. 16. 3. 1. 3 28. 3. 12. pr. 4 G. 2. 122. 5 *Ante*, § CI. A will was destroyed by the testator but no other made. Pius provided that *bonorum possessio* under it should be *sine re*. If a testator lost capacity after legislation but regained it before he died, his will failed at civil law though *b. p.* could be obtained under it, but was *sine re* in classical law, *ante*, § CII. 6 G. 3. 37; 2. 149; Ulp. 26. 8; 28. 11. 7 *Ante*, § CXXXIV. 8 Coll. 16. 9. 2. 9 28. 3. 12. pr.

against agnates, and where a testatrix had acted without consent of her *tutor fiduciarius*, it was Pius[1]. The cases of the *l. Papia Poppaea* and Justinian's changes speak for themselves. It may be that even in the older cases, before the Empire, the praetor never of his own authority made a *bonorum possessio cum re* except where there was no adverse civil claim, but no such general statement is warranted; *unde liberi* and *unde decem personae* are probably both republican, and may both owe their efficacy to the praetor. The language of Cicero[2] certainly implies that the Edict could give an effective right as against civil law claims. It must be remembered that a *bonorum possessio* not *ex edicto* was neither *cum* nor *sine re*; it was a mere nullity, not for practical purposes *bonorum possessio* at all[3].

CXL. The foregoing statement raises two questions:

(i) What was the advantage of obtaining *bonorum possessio sine re*? There are obvious answers. One who was, or thought he was, entitled to *bonorum possessio* might not know, on the facts, whether it would prove to be *cum* or *sine re*, since this depended on circumstances which might not, and in some cases could not, be within his knowledge. And though he might know that it was technically *sine re*, it might yet be effective because the person really entitled abstained, from whatever cause, from taking steps against him. And a *bonorum possessor* who had obtained actual possession under the interdict *quorum bonorum*, for which result it was indifferent whether his *bonorum possessio* was *cum* or *sine re*, had the advantage of being defendant if the property was claimed from him by the *heres*, no small matter, as the burden of proof was on the plaintiff.

(ii) Why did the praetor give *bonorum possessio sine re*, *i.e.* to one to whom on his own principles the property was not ultimately to belong? The final answer to this is no doubt to be found in the answer to the other and unsolved question of the origin of *bonorum possessio*. But apart from this there are several answers. So far as the original grant was concerned the praetor could not know whether the *possessio* would be *cum* or *sine re*; in appropriate circumstances any *bonorum possessio* might be *cum re*, and the praetor had ordinarily never heard of the case till the demand was made. Again, the fact that a *bonorum possessio* was *sine re* is no evidence that the praetor wished it to be so. No doubt every grant was originally *sine re*, if there was an adverse civil law claim. The first step in the evolution of a new praetorian right of succession would be to grant *bonorum possessio* and no more. Later, the praetor or some other agency[4] might make it *cum re*, by giving an *exceptio doli* if

1 G. 2. 120–22. 2 *In Verr.* 2. 1. 48. 3 The *exceptio bonorum possessionis non datae*, 44. 1. 20, *ante*, § CXXXVII, must mean "*non ex edicto datae.*" 4 *Ante*, § CXXXIX.

the *bonorum possessor* was sued by the *heres*, and, in due course, the *hereditatis petitio possessoria* against the *heres*, that is, by excluding his *exceptio doli*. Again when the *bonorum possessor* brought the interdict *quorum bonorum*, even if the *b. p.* was *sine re*, the *heres* was not permitted to prove that fact in the interdictal procedure, but must yield to the *bonorum possessor*, and, if he thought fit, bring *hereditatis petitio* later, though the facts which he would then have to prove might conceivably have been admitted, under an appropriate *exceptio*, in the interdictal procedure itself. The plea of title was not admitted in that procedure. This restriction is not peculiar to this case; it runs through all the possessory system. Taking this principle as a starting-point, it is clear that *bonorum possessio* was necessarily granted without reference to the question whether it would ultimately prove to be *cum re*.

If we go further and ask why title might not be pleaded in reply to a possessory claim, we may find ourselves in difficulties. The most fundamental answer will have nothing to do with succession, probably it will have nothing to do with Roman law specially[1], for the same principle is to be found in the ancient system of possessory remedies in English law[2], which do not seem to be connected with Roman law or to owe anything to that system. It may however be suggested, that if *bonorum possessio sine re* was only a first step towards *bonorum possessio cum re*, there was an obvious reason for not facilitating proof of title. But the praetor's aims in originating the system of *bonorum possessio* we have not considered.

We have seen that the demand of *bonorum possessio* was analogous in nature and effect to *aditio*. The time limits for claim, though not the same, are similar. A hundred days, or even a year, seems very short as a period of limitation, but one who had let these times pass could never claim either as *heres* or as *bonorum possessor*. It is however to be observed that in all cases of *bonorum possessio*, and where the praetor fixes a *spatium deliberandi*, and, usually, where a will fixes the time, this runs only from the date at which the party has notice of his right, and that all he need do is to make a certain formal, or, in some cases (and always in later law), informal, declaration or claim. When once he has done that his right is an ordinary right of action, subject to none but the ordinary rules of limitation or adverse prescription.

Bonorum possessio decretalis. The foregoing is an account of what may be called routine *bonorum possessio*, *bonorum possessio edictalis*. There was another form called *bonorum possessio decretalis*. In a few

1 See, however, *post*, § CCLII. 2 The remark of O. W. Holmes (*Common Law* 210) that "English law has always had the good sense to allow title to be set up in defence to a possessory action" pays the common law an undeserved compliment. See Pollock and Maitland, *Hist. of English Law*, 2. 57 sqq.

cases, probably survivals of a much larger number, possibly representing the original form of *bonorum possessio*, it was not given as a matter of course, but only by a *decretum* of the magistrate given after investigation. It was given *pro tribunali*, in court, and not *de plano*, as in the other case[1]. The applications of it were, in general, cases in which, for some reason, ordinary *bonorum possessio* could not be given to the person entitled, *e.g.* that of a lunatic, whose *curator* could get this *bonorum possessio* for him, but not *edictalis*[2], that of an unborn person, who would be entitled to *bonorum possessio* if he came into existence[3], and whose mother could claim this for him, and that of a child whose legitimacy was contested[4]. The purpose in all these cases was to provide for the administration of the estate till the difficulty was out of the way. It was essentially provisional in nature, and did not necessarily put the holder into the position of a praetorian owner, but gave him usually only such rights as were essential to administration, the extent of the rights differing somewhat in the different cases[5].

CXLI. Death created by far the most important case of universal succession, but there were other occasions on which a man's *universitas* was transferred. Each of them had its own special rules, which renders it necessary to consider them separately.

ADROGATIO. The forms and restrictions of *adrogatio* have already been considered[6], but only general notions as to its results have been mentioned and these must now be considered. Gaius tells us that all the *res, corporales* and *incorporales*, of the *adrogatus* passed to the *adrogator*, so far as they were not destroyed by the *capitis minutio*[7]. But more than this passed; rights which were not *res* passed also. Those persons in his *potestas* and *manus* passed into the *familia* of the *adrogator*[8]. This of itself shews that it is not to be thought of as a case of quasi-inheritance, for such rights as this did not pass to a *heres*. And in that case the obligations would have passed too but this is not what happened. The *iura in rem* could be vindicated by the *adrogator*, as his own, and all rights of action passed to him without need of any fiction[9], while the

1 38. 9. 1. 7; 37. 1. 3. 8. Thus the same number of *dies utiles* covered a longer time, for only days available for judicial proceedings counted. 2 38. 17. 2. 11. As to doubts in classical law, C. 5. 70. 7. 3. 3 37. 9. 1. pr., 1. 14. 4 37. 10. 1. pr.; h. t. 3. pr. *Tutor* or *pater* for an *infans* are other possible cases, *ante*, § CIX. 5 See Accarias, *Précis*, 1. 1274. 6 *Ante*, § XLV. 7 G. 3. 83. He states, as destroyed, usufruct, *operarum obligatio* created by *iusiurandum liberti* and *lis contestata iudicio legitimo*. 8 *Ante*, § XLV. 9 G. 3. 83. The changes in capacity of a *filiusfamilias* to own property make the acquisition somewhat unreal in later law. See Inst. 3. 10. 2. The statement sometimes made that Justinian reduced the right of the *adrogator* to a usufruct, while it states the practical result, is a little misleading. It is "*ad similitudinem naturalium parentum.*" The acquisitions, not being from the property of the *adrogator*, are *adventitia, castrensia* or *quasi-castrensia*, as the case may be.

obligations were, at civil law, extinct. The civil law principle applied, more or less exactly, was that the *adrogatus* was regarded as always having been under the *potestas*, and such praetorian modifications as were applied were correctives. The contractual and quasi-contractual obligations did not bind the *adrogator*[1]; they would not have bound him as *paterfamilias* at civil law. Delicts of the *adrogatus* continued to bind him personally; they would have bound him had he been a *filiusfamilias*, and the obligation was not destroyed by *capitis deminutio*[2]. And they bound the *adrogator*, noxally, as they would have bound him as *paterfamilias*, when they were committed[3]. Contractual obligations which *adrogatus* had inherited bound the *adrogator* fully at civil law, not as being *heres* to the *adrogatus*, but as having acquired the *hereditas* through him, being *heres* to the person from whom he had inherited, as a *paterfamilias* acquires inheritances through his son[4]. The acquisition of the *hereditas* involved acquisition of the liabilities.

So far as ordinary contractual debts are concerned, this civil system gave an unfair result, since the *adrogator* acquired the property and was not liable for debts. The praetor provided a remedy, not by extending the fiction that there had always been *potestas* to the applicability of the praetorian liabilities, *de peculio*, etc., which might not have served the purpose, since the *adrogator* by not creating a *peculium* might have evaded this, but by allowing an action against the *adrogatus*, with the fiction that there had been no *capitis deminutio*. This of itself would be of little use, for the *adrogatus* had no property, but the edict went on to provide that, unless the action was defended[5], the creditor might enter into possession of the property which would have belonged to him if there had been no *adrogatio*, and sell it to satisfy his claim[6].

Passing into *manus*. Where a woman *sui iuris* went into *manus* the resulting position was, *mutatis mutandis*, much the same as in *adrogatio*. There was the same praetorian action on previous contracts[7], and the same rule of absolute liability for inherited debts[8]. But it is not clear that there was at any time a power of noxal surrender in this case; certainly there was none in classical law[9].

1 G. 3. 84. 2 4. 5. 2. 3. 3 G. 4. 77. 4 G. 3. 84. 5 Lenel, *E.P.* 114. 6 G. 3. 84 in f.; 4. 80. 7 *Ib.* 8 G. 3. 84. 9 Inst. 4. 8. 7. In G. 4. 80, one passing into civil bondage is put on the same level as a woman going into *manus*, for the purpose of these rules of liability. But such a person could have had no property. The case seems unintelligible. For various interpretations see Lenel, *E.P.* 406, Girard, *Manuel*, 134. The suggestion has been made (Desserteaux, *Capitis Deminutio*, 1. 276; 2. 1. 360 sqq.; *N.R.H.* 36. 460) that the goods affected will be those which he has acquired for the *paterfamilias* since the entry into bondage. But see D. 4. 5. 2. 2, and it is difficult to bring these goods within the definition of "what would have been his if he had not entered into bondage," and it is a heavy and unreasonable fine on one who has received the *filiusfamilias* by noxal surrender, and has employed him in his business. The text is defective

CESSIO IN IURE HEREDITATIS[1]. If a *legitimus heres*, before acceptance, made *cessio in iure* of the *hereditas* to another person that other became *heres* for all purposes. If he purported to do it after entry, *semel heres semper heres*, he remained liable. But the *cessio* transferred the goods of the *hereditas*, and debtors to it were released. If a testamentary *heres* attempted to cede before entry, his act was a mere nullity. If after, it was as in the case of *legitimus*. If a *suus* attempted to cede, the Sabinians held the act a mere nullity; the Proculians held that it produced the same effect as attempted *cessio* by *legitimus* after entry. The whole notion was obsolete in later law; it was possible of course to transfer the various properties, and make agreements as to liabilities, but there was no question of transfer of the *hereditas*.

There are several points of interest in this matter. It will be noticed that the *universitas* transferred was not that of the party, but that of someone else in which he had an inchoate interest. We are not told the reason of the difference of treatment between the cases of testamentary and *legitimi heredes*, which look much alike, but from Ulpian's way of stating the case it would appear to be matter of principle. It may be that *scriptus heres* was not thought of as having a right at all, till entry, while *legitimus* had an inchoate right under the statute. But it is also possible to hold the opposite view, that *heres scriptus* being specially appointed by the testator could not be allowed, in effect, to accept so far as to exclude intestacy, and at the same time evade personal responsibility. As to the case of the *suus*, the Proculian view seems the more logical, but from the fact that Ulpian does not mention the case it seems probable that the Sabinian view prevailed.

It is not obvious why debtors were released. If *cessio* was a mere act of conveyance[2], they ought not to be in any way affected; debts were not assignable, but that is no reason why they should be annulled. If it is thought of as a judgment, this ought not to affect them as they were not parties, and a judgment, in general, affected only parties to it[3]. It is hardly likely that it was contemplated as a kind of *derelictio*.

ADSIGNATIO LIBERTI. This was the right of a patron to assign the succession of a living *libertus* to one or more among his issue, under a senatusconsult of about A.D. 45[4]. The assignee must be in the *potestas*, and if

and it may be that the missing part excluded the person *in mancipio*. See Krueger, ad G. 4. 80.

1 G. 2. 35–37; 3. 85–87; Ulp. 19. 12–15. 2 As to the nature of *cessio in iure*, *ante*, § LXXXIV. 3 Esmein (*Mél. Gérardin*, 229) in a study of *c. i. i.* accounts for the rules in this and other cases by the view that it is litigation, and that in early law *res iudicata pro veritate est*. That is: the effect is absolute, not merely relative to the parties, not in the sense that the fact is proved, but that the parties are not allowed to dispute it even against outsiders. 4 Inst. 3. 8; D. 38. 4. 1. pr.

he passed from it, or died without issue while the patron was alive, the *adsignatio* failed[1]. It might be by will or otherwise[2]. It was revocable and it might be conditional or *ex die*, but there might be no charge on it[3]. The *sc.* was needed to make this *adsignatio* possible since there is no such thing as the succession to a living man[4], and, moreover, if the *libertus* outlived the patron the succession to him when he died was no part of the patron's estate. The right of succession was in the *liberi patroni*, not by way of succession to him, but as an independent right conferred by the XII Tables[5]. This was a power therefore in the patron to transfer a *universitas* in which he had not even an inchoate interest, a *universitas* which was not his own. Thus it needed express authorisation by statute; hence the senatusconsult, and hence also the rule that he could impose no charge on it. All he could do was to exclude some *liberi*; he could not benefit anyone else[6].

CXLII. *ADDICTIO BONORUM LIBERTATIS CONSERVANDAE CAUSA.* This was a rule, introduced by M. Aurelius[7] and modified from time to time, under which if liberty had been given by will or codicil, and no *heres* entered, so that the creditors were about to sell the estate and the gifts would fail, the estate might be assigned to any one of the freed slaves, or (later[8]) any outsider, who gave security to the creditors[9]. The effect was that the estate vested in him "as if he were *bonorum possessor*"; the liberties directly given thereupon took effect and he must carry out the others[10]. It was in effect a transfer of the *hereditas*, as in *cessio in iure hereditatis*. Ulpian speaks of the addictee as acquiring the property like a *bonorum possessor*[11], but that would give him only a praetorian title, and, in classical law, would not have enabled him to free slaves in whose favour there was a *fideicommissum* of liberty so as to make them *cives*. His title, resting on imperial rescript and *addictio*, was civil, but, debts not being transferable, he had only the same rights against debtors to the estate as a *bonorum possessor* had. As to his liability to creditors, the better view on confused texts[12] is that at first he could be sued only by the person or persons to whom he had given security, but that, later, creditors could sue him by *utiles actiones*.

PUBLICATIO. In various cases of condemnation for crime, in fact in all cases of capital sentence, *i.e.* involving loss of citizenship, the property

1 Inst. 3. 8. 2; D. 38. 4. 1. pr. Modestinus (D. 38. 4. 9) lays down the contrary view that there may be *adsignatio* to an *emancipatus*. 2 Inst. 3. 8. 3; D. 38. 4. 1. 3. 3 38. 4. 7; h. t. 13. 3. 4 There could be no sale of such a thing, *post*, § CLXIX. 5 *Ante*, § CXXXIV. 6 There was no such difficulty in the case of Latins. Their property on their death was treated as if it had been *peculium* all the time, see G. 3. 56 in f. 7 40. 4. 50. 8 As to this and other details not affecting the present point, see *ante*, § XXXI. 9 Inst. 3. 11. 1. 10 40. 5. 4. 5; Inst. 3. 11. 1. 11 40. 5. 4. 21. 12 40. 5. 4. 22; h. t. 3.

of the criminal vested in the State, with limitations and exemptions in favour of children and others, into which we need not go[1]. Apparently there was an administrative enquiry, and only if the estate proved to be solvent did it vest in the fisc. If it was insolvent it was sold by the creditors and the *fiscus* took no account of the matter. If it was solvent it vested in the *fiscus*, which paid off the creditors and could claim from debtors to the estate[2]. It is not clear whether the creditors could sue the *fiscus* in the ordinary way or whether the matter was dealt with by administrative methods. When the matters had been adjusted, it was usual to sell the property *en bloc* to a buyer who resold in detail, *bonorum sector*[3]. He had an *interdictum sectorium* to obtain possession of the property[4], but there is not usually any question of *universitas*[5]. Our information as to *bonorum sectio* is however very scanty.

If the forfeiture was total the *publicatus* was free of his old debts, but if he was allowed to retain some of his property he remained *pro rata* liable[6]. But in any case, if he was free, he was liable for his old delicts[7].

SUCCESSION UNDER THE *SC. CLAUDIANUM*. In certain circumstances women who cohabited with slaves were themselves enslaved and lost their property with their liberty[8]—*successio miserabilis*. We are nowhere told what became of the property. The expression *successio miserabilis* suggests that it went to children, and this would more or less agree with the concessions made to children in later law where a criminal's property was forfeited, but the *sc.* is older than the earliest known of these concessions[9]. On the other hand the ordinary forfeiture for crime is to the State. But as in this case the woman herself passed into private hands, it is commonly held that her property went to the person to whom she was enslaved, and that he was liable and entitled by means of *actiones utiles* in respect of her estate, and no doubt also to noxal actions. The whole institution was abolished by Justinian[10].

BONORUM VENDITIO[11]. The details of this system will be most conveniently considered in connexion with its most important application, execution of a judgment[12]. Here it is enough to say that in cases of insolvency either *inter vivos* or at death, with rules varying somewhat in the two cases, the estate was sold under the authority of the praetor by

1 See Buckland, *Law of Slavery*, 406 sqq. See also as to *sc. Claudianum*, below. 2 48. 20. 4; h. t. 10. pr.; 49. 14. 1. 1; h. t. 6; h. t. 11; h. t. 17. 3 G. 4. 146. 4 *Ib.* 5 It is possible that at one time the *bonorum sector* bought the *universitas* and was liable and entitled to *utiles actiones*, but there seems no clear evidence of this. 6 *Ante*, § XXXVI. 7 *Post*, § CXCVI. 8 *Ante*, § XXV. 9 See 48. 20. 7. pr. The *sc.* is of A.D. 52. 10 See Inst. 3. 12. 1. 11 See a recent study by Kniep, *Mél. Girard*, 1. 623 sqq. 12 *Post*, § CCXIX.

a *magister bonorum* acting on behalf of the creditors. He sold it *en bloc* to a person called *bonorum emptor*, the sale being usually by a sort of auction, the goods being "*addicta*" to the person who bid, not the highest sum, but the highest dividend on the debts[1]. Our concern here is with the position of this *bonorum emptor* regarded as universal successor. Both Gaius and Justinian so describe him[2], but the case differs notably from those already considered. These were civil in character, but here the succession was purely praetorian, like *bonorum possessio*[3]. The *emptor* had the goods *in bonis*, and he or his transferee would become *dominus* only by *usucapio*. But there are other and more striking points of difference. Properly speaking it was not universal succession at all. The debtor underwent no *capitis deminutio*; he remained liable for his old debts, since he could still be sued for the unpaid fraction[4], under restrictions which do not here concern us[5]. Indeed it seems probable that if any creditor had not put in a claim under the *venditio* he could sue for the whole debt, though he would not stand to gain anything by his abstention. But, on such a state of the law, it is difficult to see that the *universitas* passed. What passed were the debtor's commercial assets, and these were technically still his, till the period of *usucapio* had run.

Thus the debtor's *universitas* did not vest in the *bonorum emptor*. He became bonitary owner of the goods, having also an *interdictum possessorium* to get possession of them[6]. He could sue debtors to the estate by praetorian actions, with the Rutilian *formula*, in which the bankrupt's name was in the *intentio*, but the *condemnatio* was to pay to the *bonorum emptor*, in an ordinary case of bankruptcy[7], and by another praetorian type of action, *formula Serviana*, with a fiction "*si heres esset*" if the insolvent was dead[8]. He did not become liable for the debts, but only for the proportion of them that he had promised, and this liability did not rest on succession; it was a result of his contract with the *magister bonorum*. It would be the logical result that he could not be sued by the creditors at all, but was liable only to the *magister bonorum* with whom he contracted. It is indeed observable that Gaius in describing the actions deals only with those brought by him[9], his other text, very imperfect, carrying the matter no further[10]. But Theophilus says he could sue and be sued by *utiles actiones*[11], and Lenel cites several texts which in their original form seem to have dealt with action against the *bonorum emptor*, but are not quite conclusive on the point against

1 G. 3. 78 sqq.; *post*, § CCXIX. 2 G. *ib.*; Inst. 3. 12. pr. 3 G. 3. 80. 4 G. 2. 155 and see Lenel, *E.P.* 415. 5 See *post*, § CCXIX, and Inst. 4. 6. 40. 6 G. 4. 145. 7 G. 4. 35, 86. As to his obligation of *deductio*, *post*, § CCXXXVIII. 8 G. 4. 35. It is, however, nowhere expressly stated that the field of these *formulae* was so divided. 9 G. 4. 35, 66. 10 G. 3. 81. 11 Ad Inst. 3. 12. pr.

whom the action was brought[1]. There seems however no sufficient reason to reject the statement of Theophilus and the argument from analogous cases.

It is clear however that the notion of universal succession is of little use in this case, or in the connected system of *bonorum cessio*, which is identical in principle, though the debtor who had voluntarily surrendered his estate to his creditors had some special protection in the case of subsequent proceedings against him[2].

1 Lenel, *E.P.* 412. 2 *Post*, § CCXIX.

CHAPTER X

THE LAW OF OBLIGATIONS. GENERAL NOTIONS. VERBAL CONTRACTS. CONTRACTS *LITERIS*.

CXLIII. Nature of Obligation, p. 403; Personal nature of obligation, 404; CXLIV. Classification of obligations, 406; CXLV. Contract, 409; *consensus*, 410; interpretation, 411; CXLVI. Fraud, 412; *Metus*, 413; *Error*, 415; CXLVII. Capacity, 416; possibility, 417; CXLVIII. *Dies*, 419; *condicio*, *ib.*; resolutive conditions, 422; CXLIX. Contract for *heres*, 423; for third persons, *ib.*; *causa* as basis of contract, 425; CL. *Nexum*, 426; CLI. *Fiducia*, 427; CLII. Classification of contracts, 430; Verbal Contracts, 431; *Stipulatio*, *ib.*; Form, 432; CLIII. Capacity, 434; *Stipulatio* by slave, 435; CLIV. Content of *stipulatio*, 436; *ad diem deberi non posse*, 437; *Exceptio non numeratae pecuniae*, 438; CLV. *Adstipulatio*, 440; CLVI. *Adpromissio*, 441; *Sponsio*, *ib.*; Legislation affecting *adpromissores*, 442; CLVII. *Beneficium cedendarum actionum*, 445; *Beneficium divisionis*, 446; *Beneficium ordinis*, 447; Release of surety, *ib.*; CLVIII. Plurality of principals, *ib.*; Solidarity, varieties, 449; Correality, 450; Regress, 451; CLIX. Simple solidarity, 452; Basis of distinction, 453; CLX. *Dictio dotis*, 454; *Iusiurandum liberti*, 455; CLXI. Contract *literis*, *expensilatio*, 456; Varieties, *ib.*; Form of the contract, 457; Written contract under Justinian, 458.

CXLIII. The Law of Obligations is the law of *iura in personam*, of rights and duties existing between two or more persons but having, in general, and *prima facie*, no bearing on their relations to other people. It has already been pointed out[1] that, while *obligatio* is classed as a *res incorporalis*, and so forms part of the *ius rerum*, there are not wanting signs of a view according to which it was not a *res* but a conception with a close affinity to the notion of *actio*. Such a notion makes it a connecting link between the two topics. Apart from the texts already cited it may be noted that Ulpian's *Regulae*, in the form in which we have them[2], stop at intestate succession, that both the Digest and the Code contain the rubric, *De obligationibus et actionibus*[3], and that the association is helped by the use of the word "*actio*" to mean "right of action" as in the maxim: *minus est actionem habere quam rem*[4].

Justinian's definition of *obligatio* is: "*Obligatio est iuris vinculum quo necessitate adstringimur alicuius solvendae rei secundum iura nostrae civitatis*[5]." The word "*vinculum*" expresses the tie between the *creditor, reus credendi*, and the *debitor, reus debendi*. "*Alicuius solvendae rei*" must be understood in a wide sense as covering any render or service which could have a money value. The words "*secundum iura*," etc., mean merely that it must be such an obligation as the law would enforce[6].

1 *Ante*, § LXVII. 2 The original work covered the whole field; D. 44. 7. 25.
3 D. 44. 7; C. 4. 10. 4 50. 17. 204. 5 Inst. 3. 13. pr.
6 It is suggested that obligation in early law rested on transfer of property. *Debere*, on this view = *de habere*, and in *credere* the *dare* is obvious. *Debitum* and *obligatio* appear to

Obligatio[1], like *vinculum*, implies a tying together, and the same point of view appears in other terms, *e.g.*, *nexum*, one of the oldest forms of obligation, and *contractus*, an expression which, as a noun, denoted only certain forms of binding agreement, but, in the form of a verb, was wider: there were many ways other than contract in which a man could contract an obligation[2]. It does not follow that both parties must be alike bound. Thus in delict and in *stricti iuris* contracts only one was *obligatus*. In such cases, indeed in all cases, an *obligatio* had two sides: the right and the duty. Conceived of as a right, it was a *res*, and that is the aspect of it which is considered when *obligatio* is mentioned among the cases of *res*. As it was treated as a part of the *ius rerum*, we should expect this aspect to be brought out in the definition, but that emphasises only the duty. In the actual treatment of the subject it is primarily regarded as a right, and though this might make little difference, since the right of *A* is the duty of *B* stated in another way, still this conception of *obligatio* as a *res* did in fact affect the discussion. We are told how we could acquire an obligation, the right, by the act of a subordinate, but not, in the treatment of obligations, how such a person's act could impose an obligation, the duty, on us. In contract the omission is not surprising, as, at civil law, no such thing could happen[3], but that is not so in delict; noxal liability was recognised by the XII Tables. But these matters and contractual liabilities of this type are discussed in the law of actions, in the course of the explanation of special types of action.

The intensely personal nature of *obligatio* was one of its most marked characteristics. It was evidenced to some extent by the fact that it could not be assigned, but few rights were assignable. More significant is the fact that it was, in general, impossible at any stage in Roman Law to acquire, directly, a right of this character through a transaction by a third party[4]. The same rule had held at one time in *iura in rem*, but it

express one and the same idea, and are so used by the jurists. But it has been suggested that the ideas are properly distinguishable, *debitum* (Schuld) signifying that a relation exists under which one "ought" to pay, and the other receive, and *obligatio* (Haftung) signifying that the liability can be enforced. See, for a recent statement of this view, and some suggested applications, Cornil, *Mél. Girard*, 1. 199 sqq. *Contra*, at least as to Roman Law, Duquesne, *N.R.H.* 37. 125 sqq. See also Koschaker, *Z.S.S.* 37. 348 sqq., reviewing Steiner, *Datio in solutum*.

1 The notion of *obligatio* as a bond is too abstract to be very ancient. The word is rare before Gaius. Cicero uses it, but hardly in a juristic sense (*e.g.*, *Ep. ad Brut.* 1. 18. 3). *Obligare*, as old as Plautus, is used by Cicero in a juristic sense (see, *e.g.*, *pro Caec.* 3. 7; *pro Mur.* 2. 3). It is not till later that the notion of *obligatio* as such is disentangled from *actio*, and the classifications of *obligationes* are later still. 2 See G. 3. 91, and cp. Inst. 3. 14. 1. As to this notion of binding, in terminology, and its possible history, see Beseler, *Beiträge*, 4. 92 sqq. 3 *Obligatio* is essentially a civil conception in classical law. *Post*, § CXLIV. 4 As to limitations and modifications, *post*, § CXLIX.

had disappeared, as to *iure gentium* transactions, in later classical law[1]. In contract it never did. If a man's *procurator* bought a horse for him, the transfer to the agent vested the horse in the principal, in later law, but rights and liabilities under the contract were in the agent, and would have to be transferred by the device which evaded the difficulty that such things could not be assigned[2].

Obligatio was so intensely personal that it seems that, at one time, it died with the party liable. This indeed was always so in delict, but in very early law it seems to have been not less true in contract[3]. The earliest forms of *stipulatio* that we know anything about are *sponsio* and *fidepromissio* and neither of these bound the *heres*. Long before the Empire, however, ordinary promises of *res*, certain or uncertain, bound or benefited the *heres*. An essentially personal service, *e.g.* to paint a portrait, could not be understood of the *heres* either way (apart from action on a breach committed before the death). Some jurists seem, however, to have carried the matter further and to have held that a promise of service of any kind was essentially personal and did not pass either way, but there is little trace of this in the texts[4]. Justinian adverting to the dispute, provided that *facere* and *dare* were equally transmissible both ways[5], and no surviving prae-justinianian text adverts to a contrary rule[6].

Another kind of question brings out the personal character of *obligatio*. If a slave made a contract, *e.g.* of hire, and the master dealt negligently with the property, or *vice versa*, what were the resulting liabilities? *Obligatio* being personal, could the act of *A* be breach of a contract made by *B*? In the first case put the rule seems to have been that the master's *culpa* could not make him liable on the contract[7], though if he had damaged the thing he might be liable in delict, under the *l. Aquilia*. Any *dolus* would subject him to the *actio doli*, and here the law went further and allowed this *dolus* to come into account in any *bonae fidei* transaction, under the "*ex fide bona*" clause in the *formula*[8].

In *stricti iuris* contracts earlier law knew no remedy but the *actio doli*, but later law, perhaps later classical law, gave an *actio utilis* on the contract itself[9], this way of dealing with it shewing that it was outside

1 *Ante*, § XCIX. 2 *Post*, § CLXXXIX. 3 We hear at a relatively early date of sons seized under a liability of their father (Livy, 2. 24), but the father is alive. See *post*, § CL. 4 22. 3. 9; 45. 1. 133; 46. 3. 31 have been cited in this connexion from the time of the Gloss. 5 C. 8. 37. 13. There was of course no difficulty about liability for breaches before the death. 6 See G. 4. 113. Contracts were of course often made so as not to include the *heres*, *e.g.* 45. 1. 56. 4. 7 No text states such a liability. 8 13. 6. 3. 5; 15. 1. 36. In *fiducia* there was a special clause in the Edict, bringing into account *dolus* by the *paterfamilias* of the actual fiduciary, Lenel, *E.P.* 234. 9 45. 1. 49. pr. It is not good authority. Demand seems to have been made under the liability *de peculio*, putting the master in personal "*mora*."

the true scope of the contract. The case of negligence of the slave under the master's contract was the subject of much discussion. The earlier view was that this gave no action on the contract, but only, in appropriate cases, a noxal action for delict, but there were early supporters of another view, *i.e.* that action on the contract would lie, but that the master could avoid liability by handing over the slave[1]. This was not noxal surrender, since the action was not in delict, but it gave a similar result. This view prevailed in the time of Justinian[2]; it recognises the principle that in strictness the master is not liable.

CXLIV. CLASSIFICATION OF OBLIGATIONS. In his treatment of *obligatio* Justinian follows, in the main, the order and treatment of Gaius. But while Gaius has little to say of *obligationes honorariae*[3], Justinian at the beginning of his discussion states his "*summa divisio*" as into two classes, civil and praetorian, the former created by statute or recognised by civil law, the latter by the praetor, "*ex sua iurisdictione*[4]." He then states what he calls a "*sequens divisio*" which is in fact that of Gaius, based on the nature of the fact creating the *obligatio*, amplified by the addition of the heads of quasi-contract and quasi-delict. This is the division followed in his treatment, and though he does deal with important praetorian obligations in delict, he says little of them in contract, and nowhere marks them off as a class under the head of *obligatio*[5]. Thus, for the purpose of statement of the law, the important division is into four classes.

1. Contract, which can be loosely defined as actionable agreement. This is not exact, as certain pacts gave actions but were not called *contractus*. What Gaius means is those agreements which in classical law gave a civil law action[6]. Justinian merely follows Gaius.

2. Quasi-Contract. This may be defined as an obligation which arises without agreement or wrong done, but it is much more analogous to

1 Coll. 12. 7. 9; D. 19. 2. 25. 7; 47. 1. 2. 3; cp. 47. 2. 62. 5. The case is different if the master had been negligent in choosing the man to carry out the contract. Coll. 12. 7. 7. 2 9. 2. 27. 11. 3 Gaius in fact knows nothing of *obligatio honoraria*. For him, and probably for all jurists of that age, *obligatio* is a civil conception. He mentions obligations which are in fact purely praetorian (3. 192, 209), but these are offshoots of civil obligation. He says nothing of obligations "*quasi ex delicto*," and the only case of quasi-contract he mentions is civil (3. 91). He treats only of civil modes of discharge: his language in 3. 181 being very significant. What he has to say of what are in fact praetorian obligations he says under the law of actions. He contemplates the praetor as capable of giving *actiones*, but not of creating *obligationes*. 4 Inst. 3. 13. 5 G. does not here mention this *summa divisio*. Elsewhere (*e.g.* 4. 110) he speaks of actions given by the praetor, and Paul (Coll. 2. 5. 4) speaks of *actio honoraria* or *civilis*, based on civil law or praetorian jurisdiction, which means the same thing so far as it deals with *obligatio*, but is wider. 6 *Fiducia* answered the definition, but was not called a contract; as to the reason, *post*, § CLI.

contract than to delict. Its somewhat heterogeneous content will be discussed later.

3. Delict. Obligation arising from a wrong, which may or may not be in connexion with a contract. Not all delicts are expressly treated in Gaius or the Institutes, but only four important cases, all known to the civil law. For though *iniuria* is, as we know it, mainly praetorian, Gaius is careful to state its origin in the XII Tables[1], and *rapina* is a derivative of *furtum*.

4. Quasi-Delict. This is not in Gaius; the cases treated hereunder by Justinian are all praetorian; the principle of distinction from delict will be considered later[2].

Gaius admits that his division into two heads is inexact, and involves treating under contract some things which are not contract[3], and in the Digest he appears as classifying obligations under three heads, contract, delict and "*ex variis causarum figuris*[4]." There are long citations from his "*liber aureorum*[5]" which are the source of Justinian's passages dealing with quasi-contract and quasi-delict, and suggest that these are what Gaius means by "*variae causarum figurae*," but do not suggest that all obligations must come under one of these heads. But these texts are in all probability very freely interpolated[6].

These are not the only classifications we find. Modestinus says: "*obligamur aut re aut verbis aut simul utroque aut consensu aut lege aut iure honorario aut necessitate aut peccato*[7]." Here the first three are contract and the others presumably cover everything else. But the classification seems to pass from a basis in the fact creating the obligation to one in the authority by which it is enforced, with resulting overlapping, so that neither the classification nor his illustrations give much help. The class "*lege*" is defined but not illustrated, as is the case also with "*iure honorario*." There were in fact a great number of obligations which might come under these heads, in particular the latter[8].

There were other distinctions of some importance. Leaving out of account merely moral obligations, not recognised by law, not all which the law would enforce were equally enforceable. Most were enforceable by action, but there were a few cases in which the law did not allow an action but did allow enforcement in indirect ways. There were cases in which a claim could be enforced only by way of retention, not by action. Thus the defendant in a real action could resist the claim unless reim-

1 G. 3. 223. 2 *Post*, § CCIV. 3 He calls his division the *summa divisio*, 3. 88; 3. 91. But he does not mention quasi-delictal obligations at all. 4 44. 7. 1. pr. 5 44. 7. 1, 4, 5. 6 See Mitteis, *Rom. Pr.* 1. 86. 7 44. 7. 52. 8 Many of them will appear under the head of actions: in this case, even more than elsewhere, for historical reasons, the matter is persistently looked at from the point of view of procedure.

bursed for certain expenses[1], but could not recover them by independent action. There was the same right where a creditor sought to enforce a pledge against a *bona fide* holder[2]. The husband's right to deductions in returning *dos* was in later law also enforceable by *condictio*, but the existence of this latter right was still disputed in late classical law[3]. The holder in *commodatum* or deposit had this right of retention apparently before he acquired an *actio contraria*, and at the beginnings of the contract of pledge this right of retention of the *res* was, it seems, the only right conferred by it[4].

There is also a classification into *obligationes civiles*, actionable at law, and *naturales*, enforceable only indirectly, *e.g.* by way of set off[5]. But the expression *obligatio civilis* is itself ambiguous. An obligation might be enforceable by a civil law action or by an action given by the magistrate. The former were *obligationes civiles*, in a narrower sense, the latter being *obligationes honorariae*[6]. Again, of civil obligations in this last sense, some were always such, having their origin in the old civil law; others, originally praetorian, acquired civil law actions only later. These are sometimes said to be "*iure civili comprobatae*[7]."

All these classifications are classifications according to the mode of origin, but there are others of a different type. Thus *obligatio* might be unilateral, where one party only was bound, as in delict and *stricti iuris* contract, or bilateral, where there were duties on both sides, as in sale and many other cases, or, while primarily unilateral, they might in certain events create obligations both ways, as in deposit, *commodatum*, mandate, *tutela*, etc.—imperfectly bilateral[8]. Again they might be either to do or to give or to abstain. They might be principal or accessory, such as those of a surety. They might be for a *certum* or an *incertum*, a distinction having important effects in procedure, or *bonae fidei* or *stricti iuris*[9], with similarly important effects (a classification differing from the others in that it is not exhaustive; there were many obligations which were neither). Again they might be either divisible or indivisible, a distinction obvious in its nature but not so simple in its application, having its chief importance in connexion with performance (*solutio*) with which topic it will be considered[10]. Or they might be simple

1 *Post*, § CCXXVIII. 2 20. 1. 29. 2. See, for another case, 3. 5. 17. 3 25. 1. 5. 2, and perhaps is due to Justinian, Schulz, 235. 34. 57 sqq. 4 *Post*, § CLXVI. 5 *Post*, § CLXXXIX. 6 Inst. 3. 13. 1. 7 This name does not appear in the sources but it is suggested by such texts as Inst. 3. 13. 1, though the class here spoken of as *comprobatae* would cover all not based on statute, but recognised at civil law. 8 There is no Roman authority for this description. It is of little value in any case, and on the views now held by some writers as to some of these cases (*post*, § CCXXXIV) it would be of very narrow application. 9 This distinction applies properly to the remedy, rather than to the obligation. 10 *Post*, § CXCIII.

or alternative, *e.g.* to give *A* or *B*, a distinction which also will arise in connexion with *solutio*[1].

The very artificial nature of Justinian's classification should be noticed, at the cost of some anticipation. He mentions four sources of obligation. He gives four types of contract, omitting innominate contracts and actionable pacts, which, in view of the late development of the former and the praetorian character of the latter so far as they were known to classical law, Gaius might reasonably do, but hardly Justinian. He gives four contracts "*re*," and four consensual contracts, though *pacta praetoria* and *legitima* are not really distinguishable under Justinian. He gives four delicts, though in fact there were many others and two of these four, *furtum* and *rapina*, were really one. He gives four quasi-delicts. This symmetrical scheme obviously does not correspond with practical facts.

CXLV. Contract. A contract was, subject to a small correction already indicated[2], an agreement enforceable by action at law. It involved a concurrence of two wills as to future conduct of one or both of the parties. Such a concurrence, to be capable of proof, must be in some way expressed. The law might hold that any expression sufficed, that the moment agreement was proveable there was a contract. Roman Law did not take this position; it started from the point of view that an agreement was not enforceable unless there was some reason why it should be. At first, like other systems, it found this reason in Form. The oldest contracts of Roman Law are formal contracts; owing their validity to the fact that they are expressed in a certain way, with the corollary that this form was the essential. If that was correctly gone through it was immaterial whether real consent was present or not[3]. But of those of which we have any knowledge it is probable that *nexum* alone answers strictly to this conception. Consent is at any rate emphasised in *stipulatio*[4]. The contracts "*re*" mark a certain further advance; for a very limited number of transactions the principle was recognised that the agreement became a binding contract if the subject-matter was handed over for the concerted purpose.

A further development[5] was the consensual contracts. For a small but commercially important group of contracts the principle was accepted that mere consent, however evidenced, should suffice. All these steps had been taken by the beginning of the Empire. This course of progress, resulting in the existence of distinct groups of contracts makes

1 They may also be simple or subject to a modality, *e.g.*, *dies* or *condicio*. See *post*, § cxlviii. 2 *Ante*, § cxliv. 3 Thus, as we shall see, it was only gradually and imperfectly that the law took account in these contracts of factors affecting the reality of consent. 4 2. 14. 1. 3. 5 Historically perhaps earlier.

it difficult to lay down any general theory of contract for Roman Law. It is somewhat easier for the modern Roman Law in which formal contracts have ceased to play a part, but for the classical and even the Justinianian law there are at least two theories of contract, that of the formal (or rather *stricti iuris*) contracts, and that of the *bonae fidei* contracts[1]. In stating the general principles of contract this distinction has constantly to be borne in mind.

A contract involves agreement, *consensus*, concurrence of two minds, and this must exist at the moment when the contract is made. This moment would be readily determined in *nexum* (assuming that this is to be treated as a contract), and almost equally readily in *stipulatio*, where the question and answer ordinarily occurred substantially together. But even here there might be difficulty. If the offer and acceptance were not at the same time (and essentially all contracts can be reduced to offer and acceptance) it would be difficult to prove that the stipulator's intent still existed at the time of the promise. Accordingly it was laid down that they must be substantially continuous. Thus, says Ulpian, if the stipulator left the room before the answer was given, there was no *stipulatio*, unless indeed it was only for a moment, and he duly returned and got his answer[2]. Again, if, after the question was asked, the *stipulator* attended to other business, a *promissio* later in the day was useless[3]. On the literal contract we have no information; we do not know how the debtor expressed his assent to the entry, but in the actually recorded cases it seems to have been on the spot[4]. In the contracts "*re*" there was ordinarily little difficulty, since the acceptance of the thing was normally acceptance of the contract. But in the consensual contracts and especially in sale and hire, it is obvious that much business was done by correspondence. Questions must have arisen whether an acceptance was prompt enough, whether an offer was still open, and so forth, but they are not represented in the legal texts[5].

As the only possible evidence of a man's intent is external facts there has been some controversy on the question whether the law is really concerned with his intent, or whether it is not more exact to say that for legal purposes there is no difference between a man's intent and the

1 *Mutuum*, loan of money, is a *stricti iuris* contract though not formal, but in fact many of its rules were laid down before it was conceived of as a contract at all, *post*, § CLXII. 2 45. 1. 1. 1. 3 45. 1. 137. pr.; 45. 2. 12. pr. 4 Cicero, *de Off.* 3. 14. 58. 5 There seems to be no evidence whatever on the rule which must have existed that an offer could not be accepted after a reasonable lapse of time. There is no direct evidence, for contract, as to the effect of death of a party on an unaccepted offer: the texts which can be adduced dealing with other types of transaction suggest that either death of a party, or death and notice of the death, usually caused the offer to lapse (*e.g.* 12. 1. 41; 39. 5. 2. 6; h. t. 19. 3; see Regelsberger, *Pandekten*, 1. § 150; Windscheid, *Lehrbuch*, 2. § 307).

expression of it in external acts and events. The Romans do not discuss this abstract question, *ex professo*, but appear to have taken the view that where intent was material it was his real intent, and to have drawn some remarkable conclusions[1]. But the controversy has played a considerable part in the discussion of two practical questions which we must now consider[2]: first, the interpretation of what purports to be a contract, secondly the question how far, when the meaning has been made clear, the agreement propounded represents a real "will" of the parties.

In dealing with formal contracts from the first point of view, *stipulatio* was taken as the type. Ambiguous stipulations are dealt with in several texts. Some of these must be disregarded in laying down a general rule, as they dealt with creation of *dos*, which had specially favourable treatment[3], and others, though they appear in the Digest in a general form, applicable to all transactions, were originally written of legacy, also exceptionally treated[4], so that it is unsafe, even for Justinian's law, and quite impossible for classical law, to apply them generally. Setting these aside, the first rule was to look at the dealings apart from the formal words so as to gather the meaning[5]. If this did not help, the common local usage of such words must be considered[6]. If that failed, there was a rule that the words must be so construed as to make the transaction effective. Thus a stipulation for payment "on the Kalends of January" meant the Kalends of next January, otherwise the debt need never be paid[7]. If all these failed the rule was that the words were to be construed in favour of the promissor, to lessen the obligation, not to enlarge it[8]. But if the words were clear the *promissor* could not insist on an interpretation favourable to him, other than the plain meaning[9].

The same question might arise in *bonae fidei* contracts, especially in the loosely constructed consensual contracts; it is in fact discussed almost exclusively in connexion with Sale. The rules were much the same. The course of negotiations (*quod actum est*) was of primary importance[10]. Usage was also to be considered[11]. Apart from this, ambigu-

1 *Post*, § CXLVI. 2 Also in the question at what moment a contract made by correspondence is complete. See Schuster, *German Civil Law*, 87, for the different solutions reached by modern systems. 3 23. 3. 2; h. t. 70; 50. 17. 85. pr., etc. 4 50. 17. 12; h. t. 56, etc. See Windscheid, *Lehrb.* § 84. 5 2. 14. 4. 3; 50. 17. 34. 6 50. 17. 34; h. t. 114. 7 45. 1. 41. pr.; h. t. 80; 50. 17. 67. 8 34. 5. 26; 44. 7. 47; 45. 1. 38. 18; h. t. 99. pr.; 50. 17. 34; illustrations 2. 15. 5; 45. 1. 106. "*Benignior*" solution means no doubt the same thing, so far as generally applicable, but these texts (*e.g.* 34. 1. 20. 1; 50. 17. 56; h. t. 168. pr.; h. t. 192. 1) were written of legacy and *dos* and "*benignior*" is a suspicious word. 50. 17. 96 was written of wills. 9 45. 1. 99. pr.; h. t. 110. 1 (which looks like a contradiction but must be interpreted by the facts). The document is construed as a whole and general words may be limited by other provisions, 50. 16. 126. 10 18. 1. 6. 1; h. t. 33; h. t. 40; h. t. 77; h. t. 80. 2; 18. 2. 2. pr.; 50. 17. 172. pr. 11 21. 1. 31. 20.

ities were to be construed against the party who formulated the proposals, as in *stipulatio*, with the difference in effect that, there, this was necessarily the *stipulator*, while here it might be either party. But the texts laying down the rule commonly treat the vendor as the formulator[1], and where this is not expressly said but the ambiguity is construed against him, the transaction is usually called a *venditio*, implying that the proposals emanate from him[2], probably the usual case. Some texts which seem to deal with ambiguities and to give a different result are merely assigning the recognised meaning to the expressions used in the contract[3]. These rules were subject to an exception. If the difficulty was created by the mistaken or fraudulent act of the vendor's slave, the vendor was not prejudiced. Thus where land was sold by description and the vendor's slave, in pointing out the boundaries, included other land, the land sold was what was covered by the description[4], an application of the principle that a slave could not, without authorisation, make his master's position worse.

CXLVI. Assuming the real meaning of the agreement arrived at, the question now arose, how far this represented a real intent. Was there anything in the circumstances to suggest that there was no real consent? Often, of course, the facts would shew that there was no intent to set up a legal relation[5]; apart from such cases this is the question, whether there had been any fraud (*dolus*), duress (*metus*), or mistake, and, if so, what was its effect?

Fraud. *Dolus.* This may have caused such a mistake as would vitiate the agreement even apart from fraud. In other cases the rule was clear. A consent induced by fraud was none the less a consent. In *stricti iuris* transactions the fraud had, till the time of Cicero[6], no effect on the liability. But thereafter the *exceptio doli* could always be pleaded in reply to a claim on a contract induced by fraud, and there was an *actio doli* where the matter had been completed[7]. In *bonae fidei* contracts there was no difficulty; the words "*ex fide bona*" in the *formula* of the action enabled the injured party to prove the fraud, if he was sued, and, conversely, to claim on account of it if he sued. The result was not the same in the two types of contract. In the last group, the *iudex*, taking notice of the *dolus* could, in appropriate cases, diminish the *condemnatio* without actually absolving the defendant[8]. But in a *strictum iudicium*, if the *exceptio doli* was proved, the action was lost, and the

1 2. 14. 39; 18. 1. 21; 19. 1. 21. 6. **2** 8. 3. 30; 18. 1. 33; h. t. 77; h. t. 80; 50. 17. 172. **3** 18. 1. 40. 1; h. t. 80. 2; 50. 16. 90; h. t. 126; h. t. 169; h. t. 205; cf. 8. 2. 17. 3. **4** 18. 1. 18. 1. **5** 44. 7. 3. 2; h. t. 54. **6** *De off.* 3. 14. 58 sqq., "*nondum enim C. Aquilius, collega et familiaris meus, protulerat de dolo malo formulas.*" **7** 4. 3. 1. 1, if there was no other action, but *condictio sine causa* would sometimes be available. **8** *E.g.* 19. 1. 41.

right of action consumed. It may also be observed that on the wording of the *exceptio doli*[1], the action was lost if any fraud was proved, even though on the facts it did not induce the contract, *e.g.* was a minor matter which would not have affected the decision of the party. But we are told that the *exceptio doli* lay on the same grounds as the *actio doli*, and that this action did not lie for small matters[2].

Duress. *Metus.* The duress contemplated by these rules was not mere threats of evil consequences, but an immediate menace of death or extreme physical injury to the party or his family[3]. In the older texts it is constantly coupled with *vis*[4], and the line between physical compulsion, which would certainly make the act unreal, and such threats as these is not readily drawn. It might easily be held that consent given under such pressure was no consent at all and the transaction therefore a nullity, but that does not seem to have been the attitude of the law. The chief points to be made out of the texts on the matter are these.

The ancient formal transactions were certainly valid at civil law, even if they resulted from *metus*; the praetor, in historic times, gave the necessary relief. A *mancipatio, metus causa*, was valid, but the *res* remained "*in bonis*" of the victim[5]. This rule had however nothing to do with consent; it expressed the fact, already noted, that in the ancient formal transactions if the form were duly gone through, consent was immaterial[6].

There are a few texts which speak generally of transactions affected by *metus* as being simply void[7]. Some of these concern manumissions, and as there could be no setting aside of a manumission which had taken effect[8], the only way in which to do justice was to declare it void *ab initio*, so that these are not in point. The other texts are general in their language and are commonly construed to mean only that relief was given in such cases. But, for the most part, this is not their natural interpretation, and one or two cannot be construed otherwise than as excluding *voluntas* and declaring absolute nullity[9]. Other texts however speak of consent thus obtained as nevertheless consent: "*quamvis si liberum esset noluissem, tamen coactus volui*[10]." And the titles dealing with these matters contain a number of texts which treat the transaction as valid *iure civili*, but as subject to praetorian relief, *restitutio in integrum* in some form. But the title in the Digest dealing with relief for *metus* does not anywhere discuss *bonae fidei* transactions, though that

1 *Post*, § CCXXIII. 2 4. 3. 9. 5; 44. 4. 2. pr. 3 4. 2. 3 sqq. 4 *E.g.* Cicero, *ad Quint. fr.* 1. 1. 7. 21; cf. D. 4. 2. 1. 5 G. 4. 117; P. 1. 7. 6–8. 6 The same consideration applies to fraud. 7 The chief texts on *metus* outside D. 4. 2 and C. 2. 19 are G. 4. 117; P. 1. 7. 4–10; Fr. D. 7; Cons. 9. 3; C. 8. 38. 5; D. 23. 2. 22; 29. 2. 6. 7; 40. 9. 9; h. t. 17; 44. 4. 4. 33, 34; 50. 17. 116. 8 4. 4. 9. 6; Fr. D. 7; D. 40. 9. 9; h. t. 17. 9 Cons. 1. 3 sqq.; 29. 2. 6. 7. 10 4. 2. 21. 5.

in the Code does contain late legislation assuming praetorian relief in such cases[1].

It seems at first sight on this state of the texts that *bonae fidei* transactions affected by *metus* must have been simply void. But when it is remembered that so long as the matter was in the contractual stage and there had been no performance, the ordinary machinery of the *bonae fidei iudicium* gave protection, it seems better to accept what is now the dominant view that in this case also the *voluntas* was supposed to be present, though the praetor would if necessary relieve. But the conflict in the texts cannot be ignored out of existence, and it must be supposed that there was an opinion other than that which prevailed[2].

Error. Here the matter is from one point of view simpler. If assent was given, on the assumption of the existence of certain facts, and they were not as assumed, there may be said to have been consent, not to what was actually proposed but to something else. Thus, wherever mistake affected the contract, it did so on the ground that there was no consent and the agreement was void. But on the important question when mistake did so affect the contract, it is difficult to draw any rational conclusion from the texts.

In the case of *stipulatio* a mere error in drawing up the usual *cautio* could be corrected. If what the parties had intended to stipulate was clear, the writing was overridden[3], and it may be safely assumed that the same rule applied elsewhere. But the question arises, where the words of the *stipulatio* were clear, how far a party might plead that they were not what he meant. We are told in several texts that error excluded consent[4], but that is not helpful till we know the limits of the rule. The general effect of the texts is that where there was no doubt as to the identity of the subject-matter the contract is valid whatever mistake there may have been as to its qualities[5]. But where the parties were actually thinking of different things, there, as there was no consent, there was no contract[6]. This is clearly stated in the Institutes and the Digest[7]. Naturally this does not mean that a mere assertion of the error sufficed; it must be proved. Even so it is a doctrine out of harmony with the principles of formal contracts, and it is sometimes explained as meaning that there was no contract even though the words were clear, if, on the facts, they were understood by the other party as used in

1 C. 2. 19. 3, 4, 5. But in all these cases the property has been handed over, so that it is relief against transfer of property, not contract. 2 Modern writers have produced many theories, shewing nullity on one state of facts and relief on another, but there is no agreement as to basis. See Windscheid, *Lehrb.* § 80, n. 2. 3 2. 14. 4. 3; 50. 17. 92; C. 4. 22. 1. 4 2. 14. 1. 3; C. 1. 18. 9. 5 4. 3. 38; 12. 6. 32. 3; 45. 1. 22; h. t. 32. 6 34. 5. 3. 7 Inst. 3. 19. 23; D. 45. 1. 137. 1.

another sense. But this involves a forced interpretation of explicit texts[1].

There seems to be no direct information as to the effect, in *stipulatio*, of error as to the identity of the other party, but from certain texts, in the law of theft, it appears that if *A* agreed to lend money to *X*, believing *X* to be *Y*, and stipulated for its return, the whole transaction was a nullity[2].

In *bonae fidei* contracts the rules in case of error are mainly stated in connexion with Sale. At first sight the principles look very different. The guiding rule was that fundamental error avoided the contract, but when we have to determine what was fundamental error, there is nothing for it but to enumerate the forms of error which are declared to vitiate the contract. Error *in negotio* avoided it, *e.g.* where one party thought it a sale, the other a loan[3], a point which could hardly arise in formal contracts. Error as to identity of what was sold avoided the contract, if it was as to the principal thing, not where it affected only an accessory[4]. Error as to quantity or price avoided it if it was to the prejudice of the party under the error, but not otherwise[5]. Error as to the person with whom the contract was made does not seem to be discussed, but it was material in some obvious cases and probably was so treated, *e.g.* where *A* intended to let a farm to *T*, a good farmer, but the person who presented himself was another *T*, not such. No doubt the rule was as in *stricti iuris* contracts[6].

There remains the case commonly called *error in substantia*. The texts do not tell a very consistent story, but the view generally held, which gives on the whole the best account of the texts, is that error as to the qualities did not affect the contract, unless it was of such a kind that the thing differed so widely from what it was supposed to be as to be in a distinct commercial category, *e.g.* where it was supposed to be gold but was in fact copper or plated, vinegar instead of wine, an *ancilla* instead of a man[7]. Another opinion is that the distinction must be such as would have determined for or against the purchase[8]. But apart from the indefiniteness of this it does not suit the texts, for many differences which might well have put off the buyer did not affect the contract if

1 A similar rule is applied in wills where there is no question of the other party's understanding, 28. 5. 9. pr.; 30. 4. But here there is not the same difficulty. In wills, intent rules. 2 Arg. 47. 2. 43. pr. -3; h. t. 67. 4; h. t. 76. Cf. 12. 1. 32, where it was *mutuum* and the mistake of identity prevented the property from passing. 3 44. 7. 3. 1; 12. 1. 18. 1. This must be distinguished from mistake as to the legal effect of the transaction gone through. If a man buys by stipulation and counter-stipulation, is it any defence to shew that he meant it to be *emptio venditio*? See 2. 14. 7. 12 (interp.). 4 18. 1. 9. pr.; h. t. 34. pr. 5 19. 2. 52. 6 See Savigny, *System*, 3, § 136. 12. 1. 32 is in point. 7 18. 1. 9. 2; h. t. 11. 1; h. t. 41. 1. See the account of the authorities in Moyle, *Sale*, 55. 8 See Windscheid, *Lehrb.* § 76, n. 9.

it was actually made, *e.g.* the article was of low carat gold instead of high carat[1]. But the explanation preferred above is only a rationalisation of the texts: it is not formulated by the jurists, and probably was never definitely conceived by them. Further, it was, at best, the rule of later classical law; there was an older view which refused to take mistake of this kind into account at all as affecting the validity of the contract[2]. Again, many texts raise the hypothesis in the form "*si aes pro auro veneat*," and it has been contended[3] that the texts are not dealing with mistake at all, but with representations, express or tacit, made by the vendor, innocently or not, and only lay down the rule that if, *e.g.*, a thing is expressly sold as gold and is copper, there is no sale. On this view misdescription "*in substantia*" prevented a contract from arising, but misdescription on a minor point merely gave a claim for compensation. But there are texts which cannot be dealt with in this way[4]. Two further remarks are needed. Even though the mistake (which has nothing to do with fraud) prevented a contract from arising, another legal relation might exist. Thus, if the thing had been delivered, the ownership might have passed: there would be a *condictio* on the one hand to recover the thing, and on the other for recovery of any price paid[5].

CXLVII. Capacity. Since contract depended on consent the parties must be capable of consent. We have already considered the capacity of *pupilli*, women under *tutela*, lunatics, *prodigi*, Latins and peregrines[6], but something must be said of persons in *potestas*. Males over 14 had full contracting power, but the right under their contract vested at once in the *paterfamilias*, except so far as the contract concerned the *peculium castrense* or *quasi castrense*, as to which they were treated as *patres-familias*[7]. Conversely at praetorian law the *paterfamilias* was liable under their contracts (with the same exception[8]), as in the case of slaves[9]. But they themselves were liable at civil law. Their *castrense peculium*, however, was not liable on contracts which concerned the *paterfamilias*, so that the point became important only when the *filius* became *sui iuris*. But if this was by *emancipatio*, the civil liability was destroyed by the *capitis minutio*, and, in any case, if the son did not succeed to the father, the action might be unjust. The praetor dealt with the matter in an edict which provided that if the son had not succeeded to the

1 18. 1. 10. It may be noted that 18. 1. 14 in f. seems in conflict with the general rule, but it is not clear what *inauratum* means. 2 18. 1. 45; Mackintosh, *Sale* (2), 94, n. 3 Leonhard, *Irrtum*, § 26, as part of a wider thesis. See also Vangerow, *Pandekten* (7), 3. 266. Recent writers find Stoic notions at the bottom of this conception of *error in substantia*. See the review of Leonhard, 2nd Edn, by Henle in *Gött. Gel. Anzeigen*, 1908, 429 sqq. 4 *E.g.* 18. 1. 11; h. t. 14. 5 12. 1. 32; 12. 6. 7; h. t. 12, etc. Error on the part of a representative, *post*, § CLXXXIV. 6 *Ante*, §§ XXXIV, XXXVI, LVI, LXI. 7 49. 17. 4. 1. 8 49. 17. 18. 5. 9 *Post*, § CLXXXIV.

father, then, whether he had become *sui iuris* in such a way as to destroy the action, or otherwise, an action would lie against him, subject to "*beneficium competentiae*," and only "*causa cognita*," a restriction which allowed the refusal of any action, or of an action *in solidum*, if the circumstances called for this[1]. Action might indeed be brought while he was still *alieni iuris*, but *actio iudicati* was deferred[2]. If he was under 14 at the time of the contract, it seems that he cannot have been liable any more than one under *tutela* would, and there is no question of *auctoritas* in this case. In the case of females there has been much controversy. The better view seems to be that the rules were as in the case of males, with however a very different result. They were capable of acquiring by contract, but incapable of binding themselves, so long as the perpetual *tutela* of women lasted[3].

The only other general requirement of contract which need here be considered is that it must be possible. The general rule was that an agreement for an impossibility was void. Such impossibility might be of either of two kinds; physical or legal. Physical impossibility meant inconceivability, what was contrary to the nature of things, a promise to touch the sky with one's finger, a sale of a hippocentaur and so forth[4]. Legal impossibility is exemplified, *e.g.* by promise or sale of a *res sacra* or the *Forum*[5]. The mere fact that it was impossible to the party was immaterial. If *A* undertook to paint a portrait as good as one by Apelles or to sell land which was not his, both were in a sense impossible, but that was no defence; if he did not carry out his contract he would be liable[6].

A thing actually impossible in fact or in law might not be obviously such. In this case the classical law, especially in case of legal impossibility, and only in *bonae fidei* contracts, especially sale, gradually admitted a certain modification of the strict rules. Where one actually free was sold, in good faith, as a slave, the later classical law gave an *actio ex empto*, for which Paul's reason is that it is difficult to tell a slave from a freeman[7]. Where *ager religiosus* was so sold, Ulpian says that there was an *actio in factum*[8]. This implies that there was no valid contract, whereas in the case of the freeman it is clear that the transaction

1 14. 5. 2 sqq. 2 14. 5. 5. 3 See the discussion of this case by Girard, *Manuel*, 475 sq.; *ante*, § XLVIII. 4 G. 3. 97; Inst. 3. 19. 1; D. 45. 1. 35. 5 18. 1. 22; h. t. 4; 45. 1. 83. 5; h. t. 103, etc. 6 45. 1. 137. 5. As to the general notion of impossibility, *ante*, § CIV, and Rabel, *Mél. Gerardin*, 473 sqq. He discusses the history of the word itself (*impossibilis*) which he holds, citing Wölfflin, to be not earlier than about Trajan's time, the idea having been expressed by "not in the nature of things," etc. He points out also that the general formula, "impossibilium nulla obligatio" (50. 17. 185), is not *expressly* applied to *b. f.* contracts. 7 18. 1. 4–5. 8 11. 7. 8. 1. According to Lenel (*E.P.* 221) this is edictal.

was a real sale. In later law, but perhaps not till the time of Justinian, this and other similar cases of legal impossibility were on a level with that of the freeman, and there was an *actio ex empto*[1]. If the buyer was aware of the facts he had of course no remedy. Conversely the fact that the vendor was aware of the facts would not bar the buyer, and it may be inferred from other rules of sale that an innocent vendor had only to return the price, while, if he was fraudulent, consequential losses might come into account[2].

In contracts *stricti iuris* none of these developments occurred. The promisee had no remedy except those resulting from *dolus*, the *actio doli*, or, if he had stipulated against *dolus*, an action on that *stipulatio*, which had the advantage of being perpetual[3]. But this gives rather a false impression. A *stipulatio* for a piece of land which was in fact a *res religiosa* would not usually be by way of gift; other transactions would be connected with it. Thus it might be that other property had been transferred in return for the promise. In such a case this could be recovered by *condictio sine causa*, even though the other party was innocent[4].

Another type of impossibility was that in which a thing sold had ceased to exist at the time of the contract. Here, whether the vendor knew this or not, there was no contract and any price paid could be recovered[5].

There was however nothing to prevent the sale of a future thing, though, in a sense, delivery was impossible. The question therefore arose: was it possible to sell or promise a thing existing, but at present incapable of sale, subject to the condition of its becoming saleable? In the case of a freeman this was forbidden; it is improper to contemplate his falling into slavery[6]. Elsewhere the same principle is applied to *stipulatio* and to *res sacrae*[7], *religiosae* and *publicae* and it may have been general.

So far we have been considering initial impossibility, but a contract might become impossible after it was made (*casus*). A thing sold or promised might cease to exist, or become *religiosa* or be expropriated by the State. This differs from the foregoing cases in that there certainly was a contract. The general rule applied was that if this occurred without the act or fault of the person liable, and before he was "*in mora*" he was released from his liability[8]. But the contract was not necessarily destroyed *ab initio*. Thus in sale, though a vendor was released by accidental destruction of the thing sold, the buyer must still pay the

1 18. 1. 4–6. 2 Arg. 19. 1. 13, etc. But see Girard, *Manuel*, 453 sq. 3 It is an ordinary civil action on *stipulatio*: the *actio doli*, like most praetorian penal actions, was *annua*, *post*, § CCXXXIII. 4 12. 7. 1; h. t. 4. 5 18. 1. 57. pr. 6 18. 1. 34. 2. 7 45. 1. 83. 5. Clearly, there were disputes. As to sale of *hereditas viventis*, *post*, § CLXIX. 8 See Windscheid, *Lehrb.* § 264, n. 5.

price[1]. What the rule was in counter *promissiones* where one party was released "*casu*" is not clear. Some texts suggest that the other party could resist action or reclaim if he had performed, but it is by no means clear that this was the case[2].

CXLVIII. MODALITIES. A valid contract, satisfying the foregoing requirements, might be subject to all sorts of restrictions created by the parties. Of these, two, *i.e.*, *dies* and *condicio*, need some consideration.

Dies (*a quo*) may be either *certus* or *incertus*, *e.g.* "on the kalends of June" or "on the death of *X*," but it must be a futurity which is certain to arise, otherwise it would be a condition. All that we need say of *dies* in this sense is that it was perfectly admissible and that the *obligatio* existed *pendente die*, though not yet enforceable[3]. Thus it could ordinarily be paid at once[4], and if paid before the day there was no *condictio indebiti*[5]. The creditor could in some cases require surety[6]. He could presumably claim in bankruptcy (*bonorum venditio*[7]).

Dies ad quem is on a very different footing. There was an overriding rule, "*ad diem deberi non posse*[8]," which gave rise to difficulties which will best be considered in connexion with stipulation. All that need be said here is that the effect was not to nullify the obligation. The *dies ad quem* was ignored at civil law, but, as this would clearly do injustice, artificial constructions of the transaction were adopted which were not the same in legacy and stipulation[9].

Dies might occur in any of the contracts of classical or later law. It does not appear that it could occur in *nexum*, as it certainly could not in *mancipatio*. It also appears inconsistent with the character of the contract *literis*, though a letter of Cicero's is supposed to indicate its admissibility[10].

Condicio is a more important matter. Of its nature it is enough to say here[11] that a conditional obligation is one subject to an event both future and uncertain. There could be no condition in *nexum* or in the contract *literis*[12]. Justinian speaks of doubts as to the admissibility of condition in *societas*[13], and a text of Gaius seems to shew that there had been similar doubts for the other bilateral consensual contracts[14]. It has been suggested that this doubt may have rested on the view that as the

1 *Post*, § CLXXI. The risk is with him. 2 See 12. 7. 1. 2 and cp. 12. 4. 3. 4. 3 G. 3. 124; Inst. 3. 15. 2; D. 45. 1. 46. pr. 4 46. 3. 70. This is *dies certus*. If it is uncertain, since this was normally "on the death of *X*," it may be that this rule would not apply as there might be obvious reasons for postponement, *e.g.* if *X* was the *paterfamilias*. 5 12. 6. 10. Such a debt could be secured by pledge, 20. 1. 14. 6 5. 1. 41. 7 For other results see Girard, *Manuel*, 480. 8 Inst. 3. 15. 3. 9 45. 1. 16.1; 33. 1. 4; *post*, § CLIV. 10 *Ad Fam.* 7. 23. 11 *Ante*, § CIV. 12 Vat. Fr. 329. The tacit conditions mentioned in 50. 17. 77 might occur in formal transactions, 23. 3. 43. pr.; h. t. 61. 13 C. 4. 37. 6. 14 G. 3. 146.

contract is based purely on consent, there could be no contract at all till the consent was operative. There seem to have been no doubts in the case of the contracts *re*. Thus in case of pledge and *mutuum* (loan for consumption) it might be agreed that the *possessio* or the ownership, as the case might be, was not to pass till a certain event. But it must have been some contract in the meantime, and it is not easy to apply the notion of condition to deposit and *commodatum*[1].

The first point to be considered in relation to conditions is the question of the attitude of the law to a conditional *obligatio* while the *condicio* was outstanding. There were many rules which resulted from the proposition that pending satisfaction there was as yet no complete *obligatio*. Thus money paid in that time could be recovered as *indebitum*, till actual satisfaction[2]. If a thing sold ceased to exist, by accident, *pendente condicione*, there was no contract and the loss fell on the vendor[3]. A contract to sell a man his own property was void, but if it was conditional and the *res* was not his when the condition was satisfied, it was good[4]. A conditional stipulation did not supersede by "*novatio*" a pre-existing one till the condition occurred[5]. If either party ceased to exist leaving no successor, before the condition arose, there was no contract[6]. On the question whether an action, lost because brought while the *obligatio* was yet conditional, could be renewed, the texts are in conflict[7].

But the transaction was not a mere nullity, in the meantime. It could not be renounced (except in cases where a right of renunciation was a tacit or express term in the contract[8]). The capacity to contract must have existed when the agreement was made[9]. There was a "*spes debitum iri*" which passed to and against representatives[10]. A conditional creditor could claim *bonorum separatio*[11].

These conflicting points of view, both that there was and that there

1 The only obvious condition is that a future event is to decide which of certain contracts, *e.g.* deposit, or *commodatum*, or mandate, it is to be, but it will be one of them in the meantime. See 16. 3. 1. 12 sqq. There are however texts which seem to shew a real condition and others in which it is a mere *lex* or term, *e.g.* 16. 3. 1. 22; h. t. 33. The use of the word *condicio* is not decisive. 2 12. 6. 16. pr. 3 18. 6. 8. pr. 4 18. 1. 61. 5 Conversely a conditional *obligatio* is not novated by a new *stipulatio*, till the condition occurs; till then there is no *obligatio* to novate. See *post*, § CXCIV. 6 See Bufnoir, *Conditions*, 271 sqq. 7 20. 1. 13. 5; 21. 1. 43. 9; Inst. 4. 6. 33, etc. See Bufnoir, *op. cit.* 240 sqq. In case of *dies* the action could not be brought again in classical law, G. 4. 53 sqq. Cf. Inst. 4. 6. 33 b; P. 1. 10. 1. *Post*, § CCXXXVII. 8 In mandate and *societas* there is a tacit right of renunciation, *post*, §§ CLXXVIII sq. 9 45. 3. 26. 10 18. 6. 8. pr. 11 42. 6. 4. pr. *Ante*, § CX. The right, where *stipulans* was a son or slave vested in the *pf.* though the condition was not satisfied till he had passed from *potestas*. 45. 1. 78.

was not an *obligatio*, naturally led to conflicts on certain points[1]. Thus the texts disagree on the right to renew an action brought *pendente condicione*[2], and on the right of a conditional creditor to get *missio in possessionem*[3]. If a debtor of a *res* was "*in mora*" when it ceased to exist, his obligation survived[4]. If, however, the obligation was novated, this was said to purge the *mora*, but the texts seem to disagree on the question whether a conditional *novatio* had the same effect[5]. If one who was liable "*pure*" promised the same thing conditionally, there would be *novatio* if the condition occurred, but there was difference of opinion as to the effect of this on the original promise, *e.g.* whether the second *stipulatio* amounted to a pact not to sue on the original one while the condition was outstanding[6], and whether if payment was made in error there was *condictio indebiti*, the old promise being now subject to the contrary condition of the new[7]. But all these questions are the subject of much controversy[8].

If, in an ordinary conditional contract, the condition failed the result was that there was *ab initio* no contract at all. When the condition was satisfied, if no intervening event had discharged the obligation, there was a simple contract. Some texts say that the effect was retrospective[9]. But though this proposition is in harmony with some of the rules[10], it is inconsistent with others[11], and the better view is that it is not really an expression of any actual principle of law[12]. In fact the various decisions do not express any strict principle; they were a compromise—the needs of life were more important than theory.

On the question what amounted to satisfaction of the condition it is to be noted that a condition could not be partly fulfilled—until it was completely fulfilled it was not fulfilled at all[13]—and that in some circumstances a condition was treated as satisfied where in fact it was not. This occurred where the satisfaction was prevented by one interested in the non-fulfilment[14]. The rule seems to have been that this must have

1 The distinction between *debitum* and *obligatio*, Schuld and Haftung, has been utilised to explain these. See *ante*, § CXLIII. 2 *Ante*, p. 420. 3 42. 4. 6. pr.; h. t. 7. 14; h. t. 14. 2. 4 *Post*, § CLXXXVIII. 5 45. 1. 56. 8; 46. 2. 31; 46. 3. 72. Bufnoir, *Conditions*, 250 sqq. 6 2. 14. 30. 2; 12. 6. 60. 1. 7 12. 6. 60. 1. 8 Vassali, *Bull.* 28. 192 sqq., holds that the texts, much interpolated, shew a tendency in the compilers to assimilate the effects of a conditional transaction to those of one *sub die*. 9 18. 6. 8. pr.; 20. 4. 11. 1. 10 *E.g.* a conditional contract by a slave remained with his master at making though he was transferred, while a conditional legacy, where there was no retrospection, passed with him. 45. 1. 78. pr.; 50. 17. 18. But the theory is not necessary to this. 11 It does not make a sale valid where the thing perishes between the making and fulfilment of condition, 18. 6. 8. pr. It does not, on the better view, entitle the creditor to fruits accrued before condition satisfied. *Ib.* Bufnoir, *op. cit.* 308 sqq. 12 Girard, *Manuel*, 486. 13 45. 1. 85. 6. Expression of principle that conditions are indivisible, which has other effects, Bufnoir, *op. cit.* 73 sqq. See for *stipulatio poenae*, Cuq, *Manuel*, 599. 14 50. 17. 161.

been in some way in bad faith, that the prevention must have been with a view to prevention, but where there was a definite act of prevention the intent was *prima facie* presumed[1].

Conditions impossible in law or fact invalidated the whole transaction; they were not struck out, as in wills[2]. The same was true of illegal or immoral conditions, *i.e.* such conditions as gave the transaction an illegal or immoral tendency. Thus a promise to a man if he remained a bachelor (in classical law), or if he committed a crime, was void[3], but there was no objection to a promise by a man if he did wrong[4]. A promise by a man if he did not commit a wrong was void, as also was a promise to a man on the same terms[5].

Where a condition became impossible after the contract was made, as where there was a promise to *X* if he married, or freed, *S*, and *S* died, the condition failed[6], apart from cases of prevention.

The conditions hitherto discussed were suspensive conditions, which are in fact the only real conditions. But there were also what are sometimes called resolutive conditions, *i.e.* conditions the arrival of which was to destroy the obligation. These, as we are told, were not conditions on the contract, but on the discharge[7], or rather *resolutio, i.e., ab initio* destruction. But just as *ad diem deberi non potest*, so, *ad conditionem deberi non potest*. Accordingly, at civil law, such a condition was ignored. A *stipulatio* for 10 "*nisi navis ex Asia venerit*" was an absolute promise but the praetor intervened and allowed an *exceptio*, if action was brought after the ship arrived[8]. If the money was claimed before, as it could be, for it was an unconditional promise, and the ship afterwards arrived, the money could be recovered in any *bonae fidei* transaction[9], and, presumably, on the principles of *condictio sine causa*, in a case of *stipulatio*[10]. But consensual contracts were on a special footing in respect of resolutive conditions. They might be dissolved by mere consent, and therefore by a conditional consent. Such cases were prominent in the law of sale[11], but they could occur in the other consensual contracts. It is important, however, to note a distinction. A hire might be for five years and would end automatically. So also it might be till a certain event happened and this is sometimes called a resolutive condition. But it is not one. A true

1 Arg. 35. 1. 24; 40. 3. 3. 16; h. t. 38. 2 44. 7. 31; 45. 1. 7; h. t. 137. 6; G. 3. 98; Inst. 3. 19. 11. 3 P. 3. 4 b. 2; 45. 1. 123. 4 45. 1. 121. 1; h. t. 19 is only an apparent exception. 5 2. 14. 7. 3; 12. 5. 2; h. t. 3; h. t. 8. The latter is a sort of blackmail. No objection to a promise if a third person does a wrong: it is only insurance. Or if a third person does not, *e.g.* to buy a house if my ship is not captured by pirates. 6 Arg. from the rule in legacy, 35. 1. 94. pr. etc., *ante*, § CXIX. 7 18. 1. 3; 18. 2. 2. pr. 8 44. 7. 44. 2. Similar rule in promise of annuity "*quoad vivam*," but there are difficulties in this case, *post*, § CLIV. 9 41. 3. 19. 10 12. 7. 1. 2. 11 *Post*, § CLXXIII.

"resolutive condition" dissolved the contract *ab initio*, which was not the case here[1].

CXLIX. Contract, being essentially a relation between certain parties, could in strictness produce no effect for or against those not parties to it. Hence arose the rule that a man could not contract to benefit or bind a third party. Detailed rules based on this notion will be considered under the head of stipulation[2], but some remarks may be made here on the general principle. There was a maxim: "*inelegans visum est ab heredis persona incipere obligationem*[3]." This principle would exclude promises to bind or benefit the *heres* alone, and all promises "*post mortem*" of either party. This does not seem to have been an application of the foregoing principle. The rights and obligations of a *heres* were inherited and there was a logical difficulty in regarding him as inheriting those which could never on their terms have attached to the deceased. This way of looking at the matter is confirmed by the above passage from Gaius who rests the rule on an *inelegantia*, and not on the rule against contracts for third persons, which he discusses separately[4]. So too Ulpian distinguishes the *heres* from other third persons[5], and Justinian, in the enactment in which he abolishes this rule, does not speak of that about third parties, but describes the rules he is abolishing as independent *regulae*[6].

However this may be, there is no doubt of the existence of the more general rule. The acquisition by the *paterfamilias* of the rights under contracts by sons or slaves was not a real exception[7]. How far classical law did admit of exceptions is a debated question. In dealing with the case in which a contract was definitely made in favour of a third person[8] we have first to consider how far if at all it gave a right of action to the third party. The texts giving such a right have been studied by Eisele, who shews that in nearly all cases the right of action is due to interpolation[9]. But there were other cases. Where a *donatio* was made on the terms that after a time the thing was to be handed to a third party, Diocletian gave the third party an *actio utilis*[10], but it is shewn by Eisele that this was *condictio* for recovery, not an action on the contract; it was in effect a case of *cessio legis*, implied transfer of action[11]. Again if an *actor municipii* or a *curator* or a *tutor* made a *constitutum*[12] for payment

1 For examples of actual resolutive conditions, *post*, § CLXXIII. 2 *Post*, § CLIV. 3 G. 3. 100. 4 G. 3. 103. 5 45. 1. 38. 1. 6 C. 4. 11. 1. 7 *Post* § CLXXXIV. 8 As to the effect *in rem* of *pacta de non petendo*, *post*, § CXCV. 9 Eisele, *Beiträge*, 76 sqq. Deposit or *commodatum* by non-owner, on terms that it is to be returned to owner. Owner has *utilis actio*, C. 3. 42. 8. 1; *dos* given on terms that it is to go to grandchildren: they have *utilis actio*, C. 5. 14. 7; sale by pledgee on terms that debtor is still to have a right to redeem, debtor has *actio utilis ex vendito*, 13. 7. 13. pr. 10 Vat. Fr 286; C. 8. 54. 3. 11 *Post*, § CLXXXIX. 12 *Post*, § CLXXXII.

to the *municipium* or ward, these could sue, *utilitatis gratia*[1]. This is certainly an exception, explicable as such, says Eisele, by the fact that in procedure these particular representatives had a closer relation to their principal than other procurators, so that exceptional treatment is not surprising[2].

There were a few other cases in which a third party had an action on the principle of *cessio legis*, to be considered later[3], and a further case in which a *mandator* had an action on the contract of his agent[4]. On the other hand a third party might be liable to action under the *actiones institoria* and *exercitoria*[5], and a *mandator* might be sued[6]. There were also some exceptional cases under the law of partnership[7].

Apart from these not very numerous exceptions, the rule that a contract did not bind or entitle a third party still existed in Justinian's law[8].

This question suggests another. If *A* stipulated with *B* that *B* should give money to *X* or, conversely, that *X* should do something, it is clear that *X* could neither sue nor be sued. But could *A* sue if the thing was not done? In strictness he could not. In the first case *A* had no *interesse*[9]. In the second, *B* had not promised to do anything. In this case the difficulty was avoided by making a penal stipulation: *B* promised to pay a penalty to *A* if the thing was not done[10]. But the classical law went further than this; it was ready to construe a promise that *X* should do something as a promise that *B* would procure that he did, though, so far as can be seen, only in a narrow range of cases, connected with litigation[11]. In the other case, though the render was actually to be to *X* it might well be that *A* had an interest in it, and this would entitle him to sue, *e.g.* a *contutor* stipulating with his colleague, *rem salvam pupillo fore* (he had an *interesse*, as he would be liable), and a *stipulatio* for payment to the stipulator's *procurator*, or to his creditor[12]. One text adds several cases in which *A*, being under a contractual obligation to *X*, contracted with *B* that *B* should do the service to *X*[13], and shews that

1 13. 5. 5. 9. 2 Eisele remarks that it is an exception not to the present rule but to that of nonrepresentation, but that rule is merely an application of the one under discussion. A man cannot contract to bind or benefit another, even though this was the intent of all parties. 3 *Post*, § CLXXXIX. 4 *Post*, § CLXXXIV. The case in which money of a principal is lent by an agent and the principal has a *condictio* (*e.g.* 26. 9. 2) does not require this principle at all. The liability is created by the transfer of property, *post*, §§ CLXII, CLXXXVII. 5 *Post*, § CLXXXIV. 6 *Ib.* 7 *Post*, § CLXXVII. 8 45. 1. 83; 50. 17. 73. 4; Inst. 3. 19. 3 and 4. 9 C. 4. 50. 6. 10 Inst. 3. 19. 3, which points out that an express undertaking to see that *X* did it was enough to give *A* an action. 11 This is clearly the proper interpretation of the *stipulatio rem ratam habiturum*, *post*, § CCXXXIX. See also 45. 1. 81. pr.; h. t. 83. pr. Girard (*Manuel*, 463) holds that the same construction was freely applied in *b. f.* contracts. But there are no texts. 12 Inst. 3. 19. 20. 13 45. 1. 38. 21.

the necessary *interesse* existed wherever *A* was under a legal liability, and probably wherever there was a pecuniary interest. It shews also that here there was no difference between *stricti iuris* and *bonae fidei* contracts. Whether an *interesse affectionis* was ever enough, outside slave law[1], is doubtful[2].

There were agreements actionable in later, and even in classical, law, which were never called contracts[3], exceptions to a principle which existed throughout the history of the law, *i.e.* that no action lay on mere pacts as such. This principle is expressed in some well-known texts: "*Sed cum nulla subest causa propter* (or *praeter*) *conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit sed parit exceptionem.*" "*Ut debitor vel servus domino vel dominus servo intelligatur ex causa civili computandum est*[4]." These texts indicate the need of a "*causa,*" over and above the mere fact of agreement. But the word "*causa*" is a very unreliable instrument. Even where it is used to signify a basis of right it does not always mean the same thing. The *iusta causa traditionis* is not quite the same as the *iusta causa usucapionis*[5]. In the words of Sacramentum, "*secundum suam causam*[6]," the word may mean all the facts of title, the conveyance as well as the facts leading up to it. It also means many things which have little to do with a basis of right. It means a lawsuit[7], the accessories of a thing recovered by action[8], cause, indeed the lexicons give a bewildering number of meanings and shades of meaning. In the present connexion it is taken to mean a pre-existing fact giving validity, with the resulting rule that an action arose on agreement coupled with *causa.*

The *causa* was some characteristic of the transaction. Usually it was the form employed. But, in the consensual contracts, there is the difficulty that they had no necessary form; there was mere *conventio,* and the main text expressly declares this to be insufficient. Maine surmounts the difficulty by finding the *causa* not in the individual transaction, but in the frequency or importance of such transactions as a class[9]. In the contracts "*re,*" the "*causa*" was delivery. But if that was a sufficient *causa,* any agreement with delivery ought to have been binding. But gratuitous delivery of an article for a temporary purpose would not make a contract unless it was within one of the recognised cases. No doubt it would frequently come within the conception of mandate[10], but

1 See Buckland, *Slavery,* 69 sqq. No general inference can be drawn from these cases. 2 In 21. 2. 71 pecuniary interest is not wholly absent. 3 *Post,* § CLXXXII. 4 2. 14. 7. 4; 15. 1. 49. 2. 5 *Ante,* §§ LXXXIII, LXXXVIII. If putative *causa* had sufficed in general in *usucapio,* they would have been much the same. 6 But, as to these words, see *post,* § CCVIII. 7 1. 18. 10. 8 10. 2. 44. pr. 9 *Ancient Law,* 333. 10 *E.g.* 16. 3. 1. 11 sqq.; 47. 2. 14. 17.

for that purpose delivery was indifferent[1]. The whole notion gives undue importance to the word *causa* in the texts quoted. What Ulpian means is that there can be no agreement on a mere pact as such—it must be shewn that the agreement is one of those which the law makes actionable. He is expressing a great difference between the Roman conception and that of our law. To the Romans an agreement was not actionable unless there was some reason why it should be. To modern English law an agreement is actionable unless there is some reason why it should not be. "*Causa*" thus means actionability and not something else independent of actionability which produces that characteristic. *Pacta legitima*[2] had no *causa* except the fact that enactments made them actionable.

CL. Before entering on the Contracts, as classified by Gaius and Justinian, something must be said of two cases which do not appear in the classification.

NEXUM. This highly controversial matter will be briefly dealt with as the transaction was obsolete in classical law[3]. So little is really known of it that it has been doubted whether there ever was such an institution. No text expressly tells us that there was a contract called *nexum*, but we have so little juristic literature of the republic that that is not surprising. But we have texts which speak of *nexum* as creative of obligation, of *nexum aes* and *nexi liberatio*[4], and many literary texts dealing with debtors who were *nexi*[5], so that it may be taken as certain that there was such a transaction, *per aes et libram*, which in some way reduced debtors to a sort of slavery, that great hardships resulted and that a *l. Poetelia*[6], of somewhat before B.C. 300, practically ended this state of things, presumably by requiring an actual judgment before seizure. The effect was not to abolish *nexum*, but, by depriving it of its chief value, the power of seizure (executive force), to leave it with no advantages to counterbalance its clumsiness, so that it went out of use.

The problem of historians has been, how to formulate this transaction. The view propounded by Niebuhr[7] was that the transaction was essentially self *mancipatio*, to be operative only if the due payment of money lent was not made. But self mancipation is not known to have

1 Mandate is consensual, *post*, § CLXXX. If delivery was a sufficient *causa*, *permutatio* (*post*, § CLXXXI) should have been a civil contract long before it was. 2 *Post*, § CLXXXIII. 3 See, for a full discussion of the texts and the literature, De Zulueta, *L.Q.R.* 29. 137 sqq.; Girard, *Manuel*, 487 sqq. 4 The chief juristic texts are definitions by Manilius and Q. M. Scaevola, quoted by Varro, *LL.* 7. 105, Cincius and Gallus Aelius, quoted by Festus s.vv. *Nexum*, *Nuncupata pecunia*; G. 3. 173, 174 of inferential value. 5 For reff. to the passages in Dion. Hal. see De Zulueta, *op. cit.* 138, n. 2. For those in Livy, Roby, *R.P.L.* 2 297 sqq. 6 Varro, *LL.* 7. 105; Cicero, *de Rep.* 2. 34. 59. 7 *Röm. Gesch.* 1. 322 (ed. 1853).

been an institution of Roman Law, though its analogue is found in most early systems[1], and conditional *mancipatio* is at least in historic times an impossibility. Another view, propounded by Huschke[2], speedily became dominant, and was to some extent confirmed by Studemund's new readings in Gaius. According to him *nexum* was a contract, made with copper and scales, with a *nuncupatio* declaring the debtor "*damnas*" if he failed to fulfil his obligation. This *damnatio*, in early law, whether in a statute or in a will or in a contract, entitled the injured party to seize the debtor by *manus iniectio*, without judgment, and carry him into confinement. There is no direct evidence of its application to anything but debts of *certa pecunia*.

This hypothesis involves a good many assumptions. There is no direct evidence for "executive" force in *nexum*, and Huschke's view that this is due to its "publicistic" character, as carried out before five witnesses representing the Roman people is of little weight, as involving an unproved assumption[3]. No text speaks of the seizure under *nexum* as based on *addictio* and this was essential to *manus iniectio* in historic times[4]. We are not told that the *l. Poetelia* abolished the executive force of *nexum*, but only that it released *nexi*, and *nexum* went out of use. But there is no doubt that *nexi* were seized and imprisoned, and those who reject Huschke's views are driven to other explanations. Thus Mitteis holds[5], on the evidence of texts which suggest two stages, that there was a loan *per aes et libram* which would lead to a judgment, and the debtor subsequently mancipated himself to the creditor to avoid the terrible consequences of an unsatisfied judgment. But this twofold proceeding *per aes et libram* hardly helps and is neither necessary on the texts nor consistent with all of them; accordingly Lenel rejects it[6], holding that the loan was not *per aes et libram*, and so gets rid of one of the transactions *per aes et libram*. But as in fact texts speak of *aes nexum* and of the money as due *per aes et libram*, Mommsen[7] holds that the process *per aes et libram* was part of the loan transaction but was a *mancipatio* to operate only if the loan was not paid. But the difficulty about self mancipation remains, and in addition there is no more direct evidence for this view than for Huschke's, so that his doctrine cannot be said to be overthrown[8].

CLI. *Fiducia*. This was essentially an agreement appended to a

1 *Ante*, § XLVIII. 2 *Das Nexum*. 3 *Ante*, § LXXXV. But it is not necessary to his theory. 4 *Post*, § CCXI. 5 *Z.S.S.* 22. 96 sqq.; 25. 282; *Rom. Pr.*, 1. 136 sqq. 6 *Z.S.S.* 23. 84 sqq. 7 *Z.S.S.* 23. 348 sqq. 8 For a number of other opinions, mostly involving small variations, see De Zulueta, *op. cit.* His own view is that Huschke's doctrine, as slightly modified by more recent writers, while not proved, is not disproved, and is not open to the objections to all the doctrines based on self mancipation.

conveyance of property, involving a direction or trust as to what was to be done with it. The recorded cases are in connexion with *mancipatio*, but we are told that it might be used with *cessio in iure*[1]. On the other hand there is no evidence that it could be used with *traditio*.

The *fiducia* was not an integral part of the conveyance, but an agreement made separately, though at the same time. It had no necessary form, and the instances which we have[2] shew that it might contain a number of provisions. Its main purpose is the regulation of the ultimate destination of the property, but it might also contain subsidiary provisions, for instance, where it was by way of security, restrictions on the right of sale, provisions as to what was to be done with any surplus in the price, and so forth.

Fiducia was extant and important in the time of Gaius and long after[3]. The question therefore arises why it did not figure in the list of contracts. It was in fact not called a contract. It may be called a *pactum*[4], but it differed from the actionable pacts known in the time of Gaius in that it had an *actio in ius*, a *bonae fidei iudicium*, so that it was not merely praetorian. The reason for its non-appearance in the lists of contracts may be its parasitic character; it could not occur as an independent transaction, but only as an appendage to a conveyance.

Fiducia had many applications. In the law of persons it occurred in *coemptio fiduciae causa*, in *adoptio* and *emancipatio*, and in *tutela fiduciaria*[5]. Its applications in the law of things were still more numerous. Gaius divides them into two classes—*fiducia cum creditore* and *fiducia cum amico*[6]. The first, much the better known, is mortgage, and its rules will best be dealt with in treating the law of "real security" as a whole[7]. Here it is enough to say that it was in full operation till long after the close of the classical age and that a number of texts which, in the Digest, deal with *pignus* have been shewn to have dealt originally with *fiducia*[8].

Of *fiducia cum amico*, before the introduction of the *bonae fidei* contracts, deposit and, no doubt, *commodatum* and many forms of mandate, were cases. So too it was common to transfer slaves with a *fiducia* for manumission in order to evade restrictive legislation, till this evasion

1 G. 2. 59. 2 Girard, *Textes*, 819 sqq. 3 C. Th. 15. 14. 9. 4 The expression *pactum fiduciae* does not seem to be in the sources, but "*fiduciam contrahere*," "*fiducia contracta*," etc. are (G. 2. 60; Inst. 3. 2. 8 etc.). But as to the verb "*contrahere*" see *ante*, § CXLIII. 5 *Ante*, §§ XLIV, XLVII, LII. 6 G. 2. 60. 7 *Post*, § CLXVI. 8 This is rather puzzling, since there must have been, in the time of the classical lawyers, plenty of literature on *pignus*. Either the compilers altered the law of *pignus* by applying to it the law of another and obsolete institution, or the rules of *fiducia cum creditore* had in great measure been applied to *pignus*: the latter seems more probable. Buckland, *N.R.H.*, 1917, 45 sqq.

was prohibited[1], and also in order to give the donee of the slave the position of patron. It was also used for *donatio mortis causa*, with a resolutive condition instead of the more usual suspensive condition[2], and other applications are suggested. As to most of these cases it seems to have been out of use by the time of Gaius, but it existed for gifts "*ut manumittatur*" till the time of M. Aurelius[3], and apparently later[4]. And in *donatio mortis causa* it lasted at any rate till the time of Papinian[5].

The rights under *fiducia*[6] were not always the same. The cases under the law of persons had to do with the destiny of free persons or with liberty. It is plain that the *actio fiduciae*, a personal action for damages, would not serve here. Damages were useless if a man to whom a son had been mancipated in the process of *emancipatio* refused to manumit him. There is reason to think that the *actio fiduciae* had no application to such cases, but that fulfilment was enforced by the direct intervention of the praetor, using the power of *coercitio* possessed by all magistrates[7]. In the case of gift "*ut manumittatur*," no enforcement was needed after M. Aurelius provided that the freedom should take effect automatically at the appointed time[8]. In the case of noxal surrender of a son we are told that the praetor would compel the release of the man when he had worked out the damages, and that there was no *actio fiduciae* here, but it is not clear that there was any *fiducia*, though it is sometimes assumed[9].

In *fiducia cum creditore* or *amico* in the *ius rerum*, the remedy was the *actio fiduciae* with its *actio contraria*[10]. The *formula* is not recorded as a whole, but has been reconstructed by Lenel. It was archaic in form, which has led to the suggestion that the action existed in the *legis actio* system[11]. But Lenel[12] finds clauses which seem to involve a *formula in factum*, as an alternative and probably a forerunner[13] of the *formula in ius* recorded in the texts, a *bonae fidei iudicium*, condemnation involving *infamia*[14].

In the various cases of *fiducia cum amico*, it was reasonable that the principal should have a right of withdrawal. We are told of this in some cases[15], and it no doubt existed in all. The effect of exercise of this right would be, on the one hand, to make execution of the *fiducia* an actionable

1 See, *e.g.*, 40. 9. 7. 1. **2** 39. 6. 42. See Jacquelin, *De la Fiducie*, 359. **3** There is no *fiducia* in the case actually dealt with in the enactment. See *ante*, § XXXI. **4** Vat. Fr. 334 a. **5** 39. 6. 42, which was originally a case of *mancipatio cum fiducia*. **6** As to good faith in *usureceptio*, *ante*, § LXXXVII. **7** Jacquelin, *op. cit.* 103 sqq.; G. 1. 137 a, "*cogere*." **8** *Ante*, § XXXI. **9** Coll. 2. 3. 1. See Jacquelin, *op. cit.* 237. **10** P. 2. 13. See *post*, § CCXXXIV. **11** Pernice, *Labeo*, 3. 1. 122, n. 2. **12** *E.P.* 282 sqq. **13** Girard (*Manuel*, 534) observes that this *actio in factum* would negative the existence of a *legis actio*. But opinions differ widely. See Girard, *loc. cit.*; Karlowa, *R.Rg.* 2. 560 sqq. **14** G. 4. 182. The edict contained a clause making "*fraus*" of the *paterf.* material, where the *fiducia* was with a subordinate member of the family. See Lenel, *E.P.* 284 sqq. **15** 24. 1. 49, written of *fiducia*.

wrong, so far as this involved more than return, and on the other, to enable the principal to recover the property. The remedy would be a *condictio ob rem dati*, which appears in the texts as *condictio ex poenitentia*, but this name is post-classical, and is introduced to the texts by the compilers[1]. In the case of gift "*ut manumittatur*," the revocability continued after *fiducia* had ceased to be used, and was then applied also where, so far as can be seen, *fiducia* had never been applied, *i.e.* where the transaction was a genuine sale, but there was to be manumission after a certain term of service[2]. There does not seem to have been any right of revocation here in classical law[3]. So too the texts give a right of withdrawal where a man had given an owner money to free his slave, with a *condictio ex poenitentia*[4]. It is no doubt in connexion with these post-classical extensions that the name *condictio ex poenitentia* was introduced.

CLII. CLASSIFICATION OF CONTRACTS. Justinian, following Gaius, classifies contracts as of four types: *re*, *verbis*, *literis* and *consensu*. The characteristics of each class will be considered in discussing the different classes, but one or two remarks may be made here. Gaius is our earliest authority for the classification[5] and though he may have invented it, it is more generally thought, and more probable, that he merely adopted a traditional classification[6]. The question remains, on what this traditional order, which does not look very rational, actually rests. Of the many views which are held[7] the most probable is that it rests on the edict. In the edictal scheme contract was placed under the rubric, "*de rebus creditis*." *Mutuum*, loan for consumption, was the typical *creditum* and its remedies therefore came first. It was immediately followed in the Edict by the other real contracts, as *stipulatio* for a *certum* and the contract *literis* need no separate treatment from a procedural point of view, their remedy being the same as that for *mutuum*. The *actio ex stipulatu*, which was the remedy for the promise of an *incertum*, is in another part of the Edict altogether. But in a discussion of the law of contract the verbal and literal contracts must be dealt with, and they come next as being the oldest. Last come the consensual[8].

The classification, though serviceable enough for the purpose in view,

1 *E.g.* 12. 4. 3. 3. See Gradenwitz, *Interpolationen*, 146 sqq. The pact does not seem usually to have contained an express provision for return, at least in case of *f. cum creditore*, see *post*, § CLXVI. 2 *E.g.* 40. 8. 3. 3 See Buckland, *Slavery*, 633; Lotmar, *Marc Aurels Erlass*, 320 sqq. 4 12. 4. 3. 2, 3. 5 G. 3. 89. 6 It is widely held that his *commentarii* are largely built up of existing materials. For an extremely iconoclastic view, see Kniep, *Der Rechtsgelehrter Gaius*, 30 sqq. 7 It has been said that it is chronological, *mutuum* attracting the other real contracts, that the order is that of relative simplicity, that it proceeds from those with the most obvious external sign, that it is merely arbitrary, etc. 8 Accarias, *Précis*, 2. 19; Moyle, *Instt. Just.* ad 3. 13. 2.

is not very scientific. All the verbal contracts and the literal contract are forms: the real and consensual are not forms, but groups of informal bargain which the law would enforce. This suggests a division into formal and informal[1], but this would need subdivision, for *stipulatio* in classical law is a form or mould into which any transaction could be run, while the other formal contracts are, each, a form for one particular transaction. A classification which would express more clearly the actual distinctions would be into *stricti iuris* and *bonae fidei*, or what is the same thing, unilateral and bilateral, contracts, the latter being either perfectly bilateral, sale, hire and *societas*, or imperfectly, *pignus*, deposit, *commodatum* and mandate. But this cuts across the method of the Institutes and it seems better to follow that, with the exception of taking real contracts last but one, with the effect of bringing together the formal contracts[2].

The Verbal Contracts. Of these the most important is:

Stipulatio. This was a contract made by question and answer, originally in Latin, and, probably, only in the form "*Spondesne?*" "*Spondeo,*" afterwards marked off as the form confined, in private law, to *cives*[3]. The source of the contract has been variously explained; perhaps the most probable view is that its first application was in procedural undertakings given by litigants[4]. In any case it seems to have applied first to promises of *certa pecunia*, then, before the *l. Calpurnia*[5], to *certa res*, then to *incerta*, and finally to acts (*stipulatio faciendi*), but all this was complete before the time of the classical lawyers[6]. It had formerly been the practice to arrange for *facienda* by *stipulatio* for a penalty if the act were not done, a method which left many traces in the law[7], and indeed continued in use for some purposes throughout the Empire[8].

The parties must be present together[9], and as we have seen[10], the proceeding must be continuous. The law required no witnesses, though

1 Girard, *Manuel*, 487. 2 It must be noted that this criticism is relevant only for the classical law. There was a time when *stipulatio* was a form for only one type of transaction, like the contract *literis*, indeed narrower still, for it seems to have been first applied only to promises of security in litigation (see n. 4). *Dotis dictio* and *iurata promissio liberti* have this character still in the law of the Empire. Again the imperfectly bilateral contracts do not seem to have been bilateral at all at first: the *actio contraria* is a secondary development. 3 G. 3. 93. 4 Mitteis, *Aus Röm. und Bürg. Recht*, 107. See, however, Collinet, *Mél. Gerardin*, 75, who suggests an origin in the promises of the statutory penalties under the XII Tables For a variety of suggested derivations of the word *stipulatio*, and theories of the origin of the contract into the service of which these etymologies have been pressed, Costa, *Storia d. dir. Rom. priv.* 339, n. 5. 5 *Post*, § CCX. 6 It is held by Girard (*Manuel*, 500) that *stipulatio faciendi* is as old as Cato (d. 149 B.C.). He refers to *R.R.* 144. 2 and 146. 2. 7 *E.g.* pact and *stipulatio* in servitudes, *ante*, § XCIV; *receptum arbitri*, *post*, § CLXXXIII. 8 See Cuq, *Manuel*, 598. 9 45. 1. 1. pr. 10 *Ante*, § CXLV.

proof would be difficult without them, unless, as came to be the usual course, a memorandum of the transaction was drawn up[1].

Most of the rules underwent relaxation. Long before the Empire other words might be used, "*Dabisne?*" "*Promittisne?*" and so forth[2]. In classical law any language might be used, and in late classical law even different languages, all that was needed being substantial agreement between question and answer[3]. But these must so agree. A conditional acceptance, where there was no condition in the *stipulatio*, was void, as was one which introduced fresh terms. Ulpian appears to add that if the *stipulator* at once agreed to these fresh terms this was a valid new stipulation, but it is generally held that this is due to the compilers[4]. If there was substantial agreement the fact that the answer contained useless further verbiage was immaterial—*supervacua non nocent*[5].

The rule that question and answer must substantially agree was subject to one peculiar exception. Gaius tells us, and Justinian repeats the statement, that where the *stipulatio* was for ten and the promise for five or *vice versa*, there was no contract for want of identity[6]. But in the Digest we are told that in such a case the contract was good for the smaller sum common to both. The view of Gaius rests on the notion that five and ten are two different things. The other view treats them not as things, but as quantities. Even so it is doubtful whether this view is due to Ulpian or to the compilers[7]. The matter is complicated by the fact that in an analogous case, that of a *stipulatio* for two things and a promise of one, or *vice versa*, the contract was good for that one, the words being construed as two stipulations of which one was completed[8]. But where the *stipulatio* was for one of two things, *A* or *B*, and was accepted for one of them, the same construction was not adopted[9], though the choice would be with the promisor[10]. But a *stipulatio* for quantities, ten or twenty, accepted for ten, was valid on the principle that they were quantities and the greater included the less[11].

It was usual to express the *stipulatio* in a written note or *cautio*. By

1 The absence of any legal requirement of writing is in striking contrast with the rules of Attic law which required writing in nearly all cases of contract, etc., evidence perhaps of a different standard of commercial morality. See Collinet, *Études Hist. du Dr. de Justinien*, 61. 2 G. 3. 92; P. 2. 3. 1. See for illustrations from Plautus, Costa, *op. cit.* 340, n. 1. 3 G. 3. 93; D. 45. 1. 1 *passim*. Much of the relaxation seems to have been known to Sabinus. Ulpian says that "*Dabisne?*" "*Quidni?*" is good, but a mere nod will not serve, as it must be verbal, 45. 1. 1. 2. 4 45. 1. 1. 3. 5 "*Dabisne?*" "*Arma virumque cano, dabo,*" was good, says Ulpian, 45. 1. 65. pr. 6 G. 3. 102; Inst. 3. 19. 5. 7 45. 1. 1. 4 (interpolated). 8 45. 1. 1. 5; h. t. 83. 4; cf. h. t. 29. The texts appear to be genuine. 9 45. 1. 83. 2. 10 *Post*, § CXCIII. It is, however, not the same thing. On the *stipulatio* the promisee, if one were extinct, would be entitled to the other, which would not be the case under the promise. 11 45. 1. 83. 3. See, on these questions, Riccobono, *Z.S.S.* 35. 243 sqq.

a rescript of Severus it was provided that if the *cautio* alleged a *stipulatio*, even though it was not itself in the form of question and answer, and even though it was defective in that it spoke of the *promissor* as having promised but did not say that the *stipulator* had stipulated, an actual *stipulatio* was to be presumed[1], and Paul tells us that, at least where there was a complete allegation of a *stipulatio*, this presumption was conclusive[2]. Ulpian appears to modify this, by saying that on such facts a party might still prove that a mere pact was meant, *i.e.* it was a *presumptio iuris*, not *iuris et de iure*[3], but this is probably due to Justinian. Even if it is classical the rule remains that no further evidence could be required that the form had been gone through. In A.D. 472 a rescript of Leo provided that all stipulations, even though not in solemn words but in any words expressing the intent, should have full force[4]. (The enactment contains the words "*legibus cognitae*" the meaning of which is not very clear.) This may be, like many rescripts[5], merely an enunciation of existing law, but it is more generally held that it suppressed the need of question and answer or express allegation of question and answer altogether, all that was now needed being some clear evidence of verbal assent[6]. But this is a somewhat extreme interpretation of the rescript and the citation of it in the Institutes[7]: the title in the Digest contains no interpolations expressing this doctrine[8].

These changes, whatever their extent, did not affect the rule that the parties must be present together. Justinian however modified this by a provision that where the *stipulatio* was embodied in a *cautio* alleging presence, this was to be presumed, and could be rebutted only by clear proof that one or the other party was absent, for the whole of the day on which the *cautio* was made, from the place from which it was dated[9].

CLIII. *Stipulatio* was a unilateral contract, the questioner, *stipulator*, being in no way bound, the *promissor* acquiring no right of action. Like all other unilateral contracts it was what Justinian calls *stricti iuris*, *i.e.* it gave rise to a *strictum iudicium*. In any case of a promise of a *certum* this was a *condictio*, but where it was a promise of an *incertum* or an act[10], the remedy was an *actio ex stipulatu*, which differed from a *condictio*, in that it stated, in the *intentio*, the basis of the liability, as

1 C. 8. 37. 1. The case suggests that the courts were already in the habit of accepting a complete *cautio* as sufficient evidence. 2 P. 5. 7. 2. 3 2. 14. 7. 12. As to interpolation, see Berlin stereotype edition. 4 C. 8. 37. 10. 5 *Ante*, § VIII. 6 Girard, *Manuel*, 498. 7 Inst. 3. 15. 1. 8 As to the view that as a result of these changes *stipulatio* becomes a written contract, see Siegel, *Archiv f. civ. Pr.* 113. 6. 9 C. 8. 37. 14. 2. 10 As to the transmissibility of these, *ante*, § CXLIII.

condictio did not[1]. There was, in later classical law, an action called, but perhaps only later so called, *condictio incerti*[2], but it was not applied to this case, probably because of the existence of this special remedy, introduced when *stipulationes* for *incerta* were first recognised.

Stipulations may be classified as divisible or indivisible, a distinction which applies to all obligations and will arise for discussion when we are dealing with performance of obligation[3].

They are also classifiable as conventional and procedural[4]. The former are the ordinary contracts with which we are here concerned[5]. The latter are those undertakings or securities which could be required in litigation, and in some other cases, *e.g. tutela* and legacy, on application to the Court. They are described as Praetorian, Aedilician or Judicial, according to the authority under which they are taken, and *Communes* where, as in some cases, they might be ordered by a magistrate or a *iudex*. As they belong essentially to other branches of the law, mainly to procedure, we need not consider them here. All that need be said is that in some cases a mere *stipulatio* of the party sufficed, while in others there must be *satisdatio*, security of some type. Like the English "contract of record" they were scarcely contracts at all, though they assumed that form, for in many cases they could be compelled, and we are told that praetorian *stipulationes* "*ex mente praetoris descendunt*[6]," so that they could not be varied at the will of the parties.

The general rules as to capacity have already been stated[7], but, as there were rules peculiar to *stipulatio*, the rules of capacity for this contract must be stated though this involves some repetition.

1. Since the contract was essentially verbal no one who was deaf or dumb could take part in it, nor therefore could an *infans*. The rule remained in Justinian's law[8], notwithstanding the validity given to *cautiones*. It could of course be evaded by utilising a slave.

2. Only *cives* could use the form "*Spondesne?*" "*Spondeo*[9]."

3. A *stipulatio*, or other contract, between *paterfamilias* and *filius*, or between *dominus* and slave, gave no action, though it set up a *naturalis obligatio*[10].

4. *Furiosi* could take part in no contract, except in a lucid interval[11]. We are not told if this applied to imbeciles, and we have no direct information as to the effect of drunkenness. There is a text suggesting

1 *Post*, § CCXXI. 2 *Post*, § CCXXX. 3 *Post*, § CXCIII. 4 45. 1. 5. pr.; Inst. 3. 18. 5 For the special rules of *sponsalia*, *ante*, § XLI. 6 45. 1. 52. pr. 7 *Ante*, § CXLVII. 8 G. 3. 105; Inst. 3. 19. 7. 9 G. 3. 93. 10 G. 3. 104; Inst. 3. 19. 6; *post*, § CLXXXIX. 11 G. 3. 106; Inst. 3. 19. 8; C. 4. 38. 2.

that one who made a promise in a fit of extreme anger was not bound if he withdrew it on cooling[1].

5. A *pupillus* could contract so as to benefit, but not, without *auctoritas*, so as to bind himself, subject however to liability for enrichment and other protections of the other party, already mentioned[2].

6. Persons *in mancipio* were incapable of binding themselves in the time of Gaius[3], but there was presumably a *naturalis obligatio*.

7. A slave's *stipulatio* enured to his *dominus* or another having rights in him according to rules already considered[4]: he himself acquired no rights. *Promissio* by a slave is rather rare: we are told that at civil law it was void, but there was praetorian *actio de peculio* on it[5], and it created a *naturalis obligatio* which survived manumission[6]. As it had not the force of a verbal contract, Gaius doubts whether it could be guaranteed by *sponsio* or *fidepromissio*[7]. It is to be noted that where a stipulation was made by a slave (or a son) the *paterfamilias* did not always acquire the same right as if he himself had stipulated. He got what was stipulated for, but no more. Thus if a slave stipulated for a right of way, the *paterfamilias* acquired a right of way, but if the slave stipulated that he be allowed to cross a certain field, what the master acquired was permission for the slave to cross the field, not for himself to do so. It was literally construed. This is rather obscurely expressed in the Institutes in the words "*cum factum in stipulatione continebitur, persona stipulantis continetur*[8]."

In the case of a slave there was a still further difficulty. A slave could stipulate using his master's name or his own, or a fellow-slave's, or none at all[9]. If however he used his own name, stipulated, that is, "*sibi*," and it was for a *ius* of any kind, the *stipulatio* would be void, as a slave could not have a right. The later jurists evaded this result by understanding the word expressive of a right in a *de facto* sense[10], but this was not possible in all cases, as where a slave stipulated for a *cessio in iure* to him, and where it was possible it gave a result different from what was intended. The difficulty could be avoided by not naming the slave's own personality in the *stipulatio*.

As the slave's capacity was derivative he could acquire by *stipulatio* only for a master who was himself *capax*, not indeed to contract, since he

1 50. 17. 48. But the text is not on contract. Horace's "*ira furor brevis est*" is hardly conclusive. 2 *Ante*, § LVI; as to *naturalis obligatio*, *post*, § CLXXXIX. As to *filii* and *filiae familias*, *ante*, § CXLVII. As to women in *tutela*, *ante*, § LX. 3 G. 3. 104. 4 *Ante*, §§ XXIII, XCIX. 5 G. 3. 119, 176; Inst. 3. 29. 3. As to *de peculio*, *post*, § CLXXXIV. 6 15. 1. 50. 2; *post*, § CLXXXIX. 7 G. 3. 119. In 3. 176 he says it is as if *a nullo*. But this is a civil law conception and even so is too energetic, as the rule *solutum non repetere* on a *naturalis obligatio*, such as this created (*post*, § CLXXXIX), was effective at civil law. 8 Inst. 3. 17. 2. 9 Inst. 3. 17. 1. 10 45. 1. 38. 6–9; h. t. 130.

could acquire for an infant or lunatic master, but to acquire[1]. Thus, as a man could not acquire a servitude for land not his own, his slave's *stipulatio* for it was void[2]. A slave of a *hereditas* could stipulate on its behalf, but the *stipulatio* was void, unless a *heres capax* ultimately entered[3]. Where there were also rights in the man other than ownership, the question for whom he acquired might sometimes be in suspense. Thus where a slave in usufruct stipulated for a thing, the destination of the thing would depend on the ownership of the *peculium* out of which it was paid for[4].

CLIV. Content or substance of *stipulatio*. Some of these matters have already been dealt with, but there remain several points for notice.

It was a fundamental rule[5] that a man could not stipulate for a third person, more generally and accurately, that a third person could not acquire rights or be subject to obligation under a *stipulatio*. The Institutes deal with the case in which a third party was joined with the actual contracting party in the *stipulatio*. Two cases are considered.

A stipulation between *A* and *B* provided that *A* would pay 10 to *B* and *C*, or that *A* and *C* would pay 10 to *B*. On the Sabinian view, the mention of *C* was mere surplusage and the *stipulatio* was good for the whole amount between the actual parties. On the Proculian view it must be construed as two *stipulationes* for five each, of which that concerning *C* was void, as he was not a party to it, so that the *stipulatio* was valid for five only between *A* and *B*. This view prevailed and was confirmed by Justinian[6]. Two points must be noted. If the case was one of those in which the *stipulatio* for a third person was valid[7] because the *stipulator* had an *interesse*, then the part affecting the third party would be valid. He indeed could not sue, but the whole would be due to the contracting party.

The Proculian solution adopted in stipulation appears not to have been applied in other cases. The text affecting the matter on sale tells us that the addition of the third party was *supervacuum* and the whole was due to the contracting party[8], a sort of *ius accrescendi*.

If *A* promised *B* that he would pay to *B* or *C* this was valid: *C* was said to be *solutionis causa adiectus*[9]. It was convenient for both parties to arrange that payment might be made to the principal or to someone for him, *e.g.* an *argentarius* in the debtor's town. Only the actual party could sue, but the debt might be discharged in either way. The converse

1 41. 3. 28; 45. 3. 40; 27. 8. 1. 15. **2** 45. 3. 17. **3** 45. 1. 73. 1. **4** 7. 1. 25. 1. So too where the dealing is by a slave of a *captivus* who may or may not return with *postliminium*, 45. 1, 73. 1; 45. 3. 18. 2. **5** *Ante*, § CXLIX. **6** G. 3. 103; Inst. 3. 19. 4; D. 45. 1. 110. pr. Analogous to the case in which the question includes more than the answer, or *vice versa*, *ante*, § CLII. **7** *Ante*, § CXLIX. **8** 18. 1. 64. Same result in 8. 4. 5, but servitudes are indivisible. **9** 46. 3. 12. 1; Inst. 3. 19. 4; *post*, § CXCIII.

case of a promise by *A* that he or *C* would pay *B* was dealt with in the same way[1].

The rule of classical law avoiding contracts *post mortem* of a party, or those purporting to bind or benefit the *heres* alone, which seems, as we have said, to rest on a principle independent of that just discussed and was abolished by Justinian[2], did not of course affect promises which, as events turned out, did in fact affect the *heres* alone: this might happen in any contract for a future performance[3]. And a promise for performance after the death of a third party was of course quite valid.

A promise for performance so many days before the death of either party (*e.g. pridie quam moriar*) was void, the rule being abolished by Justinian in the same enactment[4]. The reason for the nullity given by Gaius is that it cannot be told till after the death when the debt was due, so that it is in effect one for payment after death, and therefore bad. But a stipulation for payment at death is perfectly good, and Gaius observes that the distinction, which existed also in legacies, was without reason[5]. The "*pridie*" cases were in fact within the objection to *stipulationes praepostere conceptae* ("*si navis ex Asia venerit, hodie dari spondes?*") which were void before Justinian but validated by him, without the impossible part[6], a rule clearly ancient though Gaius shews no knowledge of it. The *stipulatio*, "*cum moriar*," was not. In holding it valid, the lawyers decided that a man is alive at the moment of his death: it is, as they say, "*novissimum vitae tempus*[7]."

The rule "*ad diem deberi non posse*" is in itself rational: it seems absurd to contemplate a debt which I am to owe you up to a certain day, which must come. Yet it might be useful. A capitalist who invests his balances periodically might reasonably promise to lend a man money to complete a contemplated purchase, provided it was asked for before

1 At least in later law, Nov. 115. 6. 2 *Ante*, § CXLIX. One for payment after *capitis deminutio* of a party was equally bad in classical law, G. 3. 101. 3 A man could validly stipulate for payment to his son in the family, as this was to himself (Inst. 3. 19. 4), and it has precisely the same effect. But he could also stipulate *post mortem filii*, as this was not himself, and if it was *post mortem suam* and *filio*, the son had in later law an *actio utilis* (23. 4. 23; 45. 1. 45. 2. interp.) even though not *heres*. 4 C. 8. 37. 11. 5 G. 2. 232; 3. 100. 6 Inst. 3. 19. 14; C. 6. 23. 25. Leo had already abolished it in a special case. Koschaker (*Z.S.S.* 34. 427) holds this cannot be the ground and adopts that of Gaius. He gives no reason, and that of G., as we see, fails to account for the rule in "*cum moriar*"; a distinction so clearly recognised and undisputed probably had some reason. Paul gives the rule in "*cum moriar*," Vat. Fr. 98. The "*pridie*" and "*praepostera*" rules were abolished by the same enactment, and it is likely that the former is treated as merely a special case of the latter. 7 G. 2. 232; 3. 100; cp. 28. 5. 5. This seems conclusive as to their point of view. It has been described as a "puérilité" of commentators (Accarias, *Précis*, 2. 96). But it is Roman. And the discussion of these "limiting cases" has attracted logicians in all ages. Accarias gives a list of cases in which "*cum moriar*" or "*moriens*" are void (95, n. 3), *e.g.* a *stipulatio* for a usufruct "*cum moriar*," which would be meaningless.

the date at which his balances were usually invested[1]. And we shall shortly see that the civil law itself recognised a liability of sureties which ended in a definite time[2]. On the general rule Paul gives the illustration "10 *dare spondesne usque ad kalendas Iulias?*" and says that the limitation was ignored at civil law, but that if the promise was sued on after the agreed time there was an *exceptio doli*, or *pacti conventi*[3], so that the arrangement above outlined could be safely made. One case is specially prominent. A man might be willing to undertake a contingent liability but not that this should burden his heir. He might therefore promise "*quoad vivam*" or "*quoad vivas.*" This was treated in the same way: the action was perpetual, but if action was brought after the death there was an *exceptio*[4]. In the Institutes this is carried further. We are told that a promise of "10 *aureos annuos quoad vivam*" was essentially perpetual, the *exceptio* being available in the same way[5]. This is a puzzling proposition. We are told elsewhere that a *stipulatio* "*in singulos annos quoad in Italia fuero*" was quite good[6]. And *locatio* could be for a limited time[7]. It appears to be a mere blunder[8]. A legacy to a widow "*in annos singulos quoad vivat*" was good and was determined *ipso facto* by her death[9], but nothing can be inferred from this. Legacies were construed by intent. Thus a legacy *in annos singulos*, with nothing about death, ended *ipso iure* by the death, being construed as a number of separate legacies of which all but the first were conditional on the legatee's being alive when they fell due, unless indeed it was left to a corporation, when it was perpetual[10]. But a *stipulatio*, "*in annos singulos*," was one *stipulatio*, unconditional, *incerta* and *perpetua*, not affected by the death of the promisee[11].

The rule applied not only to *dies certa* or *incerta*, "*usque ad kalendas Iulias*" and "*quoad vivam*," but also to cases of condition, such as "*nisi Titius consul fiat*," "*nisi navis ex Asia venerit*[12]."

Exceptio non numeratae pecuniae. Where the *stipulator* brought an action upon a promise to repay a loan of money, but in fact the loan had not been made, Gaius observes that this could be proved under an *exceptio doli*[13]. But it is hard to prove a negative, and at some time not later than A.D. 215 a better defence was introduced—the *exceptio non numeratae pecuniae*[14]. When an acknowledgment of loan was sued on the defendant had this *exceptio*, under which the burden of proof was on

1 Any conditional promise where the condition must be determined by a certain time is on much the same footing, but it is not so treated. 2 *Post*, § CLVI. 3 44. 7. 44. 1. 4 45. 1. 56. 4. 5 Inst. 3. 15. 3. 6 4. 6. 43. 7 *Post*, § CLXXIV. 8 Mitteis, *Rom. Pr.* 1. 193. 9 33. 1. 5. 10 33. 1. 4; h. t. 6. 11 45. 1. 16. 1. But the above cited 4. 6. 43 shews that the insertion of a limit varies this construction. 12 See *ante*, § CXLVIII. 13 G. 4. 116. 14 C. 4. 30. 3. Even if *exceptio doli* was used the *lex* gave the same advantage, within the time allowed.

the plaintiff, to prove the loan (contrary to the usual rule in *exceptiones*, in which the burden of proof was ordinarily on the defendant), and making the *cautio* a very poor security. Accordingly it was strictly confined to this case and was available only for one year[1]. But since the creditor by waiting a year could make it useless, it was further provided that the alleged debtor could bring a *condictio sine causa* within the year for return of the *cautio*[2], and presumably the same exceptional rule as to burden of proof applied here. It was laid down by Alexander that the creditor need not prove the money to have been paid in coin, but only that there was a real debt, even a pre-existing one[3].

The system underwent various changes. Diocletian extended it[4] to five years. Justin provided that if it was for a past debt specifically stated in the *cautio*, the *exceptio* was not available without written proof submitted to the *iudex* that the statement in the *cautio* was untrue: on proof of this the creditor must prove that there was a real debt[5]. Justinian limited it to two years, extended it to other loans for consumption, and to some analogous cases (but here only within a very short limit of time), to which it had already been sought to apply it, and provided that, at any time within the two years, it could be made perpetual by notice to the creditor, or in his absence to certain officials[6]. In a Novel he excluded the system altogether if the creditor was an *argentarius*[7]. There does not seem to have been anything to exclude the *exceptio doli* after the time had expired, but the burden of proof would be the other way. It has been suggested that the system had no operation under the *formula*, that it first applied only in certain *cognitiones* and was generalised under or after Diocletian[8].

1 Herm. Wis. 1. 1. **2** C. 4. 30. 4; h. t. 7. **3** C. 4. 30. 5. **4** Herm. Wis. 1. 1. **5** C. 4. 30. 13. In an interpolated text in the Digest which seems to be based on this enactment (22. 3. 25. 4) the rule is made to apply to any express acknowledgment, whether the debt was a past one or then and there created. **6** C. 4. 30. 14. Some texts (apart from the Digest text mentioned in n. 5) of an earlier date than Justinian refer to, or may refer to, this system of protest, and it is therefore held by Girard (*Manuel*, 514) that this power of protest and perpetuation was older and was merely reorganised by Justinian. But he appears to treat it as new; of the texts, C. 4. 30. 9 has certainly been altered (see Krueger's edn. ad h. l.), C. 4. 30. 8. 1 and 2 look like additions (*sin vero*, *sin autem*, *legitimum tempus*, *minime* are all suggestive more of Justinian than of A.D. 228), and the C. Th. 2. 27. 1. 4 is too vague to prove anything: it may well refer only to the *condictio*, and is not understood by the *interpretatio* to have any reference to perpetuation. The names "*querella*," "*querimonia*" seem to have been used generally to denote any of the steps. C. 4. 30. 4, 8, 9, 10. **7** Nov. 136. 6. **8** Pernice, *Z.S.S.* 13. 273 sqq. Since there is no *mutuum* unless the money has been lent it is odd that, apart from the case of a promise, the defence should have been by *exceptio*, which, in principle, admits a *prima facie* claim. In practice the rule is that such a *cautio* is not admissible as evidence, without the consent of the defendant, unless a certain time has passed, or, in Justinian's time, the acknowledgment is express (22. 3. 25. 4). And in his time it may be excluded altogether by protest within the two years.

CLV. We have been dealing with *stipulatio* regarded as the principal transaction, but have now to consider what may be called accessory *stipulationes*, cases in which the *stipulatio* is an appendage to another. The cases are *adstipulatio* and *adpromissio*, an important form of surety.

Adstipulatio. In certain cases it was usual to reinforce the *stipulatio* between the actual parties by one made with the *promissor* by an agent or mandatory, who stipulated for the same thing (*idem*[1]). If the *adstipulator* sued on his contract he would be liable under his mandate to account for the proceeds to the principal or his *heres*, as the case might be[2]. The cases were: (1) to provide against the fact that in the *legis actio* system it was impossible to sue by representative[3]. If the principal was away when it became necessary to sue, the *adstipulator* would sue on his contract and account for the proceeds. This ceased to be necessary with the disappearance of the *legis actio*, and Gaius does not mention it[4]. (2) Where the principal *stipulatio* was "*post mortem*" and therefore void. The contract of the *adstipulator* being *post mortem* of a third party was good[5]. This was no longer necessary when Justinian validated *stipulationes post mortem stipulatoris*, so that the *adstipulator* did not appear at all in the law of the Digest.

So far as this account goes, an *adstipulatio* was merely an ordinary *stipulatio* which happened to be associated with another. But that does not properly represent the matter: it was intimately bound up with the other, as the *adstipulatio* was for "*idem.*" It was practically a case of correality. Payment to, or action by, or *acceptilatio* to, either of the *stipulatores* extinguished the debt. This is why the second chapter of the *l. Aquilia* imposed a penalty on an *adstipulator* who released the debt. Gaius observes that this was not necessary, as the action on the mandate would suffice, but notes that the former had the advantage that it imposed a penalty[6]. The real reason for the existence of this remedy is that it existed before the contract of mandate was recognised. We do not know how in those days the principal recovered from the *adstipulator* what he had received: not to hand it over may have been theft under the wide early conception of *furtum*[7]. *Adstipulatio* has another mark of extreme antiquity in its intensely personal nature. The rights of the *adstipulator* did not pass to his *heres*[8], which may have been true of all early contractual rights[9]. Further, a slave or person *in mancipio* could

1 G. 3. 110. Practically all our information on the rules is from Gaius. 2 G. 3. 111, 117. 3 *Post*, § CCXXXIX. 4 This application is nowhere expressly recorded, but see Girard, *Manuel*, 761. 5 G. 3. 117. *Ante*, § CXLIX. It does not seem that it could be used in a case of "*pridie mortis*," for the objection to this was the same whether it was the *stipulator* or a third party. 6 G. 3. 215, 216. 7 See *post*, § CXCVI. Girard, *Manuel*, 761. 8 G. 3. 114; 4. 113. 9 G. 3. 114. There is a corresponding rule in the converse case of *sponsor* and *fidepromissor*, *post*, § CLVI.

not be *adstipulator*[1]. If a person in *patria potestas* or *manus* was *adstipulator*, the right of action did not vest in the *paterfamilias*, as it ordinarily would. The *adstipulator* himself could not sue so long as he was in *potestas*, and lost his right by passing out of it in any way involving *capitis deminutio, e.g. emancipatio*[2]. Though these peculiarities have been associated with the conception of the transaction as a case of mandate, they seem rather to be survivals from extreme antiquity[3].

As the *adstipulatio* was purely accessory to the principal contract it could not be for more, though it might be for less, and it might be conditional or *ex die* where the principal *stipulatio* was *pura*, but not *vice versa*[4]. The *adstipulator* need not use precisely the same words if the import was the same[5].

CLVI. *ADPROMISSIO.* *Adpromissores* were accessories on the side of the *promissor*, sureties, who undertook to pay if the principal debtor did not. They were either *sponsores*, *fidepromissores* or *fideiussores*. The obligations were in all three cases created by *stipulatio*, the respective forms being given by Gaius as "*idem dari spondes?*" "*idem fidepromittis?*" "*id fide tua esse iubes?*" Gaius adds that he will explain what is the proper name for those to whom the question put is "*idem dabis?*" "*idem promittis?*" "*idem facies?*" but so far as he is extant he does not return to the matter[6]. Probably in all such cases they were *fideiussores*.

Sponsio was the oldest of the forms. This and *fidepromissio* could be used to guarantee verbal contracts only, and the antiquity of both of them is shewn by the fact that the obligation did not in either case pass to the *heredes*. *Fideiussio* on the other hand could be used to guarantee any kind of obligation (itself however always a *stipulatio*), and the obligation was not terminated by death but passed to the *heredes*. The first two are a parallel to *adstipulatio*. *Sponsio*, involving the word "*spondeo*," was confined to *cives*[7].

As in all cases of accessory liability, that of the *adpromissor* could not be greater than that of the principal, though it might be less, and it might be conditional or *ex die* where that was *pura*, but not *vice versa*[8]. If the *obligatio* was undertaken for more than the debt, we are

1 G. 3. 114. 2 *Ib.* 3 Where a son contracted under mandate, the right ordinarily vested in the *paterfamilias*, 14. 1. 5. pr. So would a contract by a slave, but *adstipulatio* is a nullity (G. 3. 114). The rule that it fails on death, like the liability of *sponsor* and *fidepromissor*, with which Gaius couples it, is not the same as the rule in mandate: whatever the true extent of that rule, *post*, § CLXXIX. For if I contract under a mandate my *heres* can sue on the contract. Indeed *fideiussio*, which is a typical mandate, differs on all these points. 4 G. 3. 113, 126. 5 G. 3. 112. 6 G. 3. 115, 116. See Girard, *Manuel*, 764, as to the form used by the *fideiussor*. 7 G. 3. 118–121 A peregrine *fidepromissor* bound his *heres* if this was the law of his *civitas*. 8 46. 1. 8. 7.

told that the *adpromissio* was void[1]. If, though not for more than the debt it was for more than the mandate imposed on the *adpromissor*, it was good as between him and the creditor, but he could recover from his principal only the smaller amount[2].

But the rule that the *adpromissor* could not be liable for more than the debtor had limitations. A *sponsor* or *fidepromissor* was liable even though the main stipulation was void as being made by a person in *tutela*, without *auctoritas*, or where it was *post mortem stipulatoris*[3]. This does not seem to rest on the *obligatio naturalis* which sufficed to support a surety, partly because there could hardly be a *naturalis obligatio* in the last case, and partly because it is not clear that *obligatio naturalis* was enough in the case of *sponsio* and *fidepromissio*. Its sufficiency is stated by Gaius as characteristic of the case of *fideiussio*[4]. The present rule is a survival of a time when the promise of a *sponsor* was not subsidiary but superseded that, if any, of the principal[5]. Again, if the principal debtor died without a *heres* the surety was still liable[6]. And where a surety had released the principal, by making the render impossible, he was still liable in the later classical law, though in earlier days there was only the *actio doli*[7].

It will be seen that, on general principle, a surety who had been called on to pay had a claim against his principal as *mandator*. But he was usually sued because his principal could not or would not pay, for though the surety could be sued though no action had been brought against the principal, this was unusual and might be an actionable *iniuria* to the principal[8]. And as there was not necessarily any juristic relation between different sureties for the same debt there would not be, on general principle, any claim at all against co-sureties. These and some other matters were regulated by an extensive series of enactments now to be considered.

Sponsio is much older than mandate and the *sponsor* was provided, by the *l. Publilia*, of early date, with a special remedy not applicable to *fidepromissor*, the *actio depensi*, for which Gaius is our authority[9]. This was an action, if he was not reimbursed within six months, which at first took the form of *manus iniectio*, and, on the disappearance of the *legis actio* system, became in the ordinary way an action for double damages in case of denial[10].

1 46. 1. 8. 7. 2 17. 1. 33. 3 G. 3. 119. 4 G. 3. 119 a. 5 Mitteis, *Aus Röm. und Bürg. R.* 120 sqq. 6 46. 3. 95. 1. 7 For the texts shewing the evolution of the rule, see Cuq, *Manuel*, 647. 8 47. 10. 19. 9 G. 3. 127; 4. 9; 4. 171; see also P. 1. 19. 1. 10 The name "*depensi*" indicating a weighing has been held to indicate very early origin, and also (Girard, *Manuel*, 773) that the payment must have been under a judgment, the formal satisfaction of which was in early law a payment *per aes et libram*, G. 3. 174.

A *l. Appuleia* of about B.C. 200, applying to both *sponsores* and *fidepromissores*, created a sort of partnership between co-sureties, so that any one of them who had paid more than his share could recover from the others[1]. The nature of his remedy is not known.

A *l. Furia de sponsu*[2], later, but apparently not much later, than the *l. Appuleia*, came further to the relief of *sponsores* and *fidepromissores* by providing that they should be released by the lapse of two years from the due day, and that they were not to be liable for more than the amount of the debt divided by the number of sureties still living at the due day. This law gives rise to some questions. We are told that it applied only in Italy[3]. The *l. Appuleia* still governed such transactions in the provinces, and Gaius doubts whether it still exists as an alternative in Italy. From a recently discovered fragment of Ulpian[4] it is clear that "in Italy" means a surety given in Italy: it was immaterial where the principal contract was made. Another point is more important. Gaius tells us that the *l. Furia* also gave *manus iniectio pro iudicato* against a creditor who exacted from a surety more than his share. This could occur where the surety sued was not aware of the number of the sureties, a state of things explained by the fact that, as lay literature shews, suretyship was very freely undertaken as a sort of compliment with no serious expectation of responsibility[5]. The provision was a way of compelling the creditor to inform the surety of the number of his colleagues. But it may indicate that the reduction or limitation was not "*ipso iure*," that the *lex* being *minus quam perfecta*[6], *manus iniectio* was the only way of enforcing the limit in the *legis actio* system, an *exceptio* being used under the *formula*[7].

A *l. Cicereia*[8], of a little later date, provided for the same thing in a better way. It required the creditor to declare openly beforehand the amount of the debt and the number of *sponsores* and *fidepromissores*: a surety could, within 30 days, have a *praeiudicium* to determine whether this had been done: if it had not, the surety was released. This reference to *praeiudicium* indicates that the *lex* is later than the *l.*

1 G. 3. 122. 2 G. 3. 121; 4. 22. As it assumes provinces it must be later than 240 B.C. when the first province was founded. It is odd that Gaius speaks of Italy as a province "*ceteris provinciis.*" The fact that the *l. Appuleia* applied also to provinces suggests that provinces existed when it was enacted. There is no probability of a materially earlier date. 3 G. 3. 121. 4 Girard, *Textes*, 491. 5 Cuq, *Manuel*, 642. 6 See Girard, *Manuel*, 771, n. 1 for discussion of this and other points under this *lex*. See also Appleton, *Mél. Gerardin*, 1 sqq., who holds that the reduction was *ipso iure*, referring to the above *lex* of G. and to Ulp. D. 45. 1. 72. pr. 7 G. 3. 121 may be read as shewing an *ipso iure* division. But the word *obligantur* is uncertain. The absence of reference to the *exceptio* may indicate that in practice the praetorian remedies which applied also to *fideiussor* were utilised. 8 G. 3. 123.

Aebutia[1]. Gaius tells us that the law makes no mention of *fideiussores* but that it was in practice usual to make this declaration in that case also[2]. It is probable that *fideiussores* were not yet in existence at the time when the law was enacted.

The later legislation applied to all *adpromissores*.

A *l. Cornelia*, probably of Sulla, provided that no one might be surety for one man to one man in the same year for more than the value of 20,000 *sesterces*, the surety being void as to the excess. The rule does not seem to have applied to conditional debts and was excluded from the case of surety for *dos*, or in litigation, or for claims under a will or for taxes. From the language of Gaius it seems that the obligation was reduced *ipso iure*, so that if surety was undertaken for more, and the creditor sought to enforce it, there would be a *plus petitio*[3]. The rule has disappeared from Justinian's law: nothing indeed is known of it beyond what Gaius says[4].

The *Sc. Vellaeanum*[5], usually dated A.D. 46 and certainly of about that date, forbade women to undertake liability for others, either by way of surety (cumulative *intercessio*) or by *novatio*[6] or other mode releasing the person primarily liable (privative *intercessio*). Edicts of Augustus and Claudius had forbidden such *intercessio* on behalf of the husband, and the *sc.* points out that the Courts had in practice generalised this prohibition, which practice it confirms[7].

The *intercessio* was absolutely void, but, like all rules laid down by early *scc.*, the rule was, in form, a direction to the magistrates, so that it was enforced by *exceptio*[8]. But the *intercessio* was so completely void that there was not even an *obligatio naturalis*[9]. The *sc.* was interpreted very widely. It barred not only surety or pledge or *novatio* for another, but also the undertaking of a primary obligation for the benefit of a third person[10]. If the *intercessio* was by *novatio*, the original *obligatio* must necessarily be destroyed, but was revived by an *actio restitutoria*[11]. If it was a primary obligation undertaken for another the praetor gave an action against that other[12]. And the *sc.* applied where an attempt was made to evade it by a mandate given by the woman to a third person to act as surety[13]. By the practice of the jurists[14] some cases were ex-

1 Girard, *Manuel*, 772. 2 G. 3. 123. 3 *Post*, § CCXXXVII. It has however been held that it gave rise to an *exceptio*, and also that there was merely an action for recovery, but there is no trace of such an *exceptio* or of the application to this case of the general *exceptio senatusconsulti* (*post*, § CCXXIII, Lenel, *E.P.* 492) or of the action for recovery, which seems to belong to an earlier stage of evolution. *Condictio indebiti* in case of error. 4 G. 3. 124, 125. Lenel, however, finds rather dubious traces of it in Paul and Ulpian, *E.P.* 208 (44. 7. 42; 45. 1. 73. 1; 50. 16. 34). 5 P. 2. 11. See Gide, *Condition de la femme* (2), 153 sqq. 6 *Post*, § CXCIV. 7 16. 1. 2. 8 H. t. 6; 44. 1. 7. 1. 9 16. 1. 16. 1. 10 H. t. 2. 1; h. t. 2. 5. 11 H. t. 13. 2. The name "*restitutoria*" is said to be due to Justinian. 12 H. t. 8. 14. 13 H. t. 30; h. t. 32. 3. 14 *I.e.*, not by express provision of the *sc.* See, *e.g.*, 16. 1. 19. 5.

cepted from the rule. It did not apply if the creditor was a minor and the principal debtor was insolvent[1], or where it was to save the father from execution of a judgment[2], or where, though she appeared as surety, it was really the woman's own affair[3], or where it was to provide a *dos* for her daughter[4], or, by a rescript of Pius, where she had deceived the creditor[5]. Mere mistake on the part of the creditor did not exclude the *sc.* unless the transaction was a disguised one, so that, on the face of it, it did not appear to be *intercessio*[6].

Justinian made a series of changes in this matter[7]. His enactments are confusing but the general effect seems to be this. He allowed such surety generally for provision of *dos*, or where it was on behalf of a slave who was to be free on payment of money. It was to be binding in any case, if, after two years, the woman confirmed it, or if she was paid for undertaking it, or even acknowledged in the instrument that she was so paid, which makes the rule useless at the cost of a falsehood. He provided however that in all cases there must be writing and three witnesses[8]. Finally he provided that no *intercessio* on behalf of the husband should be valid, however often confirmed.

In the enactment by which he provided that a woman might be *tutor* to her children he required such a *tutor* to renounce the protection of the *sc.*[9] This suggests that there had been a right of renunciation, and a text of Pomponius implies the same[10], while one of Ulpian, quoting Julian, implies the opposite[11]. The better view seems to be that there was no such right, except so far as it was provided by the rules of Justinian above cited.

CLVII. We have seen that *sponsores* and *fidepromissores* had a means of recovering from their co-sureties what they had been made to pay in excess of their share. The *l. Appuleia* did not apply to *fideiussores*, but, very early, probably under the republic, practice introduced the *beneficium cedendarum actionum*, *i.e.* a surety could before payment, or, in general, issue joined, require the creditor to transfer to him, by way of *procuratio in rem suam*[12], all his rights and securities against the debtor or other sureties[13]. The *cessio* could not be demanded without offer of full payment, but the demand must be made before payment[14]. As the creditor was under no duty to the surety he need surrender only such rights as he had: the surety had no ground of complaint if, *e.g.*, the credi-

1 4. 4. 12. **2** 16. 1. 21. 1. **3** H. t. 21. pr. **4** C. 4. 29. 12. **5** 16. 1. 2. 3; h. t. 30. Another exception P. 2. 11. 2. **6** 16. 1. 4; h. t. 11; h. t. 19. 5. **7** C. 4. 29. 22–25; Nov. 134. 8. **8** As the same enactment (C. h. t. 23) also contemplates valid cases which are not in writing, its meaning is doubtful and much disputed. **9** Nov. 118. 5. **10** 16. 1. 32. 4. **11** 14. 6. 11. **12** *Post*, § CLXXXIX. **13** 46. 1. 17; 46. 3. 76. **14** C. 8. 40. 11. It must be demanded and received: it was never implied.

tor had previously abandoned a security which he held[1]. There was in this system an obvious difficulty. If the creditor was paid, he had no longer any rights to cede, and though he ceded them before payment, the payment would destroy them. The difficulty was met by treating the surety who paid, not as discharging the debt, but as buying it[2]. This is simple if the transaction was without judicial process, or before joinder of issue (*litis contestatio*[3]), and we are told that it was enforced by an *exceptio doli*[4], under which the action would be lost if the *cessio* had not been made as demanded. But if there was real doubt as to the amount of the debt and the creditor refused *cessio* on the view that the offer was not enough, and at the hearing this proved to be so, and the surety sued thereon amended his offer, there could be no effective *cessio*, as some at least of the actions were destroyed by the *litis contestatio*. If the creditor proved wrong he would lose his action, though a debt was due and he had acted in good faith. It seems on the rules, as we know them, that injustice must have been done to one or the other if there was a real dispute as to amount, which could not be settled *in iure*[5].

The remedy just discussed affected the case of co-sureties only incidentally: it was designed to give the surety the benefit of securities held by the creditor. Hadrian reinforced it by the *beneficium divisionis*[6], similar to, but not identical with, the rule of the *l. Furia*. There was no relation between sureties (apart from special contract) giving one any rights against the others, but this rule provided that a *fideiussor* might not be sued for more than the amount of the debt divided by the number of sureties solvent when the action was brought[7]. The right was enforced either by refusal of the action or by an *exceptio* "*si non et illi solvendo sint*[8]," and, if this was not claimed, his obligation being essentially *in solidum*, the defendant surety would have no claim against the others, nor, even if he was in error, any *condictio indebiti*[9]. The right to division was lost by denial of the debt, and Papinian says that it did not apply where the *fideiussor* was given by a *tutor* to his ward[10].

The right applied only between sureties for the same debt and the same debtor, to the same creditor, not, *e.g.*, as between a surety and one who was surety for him, *fideiussor fideiussoris*[11]. But it was indifferent

1 C. 8. 40. 17. **2** 46. 1. 36. **3** *Post*, § CCXXXV. **4** 21. 2. 65. **5** See Girard, *Manuel*, 775. **6** G. 3. 121. Paul attributes it to the praetor, P. 1. 20. 1. **7** 46. 1. 51. 4. Thus insolvency of a surety increases the burden of the others if it exists when the action is brought, but not if it supervenes afterwards. **8** 46. 1. 28; C. 8. 40. 10. 1. **9** 46. 1. 26; h. t. 39; h. t. 49. 1. It is supposed that the rule was applied in practice to *sponsores* and *fidepromissores*, out of Italy, as these could not avail themselves of the *l. Furia*. **10** 46. 1. 10. 1; 46. 6. 12. **11** 46. 1. 27. 4; h. t. 51. 2.

that they had become sureties at different times, or that one was only conditionally liable[1].

It is not clear at what stage the solvency of the other sureties was looked into. Probably it was usually *in iure*, in which case there is no difficulty. But the use of the *exceptio* shews that this was not always so, and if it was at the hearing there is the difficulty that if the defendant surety proved the solvency of another who was not being sued, or had not been allowed for, the action was lost and *litis contestatio* had destroyed the right against the others. Various attempts have been made to avoid the difficulty by appropriate formulation[2].

The debt in the cases of all the sureties and the principal being the same, action against any one destroyed the right against any other[3], on the principle of *non bis in idem*, and the novatory effect of *litis contestatio*. We are indeed told by Justinian[4] that in very early law the creditor who had sued one, without satisfaction, could still sue the others. But this is not reconcileable with what we know of the law under the *legis actio*, and in any case had ceased to be true in the classical law[5]. The debt was one and the same. All were equally liable: the creditor could therefore sue whichever he would, but having sued one, could sue no one else, except that if he sued only for a share under the *beneficium divisionis* there was probably relief against the others. Suing a surety first was convenient if the debtor was away or was insolvent, but unless there was some such reason it was a reflection on the debtor's solvency, and Gaius says that to sue a surety when the debtor was "*paratus solvere*" was an actionable *iniuria*[6]. It became usual in later law, after the disappearance of *iudicia legitima*, for sureties to agree not to avail themselves of this extinction, so that if, when sued, they pleaded the *exceptio rei iudicatae*, there would be a *replicatio pacti conventi*[7]. Another, more ingenious, way was to make the *fideiussio* in a different form, to promise, not the debt but "whatever the creditor cannot recover from the debtor," which, in later classical law, was interpreted to mean "whatever he has been unable to recover by action against the debtor" (*fideiussio indemnitatis*), so that the debtor must be sued first[8].

Justinian provided that in all cases where several were liable for the same debt, action against one should not *ipso facto* release the others[9], which ended the difficulty. Later, he provided that the debtor must be

1 46. 1. 27. pr.; h. t. 48. 1. 2 See Girard, *Manuel*, 772. 3 P. 2. 17. 16. 4 Nov. 4. pr. 5 Paul, *loc. cit.*; *Lex Rom. Burg.* 14. 7. 6 47. 10. 19. It must however be remembered that for such an action there must be evidence of intent to insult, *post*, § CCII. 7 C. 8. 40. 5; h. t. 28. 1. 8 45. 1. 116; 46. 2. 6. pr. The older view seems to have been (Celsus, 12. 1. 42. pr.) that on such words the creditor could still sue the surety first, and the *iudex* would have to determine how much could have been recovered from the debtor, but apt words would exclude this. 9 C. 8. 40. 28.

sued first, but that if he was away, and the sureties were on the spot, time must be given them within which to produce him. If they did not, they could be sued, having a right to cession of actions. This is the so-called *beneficium ordinis vel excussionis*[1].

It must be remembered that these *adpromissores* were not the only forms of personal surety. Besides the *praes* and *vas*, who will be considered in connexion with procedure[2], there are the cases of *mandatum credendae pecuniae*[3], the *pactum de constituto*, and the *receptum* of bankers[4], which will be considered later.

As a surety could not be liable for more than the principal[5] was, it follows that anything which *ipso iure* released the debtor also released sureties. But here too there were exceptions. Thus as we have seen the surety was not released by the enslavement, or death without successors, of the debtor[6]. But in the case of release *ope exceptionis*, the exceptions were more numerous. Thus where a debtor being without means was also in a position to invoke the so-called *beneficium competentiae*[7], sureties were not released[8]. A pact not to sue him did not release the sureties if it was clearly meant to be *in personam*[9]. A minor's right of *restitutio in integrum* did not protect a surety who had contracted knowing of the minority[10]. And in many cases the praetorian release was not allowed to discharge the surety also unless, as he had a right to reimbursement against the debtor, enforcement against him would be indirectly enforcement against the debtor, so that his *exceptio* would be unreal[11]. Some of these cases will recur.

CLVIII. PLURALITY OF PRINCIPALS. It might be that there was more than one principal creditor or debtor in the transaction. This represents the main case of Solidarity, with its distinction between Correality and Simple Solidarity. These relations are not confined to *stipulatio*, but it is primarily in this relation that correality is presented to us in the Sources[12].

In general, where there were several parties to a divisible contractual obligation, it was divided between them[13]: if it was intended that each

1 Nov. 4. The names are not Roman. The enactment contains very detailed provisions. 2 It is doubtful if they had any application outside procedural securities. See Cuq, *Manuel*, 643. 3 *Post*, § CLXXX. Called by commentators *mandatum qualificatum*. 4 *Post*, §§ CLXXXII sqq. 5 46. 1. 37; h. t. 49. pr.; h. t. 68. 2. *Ante*, § CLVI. 6 46. 3. 95. 1 in fine, 16. 3. 1. 14; C. 8. 40. 20. 7 *Post*, § CCXXXIV. 8 44. 1. 7. pr. 9 2. 14. 22. As to *pacta in rem* and their effect, *post*, § CXCV. 10 4. 4. 13. pr. 11 *E.g.* 2. 14. 32. It will be understood that many of these rules might be modified in their application by special agreements between the principals and the sureties and among the sureties themselves. 12 Though the distinction between correal *obligatio* and surety is clear, it must be borne in mind that the cases overlap. It was not unusual for correal debtors to become sureties for each other, reciprocally. 13 45. 2. 11. 1; 38. 1. 15. 1.

should be liable or entitled to the whole, this must be expressed in the transaction. This is well shewn in *stipulatio*. If there were several parties on one side and it was intended that each was to be liable or entitled to the whole, the creditor uttered the *stipulatio* and the *promissores* all answered together, or conversely, each creditor asked and the debtor answered once for all[1]. If there were more than one on each side, each *stipulator* asked and the *promissores* answered together. Some such form as this was indeed the only way in which to make it one *stipulatio*; any other method would decompose into separate stipulations. But this would not be necessarily so if the *stipulatio* was by written *cautio*. There we are told that even if the *cautio* shewed that there were two *stipulatores* or two *promissores*, they were not *correi* unless the *cautio* expressly made them such—each would be liable or entitled only to a *pars virilis*[2].

The common case, in which the *obligatio* was divided, does not here concern us, and there was a case where all were liable, each for the whole, which also does not concern us. This is the case where several were liable for a penalty for a joint delict. If two persons engaged in a theft, each was liable for the whole penalty. This may be called solidarity, but it is not the case we are dealing with. Each was liable for the whole, and would continue so liable though another had paid[3], their liabilities being entirely independent. This applied to all civil liabilities for a penalty, but only to the liability for the penalty[4]. Thus in the case mentioned there would also be a *condictio furtiva* for the value of the thing. Each was liable for the whole but payment by one discharged the rest.

The case we are concerned with is that in which each of two or more persons was liable or entitled to the whole, but it was due only once, so that if the sum was once paid the whole was ended. This was what is commonly called solidary obligation, a name coined from the Roman expression, *in solidum*, which has no technical force, but is applied when it is wished to emphasise the fact that a man is liable for the whole[5].

Cases of this sort are numerous and familiar, though not always readily associated with the notion under discussion. There are many other than the primary case of joint contract. There are the cases of sureties, *inter se* (subject to the legislative restrictions already noted), of surety and principal, of *adstipulator* and principal, the liability of common owners of a slave on his contracts or noxally on his delicts, the liabilities of *dominus* and free *institor*, each of whom is liable on the

1 Inst. 3. 16. 2 45. 2. 11. 1, 2. In the case of informal contracts, the intent to exclude division must be clearly stated, h. t. 9. pr., 1. 3 47. 4. 1. 19; 9. 2. 11. 2; C. 4. 8. 1. 4 See, however, as to the praetorian delicts, *dolus* and *metus*, *post*, §§ CLIX. 5 Thus in *de peculio* the liability is limited, but in *quod iussu* it is *in solidum*. 14. 5. 1.

latter's contract[1]. So too it was provided that contracts by a member of a firm of *argentarii* or of slave-dealers (*venaliciarii*), or by one of joint *exercitores* in the business, were to be treated as made solidarily by them all[2]. So too where *A* made a legacy to *B* of what *C* owed *B*, or where several made a solidary deposit[3], or where several were jointly liable to pay compensation for a wrongdoing, as opposed to paying a penalty[4]. Other cases are those of *contutores*, and there are many others[5]. The possibilities of joint contract are endless.

These cases break into two groups, the essential difference being that in classical law, in one group, the bringing of an action by, or against, one, barred, or released, all the others. In the other group this was not so; roughly speaking, only satisfaction ended the obligation. To the first case the name correality may be applied, though it seems usual in modern writers to confine it to those cases in which the correal relation was expressly created by the parties, the others being spoken of as correal in a wide sense. The second case is commonly called simple solidarity. Where the plurality was on the creditor's side, it is called active correality (or solidarity), in the other case it is said to be passive.

We shall deal first with correality, confining ourselves to the typical case of *stipulatio*, remembering that the same relation could also arise in the *bonae fidei* contracts[6] and in *mutuum*[7], though we have no evidence of it in the literal contract.

A correal obligation did not differ in content from any other; all that we need consider are the modes and consequences of its ending. Like all obligations, it ended by performance, and this destroyed it as against all parties. It was also completely destroyed in classical law by the *novatio necessaria* involved in *litis contestatio* in an action on it, between any parties[8]. But many other events destroyed it. It may be said that anything which completely destroyed it as to any one debtor, without affecting his personality, *i.e.* as Paul puts it[9], destroyed the debt, but not the debtor, destroyed it altogether. Thus it was ended altogether by *novatio*[10] or *acceptilatio*[11] between any parties, or by an oath tendered and taken, that there was no debt[12]. It was ended by destruction of the thing due without *culpa* or *mora*[13] of a party. If it was by *culpa* or after *mora*, it survived against the party concerned, but on the texts it was extinct against the others in case of *mora*, but survived in that of *culpa*[14].

1 Or his owner, if he is *servus alienus*, 14. 3. 17. 1. **2** 2. 14. 27. pr.; 14. 1. 1. 25; 21. 1. 44. 1. **3** 45. 2. 9. **4** C. 4. 8. 1. **5** *E.g.* 45. 2. 9. pr. **6** 45. 2. 9. pr. **7** 46. 1. 71. pr. But *mutuum* was usually reinforced by a *stipulatio*. **8** 46. 1. 5. **9** 46. 1. 71. **10** *Post*, § CXCIV. **11** *Post*, § CXCV. **12** 12. 2. 28. 3; 45. 2. 2. **13** *Post*, § CLXXXVIII. **14** 22. 1. 32. 4; 45. 2. 18; 50. 17. 173. 2. The distinction is however explained away by some writers as being unreasonable. See for different solutions, Girard, *Manuel*, 756, n. 3.

On the other hand, other parties were not released or barred by deportation, or death without successors, of one of the parties, or by *confusio* between one debtor and one creditor[1]. Conversely if one debtor gave an acknowledgment to one creditor, which had the effect of lengthening the period of prescription of the action, it was, under Justinian, equally lengthened against all the debtors, and in favour of all creditors[2]. A set off held by one was of no avail to the others[3].

Praetorian defences, which did not destroy the obligation altogether, give rise to some difficulty. A *pactum de non petendo*, if purely *in personam* did not affect other parties[4]: if *in rem* it might, according to distinctions to be later considered[5]. The same is true of *transactio*[6]. The effect of *pactum de constituto* on the other parties is doubtful[7].

Justinian put an end to the most striking of these modes of discharge, by enacting that where there was a plurality of debtors, *litis contestatio* against one should not discharge the others. He does not mention plurality of creditors[8], but the omission is probably mere accident. For some of the cases there is no record of plurality of creditors; it is clear on the texts and on the facts of life that plurality of debtors is the common and practical case.

The position of *correi, inter se*, gives rise to a question. If one creditor had received all, or one debtor had paid all, was there any right or obligation of contribution? The answer, notwithstanding much modern controversy, seems to be[9] that there was no such right so far as the relation was merely one of correality. It is indeed suggested that, at any rate in post-classical law, any debtor who paid the whole could claim *cessio actionum*, as a surety could[10]. But such little evidence as exists for this is lessened in force by the fact that it was not uncommon for *correi* to agree to become sureties for each other, *fideiussio mutua* or *alterna*[11], and the few texts may well refer to this case.

But this harsh looking rule means little. Men did not become *correi*, at any rate expressly, by chance, without previous negotiation, and there were two well-known ways in which this inconvenience could be avoided. They frequently became sureties for each other, which gave all the various rights discussed in connexion with *adpromissores*. Or they might be *socii*, permanently, as in those cases, *argentarii, venaliciarii*, etc., already mentioned, in which correality was created by law, or for the purpose of this transaction only, and there was contribution *inter*

1 45. 2. 19; 46. 1. 71. 2 C. 8. 39. 4. 3 45. 2. 10. 4 2. 14. 25. 1. 5 *Post*, § cxcv. 6 27. 3. 15. 7 13. 5. 10. Demangeat, *Oblig. Solidaires*, 86. 8 C. 8. 40. 28. 2. Elaborate legislation in the Novels, *e.g.* Nov. 99. 9 35. 2. 62. pr.; 45. 2. 10. 10 C. 4. 65. 13; C. 8. 40. 11; D. 19. 2. 47 (? interp.). 11 45. 2. 11. pr. See however on this text and on the matter generally, Collinet, *Études historiques*, 1. 131 sqq.

socios[1]. Correality did not destroy the right of "regress" where it existed. Thus there was no difficulty where, as ordinarily, the case was one of consent, or where, though it was imposed by law, there was a *societas*. And where the facts did not involve consent, they commonly created a regress. A testator could impose this liability on his *heredes*[2], but the one who had paid had *familiae erciscundae*. A principal and his *institor* (or the owner of the *institor*) were correally liable, but the *institor*, if compelled to pay, had his remedy under his contract of mandate with the employer. The liabilities of common owners of a slave on his contracts and delicts were correal, but the matter could be adjusted in *communi dividundo*[3].

CLIX. Simple Solidarity. The main distinction between this and the preceding case was that here *litis contestatio* between parties did not affect other parties, while satisfaction did[4]. Beyond this we do not know very much. It is clear that nothing would discharge which did not in the case of correality. But it is not clear that the converse is true even apart from *litis contestatio*. It has been maintained that *acceptilatio* would not discharge[5]. As joint *stipulatio* involved correality, and *acceptilatio* was release from *promissio*, it might seem that the point could not arise, but this is not so. The liability of *tutores* was solidary, not correal. Where a *tutor* had given security, an *acceptilatio* on the stipulation would release him, and the question arises whether it would release his colleagues. As it was tantamount to satisfaction, it seems that it should do so. The same point arises in connexion with *novatio* and oath, but we have no information.

The question then arises: when was an obligation simply solidary? The first point is that no clear case can be shewn of this type on the side of the creditor[6]; it was always "passive" solidarity. It arose in certain

1 There is good evidence of the frequency of *societas* among *correi*, 35. 2. 62. pr.; 45. 2. 10. As to contribution *inter socios*, *post*, § CLXXVII. This *societas* modifies other rules of the institution. The right of regress would make a *pactum de non petendo* useless unless it was available to all, and accordingly it was so available, 2. 14. 25. pr. For the same reason a *transactio* was available in the same way, 4. 8. 34. pr., and any *socius* could use a set off of any other. 45. 2. 10. If there was *confusio* between one *debitor correus socius* and the creditor, the others might use it to the extent to which they would have been entitled to claim against the *correus* who had become *creditor*. 46. 1. 71. pr. Probably similar modifications applied where they became sureties for each other. 2 45. 2. 9. pr. 3 10. 3. 15; 11. 1. 20. pr.; 14. 3. 13. 2. 4 *E.g.* 26. 7. 18. 1. 5 Girard, *Manuel*, 760, citing Gérardin. The analogy of *transactio* does not seem convincing, 27. 3. 15. It is not clear that this destroyed correal liability, in all cases. And it is a praetorian defence, *acceptilatio* is civil. 6 The case of *dos* promised to *vir* and *legata* to *uxor* may be one (23. 3. 29; 30. 84. 6). It is not correal, since these texts shew that action by one did not bar the other. But it is not clear that it was solidary either, for the *heres* could claim security from the wife suing, to indemnify him from action by the *vir*, so that payment did not in principle discharge it either. The texts shew that the parties are forced by indirect means to be satisfied with one payment. In strictness it is not "*eadem res*" at all.

praetorian delicts, *metus*, *dolus*, in the *actio de rationibus distrahendis* against tutors and perhaps some other delicts. It arose also in a group of contractual and quasi-contractual cases, where the liability had resulted from a breach of duty in a common undertaking, from *culpa* or *dolus*. It appears from several of the texts, though not from all, but it is the only rational rule, that this applied only if the fault was common to them. Among the cases mentioned are *tutela* and most of the *bonae fidei* contracts, including mandate. It is not stated in *negotiorum gestio*, but common *gestio*, though it must have occurred, is rarely discussed[1].

There was in general, as in correality, no recourse. But in the case of *tutores*, any *tutor* sued, if he had not personally been guilty of *dolus*, was treated like a *fideiussor* and given the *beneficium divisionis* and *cessionis*, and even it is said an *actio utilis* where he had not taken *cessio*[2]. A text, probably due to Justinian, gives an *actio utilis* in the case of joint liability for *deiecta et effusa*, and says nothing about the *beneficia*[3]. *Tutela* seems the only clear case[4]. It should be added that in the opinion of some critics nearly all these cases of simple solidarity are due to Justinian, the cases having been correal in classical law[5].

It remains to consider why some cases were correal and others solidary. The opinion most widely held rests on a subtle distinction. In both cases there was only one object, one thing due, but in correality there was also only one obligation, so that what ended it for one ended it altogether, while in solidarity the obligations were distinct, and what happened to one need not affect the others. But this is open to serious objection[6]. It is not consistent with the facts. The same obligation could not be both civil and merely praetorian, as was the case of the obligations of employer and *institor* on a contract. It could not be both simple and conditional as correal obligations could[7]. And while there are texts which speak of unity of obligation[8], there are others which speak of distinct obligations[9]. Moreover, it is merely giving the rule as a reason for itself, for it does not shew why those who combined in a contract of *stipulatio* created only one obligation, while those who combined in a wrong created more than one. The expression *correi* is very rare[10]. The usual name is *duo rei*[11], a name equally applicable to any case in which two are liable, and not suggestive of any fundamental distinction.

1 See Girard, *Manuel*, 158, for a full statement of the cases. 2 27. 3. 1. 11–13. These texts are at least to some extent interpolated. 3 9. 3. 4. 4 It is suggested that there was the same rule in deposit, 16. 3. 22. But here both *heredes* have committed *dolus*: they would not be liable for mere *culpa* (h. t. 10). The liability *pro parte* mentioned in one hypothesis is not due to solidary *obligatio*, but to the fact that each has committed *dolus* in respect of different property. 5 See Eisele, *Archiv für C. P.* 77. 374 sqq.; Albertario, *Bull.* 26. 106. But this author accepts interpolations very freely. 6 See Hunter, *Rom. Law*, (4), 561; Girard, *Manuel*, 753. 7 45. 2. 7; Inst. 3. 16. 2. 8 *E.g.* 45. 2. 3. 1. 9 *E.g.* 46. 1. 5. 10 34. 3. 3. 3. 11 45. 2. *passim*.

Accordingly a much more simple explanation has been proposed and is strongly supported. Whether there was one obligation, or more, there was at any rate only one thing due. There was an ancient rule: *non bis in idem*, and it follows that the same thing might not be claimed twice. Thus the rule in correality was not a special rule for that case, but an application of ordinary principle; it is the rule in solidarity which needs explanation. The renewed action was *bis in idem*, for it was *eadem res*. It is therefore suggested that there was no logical basis; it was an illogical relaxation, a gradual historical development expressing the idea that those who do wrong ought not to be released from their obligation to compensate, except by satisfaction. No doubt the evolution was gradual, and, as we see it, largely due to Justinian[1]. It may be remembered that a similar difficulty was in some cases dealt with by the praetor. One who had sued *de peculio* could not sue again, though unsatisfied, but the praetor gave relief, as he did where buyer and seller were both liable *de peculio* and one had been sued[2].

CLX. There were some other verbal contracts.

Dictio Dotis. This is one of the three ways in which *dos* could be created in classical law: *datur aut dicitur aut promittitur*[3]. But *dictio* must be by the woman or her paternal ancestor or by a debtor to her, under her authorisation[4]. It was a solemn declaration that a certain thing or sum should be *dos*, made without need of any previous question. It is possible that in early law *dictio* necessarily preceded the marriage, but in classical law it might be later. It was obsolete under Justinian, but many texts in the Digest which now speak of *promissio* were written of *dictio*. Some of these preserve the form: "*Stichus* (or *centum* or *fundus Cornelianus*) *tibi doti erit*[5]." The other party must be present, but need not say or do anything[6]. Hence arise doubts whether it is properly regarded as a contract, at least for early law[7]. In any case it gave rise to a

1 History of the doctrine obscure. It has been inferred from 43. 24. 15. 2, that the idea is later than Labeo but any inference from so corrupt a text is uncertain. The starting-point is probably in *dolus* and *metus*. *A. doli* lies only *si res aliter servari non potest*, 4. 3. 1. 8; h. t. 5. *A. fortiori* not where *res servata est*. The whole process is only for restitution. *A. metus* does not lie *si res restituatur*, 4. 2. 14. 3. It is suggested by 4. 2. 14. 5 that actual *restitutio* apart from process always freed others, but it was only by a later doctrine that the same result followed from payment under *condemnatio*. See ref. *ante*, p. 453, n. 5. 2 15. 1. 11. 8; h. t. 32. 1; h. t. 30. 4. 3 Ulp. 6. 1; 11. 20. 4 Ulp. 6. 2. 5 *E.g.* 23. 3. 25. 6 G. 3. 96. 7 Karlowa, *R.Rg.* 2. 579. It was a contract in later law, Gai. *Ep.* 2. 9. 3. There were other institutions in Rom. Law presenting the same character of being unilateral in the sense that they were binding on the person who undertook them without need of any acceptance by the other side. It might be said that as the very act of enforcing them is an acceptance we have, when they are enforced, all the characteristics of a contract. The point is, however, that they are binding from the moment when they are made, so that they cannot be recalled even before acceptance. Such is *Votum*, a vow of a gift to some divinity, if some event happens, common in

strictum iudicium, but where it took the form of release from debt (*quod mihi debes, tibi doti erit*) the debt was not *ipso iure* destroyed, but only *ope exceptionis*[1]. It seems to have been a "formal" transaction. It might be conditional[2], and, no doubt, *ex die*.

It is mentioned in literary texts of the Republic[3] and by Gaius and Ulpian[4], and it appears in an enactment of 396[5]. It is supposed to have been abolished by an enactment of 428 which validated any informal promise or *pollicitatio* of *dos*[6], but as this did not abolish *promissio* it seems rather to indicate than to cause the disappearance of *dictio*.

Iusiurandum Liberti. This also was a verbal contract, *uno loquente*, but both parties present[7]. Where the manumission of a slave was otherwise gratuitous and was voluntary (*i.e.* where the master was not under an obligation to free, as under a *fideicommissum*), it was permitted to require of the man an undertaking to render certain services[8]—*operae*. There was however the difficulty that no promise by a slave was binding after manumission, and on the other hand a man once freed might possibly refuse the undertaking. This was surmounted by requiring him to take an oath before he was freed, which put him under a religious obligation to renew the undertaking after he was free. The renewed promise was also under oath, though a *stipulatio* would have served equally well. In fact, though the *iusiurandum* survived into Justinian's time[9], it is clear that *stipulatio* had long been more usual. This had indeed the advantage for the patron that presumably it would not necessarily be destroyed by his *capitis deminutio* as the *iusiurandum* was[10]. There

Roman Catholic communities to this day. But in Rome it was enforced, in early law, by legal, not merely religious sanctions (Karlowa, *R.Rg.* 2. 580), though we do not know the machinery. The occurrence of the expression "*voti damnas*" suggests that it was by *manus iniectio*. Such details as are known can be found in Karlowa, *op. cit.* 2. 580 sqq. The institution existed in classical law in some form, but, though the word is found in the Digest (50. 12. 2. 1), the institution itself was obsolete. Another such institution is *pollicitatio*. This which means, in general, any undertaking or proposal, signifies in this technical sense a promise to a municipality, usually in return for some honour conferred, or to be conferred. This was binding of itself, but if it was made without any honour or the like, it became binding only when the promisor had begun to carry it out (50. 12. 1. 1, 2). It seems to be a creation of imperial enactments about the middle of the second century (50. 12. 1. pr.; h. t. 1. 5; h. t. 6. 2; h. t. 7, etc.). There is a title in the Digest on it (50. 12). There are institutions of a somewhat similar kind in English law in which they are regarded, when they are concerned with *obligatio*, as irrevocable offers which will become contracts when accepted. The Romans do not analyse them at all. Modern German analysis seems to see in them a type of obligation independent of contract.

1 23. 3. 44. 1. 2 50. 16. 125. 3 See the reff. in Costa, *Storia del Dir. priv. Rom.* 14. 4 See p. 454, nn. 3, 4, 6. 5 C. Th. 3. 12. 3. This appears in C. 5. 5. 6, but the reference to *dictio* is suppressed. 6 C. 5. 11. 6. 7 G. 3. 96; 42. 2. 6. 3. 8 38. 1. 7. 4; h. t. 13. 9 38. 1. 7. pr. 10 G. 3. 83; Inst. 3. 10. 1, which makes the destruction occur always. But see D. 33. 2. 2.

are traces of an opinion among early lawyers that the original oath before manumission was actually binding[1], but there is no evidence that this was really so in historical times. The *iusiurandum* was a formal verbal contract, capable of release by *acceptilatio*[2], and perhaps capable of guarantee by *sponsio*[3]. The oath was binding even though taken by an *impubes*[4]. It must be made immediately on the manumission, otherwise it could not be compelled, though if actually taken later, it would be valid[5]. It was of course *stricti iuris*. Since we naturally think of services as something to be done rather than given, we should expect a formula in the form "*dare facere oportere*." But in fact the *iudicium operarum* actually had the *intentio* in the form of *condictio certi*[6]: *dare oportere*. As has recently been shewn, an *opera*—a day's work—was conceived of as a unit of value and thus as a *dandum*, not a *faciendum*, so that it had, properly enough, the *formula* of *condictio certae rei*[7].

CLXI. The Contract *Literis*[8]. *Nomina Transscriptitia*. *Expensilatio*. Although we have evidence of the importance of this contract, we know little of it. Our substantial sources are a brief account in Gaius, a very different account by Theophilus[9], one or two references in other legal texts, a number of allusions in lay literature[10], and a defective inscription[11], these last being in no way concerned to explain it. The account by Gaius is, shortly, as follows: The contract was called *nomina transscriptitia* and was made in two ways. It might be "*a re in personam*" in which what was due in some other way was transformed into this contract by recording it as having been paid to the debtor. It might be "*a persona in personam*," in which case what was due from *A* was entered up as due from *B*, *A* having "delegated" *B*. It must be distinguished from *nomina arcaria*, which were similar entries but of real payments, the liability arising not from the entry, but from the actual loan. Peregrines had not this mode of bookkeeping, and the Proculians held that they could not be parties to this mode of contract, but the Sabinians held that if it was *a re in personam* they might be debtors under it, though they could not be parties in any other way.

This tells us little of the nature of the contract. Elsewhere we are told that it could not be conditional[12], but it is inferred from a letter of Cicero that it did admit of *dies*, though the brief remark is not quite conclusive[13]. The debtor must consent to the entry[14], and no doubt he would normally make a corresponding entry in his own book, but this

1 40. 12. 44. pr. 2 46. 4. 13. pr. 3 38. 1. 8. 1 speaks only of *fideiussio*. 4 38. 1. 7. 5. 5 38. 1. 7. 2; 40. 12. 44. pr. (? interp.). 6 Lenel, *E.P.* 328. 7 Deschamps, *Mél. Gérardin*, 157 sqq. 8 G. 3. 128 sqq. 9 *Ad Inst.* 3. 21. 10 Costa, *Storia d. Dir. priv. Rom.* 346, 347. 11 Girard, *Textes*, 843. 12 Vat. Fr. 329. 13 *Ad fam.* 7. 23. It may be that the entry would be made on the day chosen. 14 Gaius does not say this, but it is inevitable.

does not seem to have been essential[1]. As it was essentially the acknowledgment of a loan it was always for a sum certain. It was unilateral and *stricti iuris*, the action being the *actio certae pecuniae creditae*. The *exceptio non numeratae pecuniae* was available, but as the basis of that defence was that the alleged loan had not been made, and the basis of this contract was a fictitious loan, this seems, at first sight, to make the contract useless. But it was always made as a sort of novation or recast of an existing transaction, or as a way of opening a credit for the debtor, and the *exceptio* would be for use where the previous transaction had never existed, or the business contemplated had not gone through[2].

All this leaves the actual mechanism of the contract obscure. What was the nature of the *transscriptio*? In what account book did the entry appear? That there were two entries and that one was based on the other appears from the name and the fact that a single transaction consists of *nomina* in the plural[3]. Romans kept a daybook or *adversaria*, on which the day's dealings were noted, and these were, it seems, copied into the *codex accepti et depensi* from time to time[4]. It has been conjectured that *transscriptio* means transfer from the daybook to the other, but it is clear that both entries were in the same book or, at any rate, made at the same time. It has been conjectured that this book was a special one kept for this purpose, and also that it was a ledger, containing a statement of debts incurred and rights acquired, but both these views are without evidence. The view most generally accepted is that it was the ordinary cashbook, *codex accepti et depensi*—the statement of moneys paid out and in. The loan being fictitious, the book would not balance. It is supposed therefore that there were two fictitious entries, one stating money received, the other, the *expensilatio*, on the other side. If it was *a persona in personam*, the former would be an entry that the money had been received from the other debtor; if *a re in personam*, it would be an entry of receipt of what was due under the earlier dealing. This would apply even though the previous dealing was not binding, *e.g.* a sale before the consensual contract existed. Where there was no previous dealing, but it was intended to open a credit, we do not know anything of the form[5].

The contract fell into disuse with the practice of keeping private

1 In the case put in *de officiis*, 3. 14. 59, the transaction is completed by entries made while the buyer is paying a call; he can hardly have had his account books with him, and, as Girard remarks (*Manuel*, 509), the point would have been material to the defence in the *Pro Rosc. com.* 2 C. 4. 30. 5. 3 Cicero, *de officiis*, 3. 14. 59, "*nomina facit: negotium conficit.*" 4 Cicero, *Pro Rosc. com.* 3. 8. 5 The foregoing account represents what may be called orthodox opinion. But the evidence is very scanty and different opinions are possible. Thus it has been recently maintained (Heck, *Archiv f. civ. Pr.* 116. 129) that there is no warrant for the conception of the contract as consisting in entries in an account book, and that it was in fact merely a formal document.

books, and disappeared late in the classical age[1], having survived longest among bankers, who of course still kept books[2]. Justinian observes that these *nomina* were not now in use, but that there was still a sort of written contract. He says that where a man had given a written acknowledgement of a loan, not in fact made, and the time for the *exceptio non numeratae pecuniae* was past he was bound by his writing, at least if there was no *stipulatio*[3]. But though the practical effect was much the same this is really a confusion[4]. The man was bound by the *mutuum* and had provided evidence which barred him from denying that there was a *mutuum*. The document was not the contract, but only evidence, though in the circumstances it was conclusive evidence[5].

1 It existed in Papinian's time, Vat. Fr. 329. See Costa, *Storia d. Dir. priv. Rom.* 350. 2 Practically they kept their customers' books, see *post*, § CLXXVIII. 3 Inst. 3. 21. 4 See however Collinet, *Ét. Hist.* 1. 59 sqq. But see also the arguments assembled by Girard, *Manuel*, 511, n. 5. 5 The custom of embodying transactions in writing is borrowed from Oriental practice, and Gaius speaks of *chirographa*, which seem to have been sealed by one, and *syngraphae*, sealed by both, as essentially peregrine. But with the extension of *civitas* under Caracalla, such documents begin to play a more important part under Roman Law. There are many forms with varying names changing as time goes on (see especially Mitteis, *Rom. Pr.* 1. 290 sqq. for an account of them), but they seem to be all, so far as Roman Law is concerned, merely evidentiary. Justinian uses the word *chirographum* freely, but he seems to mean by it no more than *cautio*, a memorandum of a transaction, usually sealed by one or both parties.

CHAPTER XI

OBLIGATIO (*cont.*). CONTRACTS *RE*. CONTRACTS *CONSENSU*. INNOMINATE CONTRACTS.

CLXII. Contracts *Re*, p. 459; *Mutuum*, *ib.*; CLXIII. *Sc. Macedonianum*, 462; *Fenus nauticum*, 463; CLXIV. *Depositum*, 464; Special cases of deposit, 466; CLXV. *Commodatum*, 467; CLXVI. Pledge, 470; *Fiducia*, 471; *Pignus* and *hypotheca*, 472; CLXVII. Remedies of creditor, 474; CLXVIII. Special rules of hypothec, 476; Priorities, *ib.*; Varieties of hypothec, 477; CLXIX. Consensual contracts, 478; *Emptio venditio*, *ib.*; Consent, *ib.*; Subjects of sale, 479; CLXX. Price, 482; CLXXI. Duties of vendor, 484; Warranty against eviction, 486; CLXXII. Warranty against defects, 488; Duties of vendee, 490; CLXXIII. Special conditions, 491; CLXXIV. *Locatio conductio*, 494; of things, 495; obligations of lessor, 496; CLXXV. Obligations of lessee, 497; Expiration, 499; CLXXVI. *Locatio* of services, 500; *operarum*, 501; *operis faciendi*, 502; Special cases, *l. Rhodia de iactu*, 503; CLXXVII. *Societas*, 504; Duties of parties, 505; CLXXVIII. Termination, 507; Special cases, 510; CLXXIX. *Mandatum*, 512; Duties of parties, 513; Termination, 514; CLXXX. *Mandatum* as a consensual contract, 516; as agency, *ib.*; as surety, 517; as a mode of assignment of obligation, 518; CLXXXI. Innominate contracts, *ib.*; Evolution, 519; *Permutatio*, 520; *Aestimatum*, 521; *Precarium*, *ib.*; *Transactio*, 523.

CLXII. The contracts "*re*." These (*Mutuum*, *Commodatum*, *Depositum* and *Pignus*) have as their common quality the fact that the binding element is the handing over of the subject-matter. This cannot be regarded as a "Form" in the sense that the contract is formal, for we shall see that, in many cases where the thing chanced to be in the hands of the person who was to hold it under the contract, there was no actual delivery. Nor can the contract properly be said to be binding by part performance, for in *mutuum* the only person bound, and in *commodatum* and *pignus* the person primarily bound, were those who received a service by the handing over, while in deposit the person primarily bound was one to whom the handing over was not a service. And that way of putting the matter leads to the notion that part performance made an agreement binding, a rule of much later development[1]. But, however we look at them, these contracts involved a new conception; certain bargains were made binding, not certain ways of making bargains.

Mutuum. This was loan, not for use, but for consumption, the debtor being bound to return, not the same thing, but the same quantity of things of that kind and quality[2]. Thus it applied only to what the Romans called *res quae mutua vice funguntur*[3]. Money is the most obvious case, but it applied equally to any things such as are commonly dealt with by

1 Innominate contracts, *post*, § CLXXXI. 2 G. 3. 90; Inst. 3. 14. pr. 3 *Res fungibiles* is not a Roman expression.

number, weight or measure—corn, wine and so forth[1]. It is conceivable that anything might be the subject of *mutuum* if the parties so agreed. The contract was purely unilateral, binding only the receiver. It was *stricti iuris*, the remedy in case of money being the *actio certae pecuniae creditae*, and in other cases *condictio triticaria*[2]. Questions of quality would be material in these cases: no doubt the *intentio* stated the grade or quality of the goods[3].

Mutuum was the oldest of the "real" contracts and the only one which was *stricti iuris*. It was not in practice very frequent, for it was usually coupled with a *stipulatio* for return (not uncommonly with interest—*fenus*), and where it was so reinforced it was superseded by the *stipulatio*[4]. It does not seem probable that *mutuum*, conceived of as a contract, is of great antiquity. But it has been pointed out[5] that the notion of an obligation to restore, where one man is wrongfully enriched by the receipt of specific sums of money which should rightfully be another's, the basis of the later system of *condictio* (*sine causa*[6]), is one of extreme antiquity. The case of money handed over on an undertaking to return it is an obvious form of this, and gradually, in the course of evolution of legal analysis, takes shape as a specific contract[7].

A *mutuum* might have subsidiary agreements in it. There would usually be a day fixed for repayment, or a provision that the property was not to pass, and *mutuum* arise, till some future day[8]. There might be a *solutionis causa adiectus*, and a place fixed for payment, and there might be conditions[9]. There might even be resolutive conditions, *e.g.* that in certain events the money was to be a gift[10].

It was of the essence of *mutuum* that *dominium* was transferred from the lender to the borrower, but in the complex relations which arose in trade it was inevitable that there should be some relaxation of this rule. Some cases which look like relaxations are not really such but are expressions of the various forms which *traditio* might take. If *A* asked *C* for a loan and *C* told him that *B* owed *C* money and that if *A* collected it from *B* he might have it as a loan, there was a *mutuum* so soon as *A* had collected the money. At first sight the actual money seems never to have been *C*'s, but in fact it passed to *C*, and was transferred from *C* to *A* by *traditio brevi manu*[11]. But one case appears to go further. *A*

1 G. 3. 90; Inst. 3. 14. pr. 2 As to these actions, see *post*, § CCXXX. 3 12. 1. 3; Lenel, *E.P.* 233. 4 45. 1. 126. 2. 5 See Girard, *Manuel*, 516 sq., and Pernice, *Labeo*, 3. 1. 220 sqq. 6 *Post*, § CLXXXVII. 7 Early express loans of money no doubt usually took the form of *nexum*, *ante*, § CL. 8 12. 1. 8. 9 *E.g.* in *nauticum fenus*, where the obligation to return does not arise unless the voyage is safely completed. *Post*, § CLXIII. This appears to be a suspensive condition. See also 12. 1. 7; h. t. 10; 45. 1. 122. pr. 10 39. 5. 1. pr.; h. t. 18. pr. 11 See D. 12. 1. 2. 4; h. t. 9. 8; 45. 1. 126. 2, etc.

asked *C* for a loan and *C* got his debtor *B* to promise to pay *A* instead of *C*; there was a *mutuum* to *A*. In the actual case there was an error which vitiated the transaction, but it seems to be the opinion of Celsus that there would be *mutuum* apart from this error[1]. It is not however absolutely clear that the *mutuum* is contemplated as arising at the moment of the promise. If it arises only on payment, there is nothing exceptional[2].

If, apart from these points, ownership did not pass, there was no *mutuum*. It does not follow that there was no liability. If the lender failed to transfer ownership because he was not able to alienate, he had a *vindicatio*, or, if the property had been consumed in good faith, a *condictio*. If it had been consumed in bad faith he had either this or, if he preferred, an *actio ad exhibendum*[3]. If the failure was due to his not being owner the true owner had the *vindicatio*, and if the thing had been consumed in good faith, the lender (so to call him) had a *condictio* to recover the money, and the owner, who had no direct claim against a *bona fide possessor* who had ceased to possess, could demand cession of these actions. If the property had been consumed in bad faith, the owner had the *actio ad exhibendum*[4].

As the actual thing lent had not to be returned, but its equivalent in kind and quality, there was no question of negligence. Apart from special agreement, whatever happened to the property lent, an equivalent must be returned[5].

Mutuum, as a result, perhaps, of its origin above stated, was gratuitous, but the Roman business man did not lend gratuitously. What the rule meant was that interest, if any, and there usually would be[6], must be agreed for by a separate contract. This would normally be a *stipulatio*[7], for a mere pact would not base an action, though a pact to pay interest created a *naturalis obligatio*, which pacts ordinarily did not[8]. The rate of interest was not unlimited and there were penalties for exceeding the lawful rate[9]. The maximum rate for money loans in the Empire was 12 per cent. Justinian lowered it to 4 per cent. for private loans and 6 per cent. for ordinary business loans. Compound interest (*anatocismus*) was forbidden[10].

Where interest was contracted for by separate *stipulatio* it would of

1 12. 1. 32. 2 See however Girard, *Manuel*, 523. He cites other texts in support of the view that the Romans were groping at, without grasping, the notion of handling book credits as if they were money. 3 12. 1. 12; h. t. 13. 1. 4 12. 1. 11. 2. 5 C. 4. 2. 11. 6 Loan at interest is called *fenus*, but so far as the loan is concerned it is the contract of *mutuum*. 7 Exceptional cases in which pact sufficed, *post*, § CLXXXVIII. 8 *Post*, § CLXXXIX; 46. 3. 5. 2; C. 4. 32. 3. 9 See, *e.g.*, for later law, C. Th. 2. 33. 2. In classical law what was paid in excess was imputed to the debt, or could be recovered as an alternative, P. 2. 14. 2, 4. 10 C. 4. 32. 26, 28; D. 12 6. 26. 1. On the subject of interest generally, *post*, § CLXXXVIII.

course be recovered by a distinct action. But a pact could not be sued on; it seems therefore to follow that the interest in those cases in which pact sufficed would be recovered in the same action. Thus, in the case of loans of grain, we are told that the fact that the value had in any case to be estimated in the judgment permitted of the addition of the interest also[1]. But in money loans by *civitates* (another case in which pact sufficed) there was an obvious difficulty. The *actio certae pecuniae creditae* did not admit of any addition to the sum named in the *intentio*. It was for *certa pecunia*. It is to be supposed that the interest due was added to the amount of the loan in the statement of claim, *i.e.* the *intentio* of the action.

CLXIII. *Sc. Macedonianum*. This enactment provided an important restriction on loans. A *lex lata* under Claudius laid some restriction, the nature of which is unknown, on loans at interest to *filiifamilias*, payable at the death of the *paterfamilias*[2]. A little later, under Vespasian, this senatusconsult (named, it seems, after the person whose malpractices led to its enactment[3]) provided, in the form, then usual in *scc.*, of a direction to the magistrates, that no action was to be given to one who lent money to a *filiusfamilias*, even though the *paterfamilias* had since died. From the language it might be supposed that this would lead to an enquiry (*cognitio*) by the praetor and consequent *denegatio actionis*, but it is clear that the defence was raised by *exceptio*[4]. Suetonius speaks of it as applying to loans at interest, but it applied equally to gratuitous loans[5].

The rule affected only loans of money to the *filiusfamilias*, and thus not loans of other property, or other contracts, *e.g.* sale, even though interest was to be paid on the price, nor even a case of surety for a loan to a third person, or an *expromissio* on loan to a third person[6]. But all these cases were subject to the rule that the *sc.* applied if they were mere masks, *i.e.* frauds on the *sc.*, the real purpose of the transaction being a loan to a *filiusfamilias*[7]. The *sc.* did not apply where money promised to a *filiusfamilias* was lent to him after he was a *paterfamilias*[8], but, conversely, it did apply if the money, promised while he was *sui iuris*, was paid to him after he was adrogated[9]. On the other hand if it was essentially a loan to a *filiusfamilias*, the *sc.* applied even though return was stipulated[10], so that the *mutuum* was superseded.

The protection applied to all those *alieni iuris*, of either sex, and it protected the *paterfamilias* against an *actio de peculio*—indeed this was

1 C. 4. 32. 11; h. t. 23. **2** Tac. *Ann.* 11. 13. **3** 14. 6. 1. pr. **4** 14. 6. 7. 10; cf. P. 2. 10. 1. **5** Suetonius, *Vesp.* 11; D. 14. 6. 7. 9. **6** 14. 6. 3. 3; h. t. 7. pr., 3; h. t. 13. **7** 14. 6. 3. 3; h. t. 7. pr.–3. **8** 14. 6. 3. 4, 4. **9** 14. 6. 6. **10** *Ib.*

probably its primary purpose[1]. It also protected sureties for the *filius*, at any rate if, as was commonly the case, they had a right to fall back on him[2]. And the defence was available to and against *heredes*[3].

The lawyers developed many rational limitations to the provision of the *sc.* Thus it did not apply if the creditor had no reason to think the man a *filius*, or was deceived by him, or he was generally thought to be a *paterfamilias*[4]. It did not apply so far as the money was applied to the father's concerns[5], or was needed for, and applied to, reasonable expenses such as the father ordinarily paid[6], or if the father, knowing of it, authorised it or did not prohibit[7] it, or if it did not exceed the *peculium castrense* or *quasi castrense*, or, under Justinian, if the loan was to a *miles*[8]. It did not apply if the *filius* acknowledged it after he was *sui iuris*, by part payment, or ratification or novation[9].

The obligation was not absolutely void. There was a *naturalis obligatio* on the son and his sureties[10], but there was none on the father. As to the son the effects of this *obligatio* were small, while he was a *filius*, for, if he paid, his father could recover[11]. He could not ratify[12], while a *filius*, but he could give a surety[13]. After he was *sui iuris* he could of course do all these things, but it does not seem that apart from ratification the *obligatio* could be used as a set off against him. If the surety paid under his natural obligation, he could not recover or claim from the *filiusfamilias*[14].

Fenus Nauticum, Pecunia Traiectitia, was a complicated transaction, on which a few words are needed. It was a loan for the purposes of a voyage, usually to buy cargo, on the terms that the money was not to be repaid unless the ship arrived safely. For the period during which the risk was with the creditor, interest might be agreed on by mere pact and was without legal limit, till Justinian, after some hesitation, fixed it at 12 per cent.[15] For the period before starting, and after arrival, legal limits applied[16]. A slave was usually sent with the ship, and there were formal rules as to his demanding the money on arrival[17]. Stipula-

1 14. 6. 9. 2; Inst. 4. 7. 7. **2** 14. 6. 9. 3. **3** 14. 6. 7. 10. **4** 14. 6. 3; h. t. 19. **5** 14. 6. 7. 12. **6** 14. 6. 7. 13; Greg. Wis. 10. 1. **7** 14. 6. 7. 15; h. t. 9. 3; h. t. 12; h. t. 16. The *initium* being the important thing, the classics doubted if ratification sufficed, or if application to father's concerns of money borrowed for himself barred the *sc.* Julian decided in the second case that it did and Justinian made ratification suffice. 14. 6. 7. 12; C. 4. 28. 7. **8** 14. 6. 1. 3; C. 4. 28. 7. 1. **9** At least, in the case of *novatio*, if he did it knowingly, 14. 6. 7. 16; h. t. 9 (interp.); h. t. 20; C. 4. 28. 2. **10** 12. 6. 40. **11** Difficulties where the thing has been consumed, 12. 1. 14; 14. 6. 9. 1. **12** Arg. 14. 6. 20. **13** 14. 6. 9. 3. **14** 14. 6. 9. 4. **15** P. 2. 14. 3; C. 4. 32. 26. 2. **16** 22. 2. 3, 4. pr. There are in fact two contracts, an ordinary *mutuum* till the voyage begins, and a *nauticum fenus* to arise when the first is ended by the starting, a sort of combination of loan and marine insurance. It is the source of *respondentia* and bottomry of commercial law. The second contract is conditional on the starting. **17** 22. 2. 2.

tions were usual for payment of the slave[1] and for the case of delay in payment[2]. It was allowed to agree that the creditor should be released from the risk if the voyage did not end by a fixed time or unauthorised ports were visited or unauthorised cargo was carried[3]. Whether the remedy on this contract was the same as on ordinary *mutuum* is not said. It was an importation from Greek law and, though it is sometimes called *mutuum*[4], it is treated distinctly in the sources[5]. It has therefore been contended by different writers that it gave an *actio in factum*, that it was an innominate contract, and that there was a *condictio ex lege*[6].

CLXIV. *Depositum.* This and the remaining "real" contracts were of a different type. They were all praetorian in origin, simplifications of *fiducia*. They gave *bonae fidei iudicia*, and they were what is called imperfectly bilateral; it may be doubted whether their full development greatly antedates the Empire.

Deposit was the handing over of a *res mobilis*, gratuitously, to be kept in charge of the depositee. There was no transfer of ownership as in *fiducia*, or even of legal *possessio*. It follows that even if the depositor was not owner, the contract was valid: depositee must hand the *res* back to him, unless it was claimed by the owner, even though the depositor was a thief[7]. On the other hand there might be an agreement that it should be handed to a third person[8]. But if the depositee was himself the owner at the time of the deposit, there was no contract[9]. If the deposit was by an owner incapable of binding himself, *e.g.* an unauthorised *pupillus*, the depositee was bound, but not the *incapax*[10], and where a deposit was made to a *pupillus*, without authority, we are told that if he was old enough to be capable of *dolus*, and committed it, he was liable[11]. As depositor need not be owner, a redeposit by a depositee was a valid contract, and might not be a breach of duty[12]. In such cases the original depositor might sue his depositee, but if the redeposit was reasonable, he could claim only cession of actions against the second depositee, against whom, however, he had, in late classical law, an *actio utilis*[13].

The depositee must restore the thing on demand, whether there was a fixed term or not, together with its "*causa*," accessories, fruits, etc.[14] He might not use the thing; to do so was *furtum*[15]. But he was liable only for *dolus*, not for *culpa*[16], so that if it had been lost by accident, or

1 22. 2. 4. 1. 2 22. 2. 9. There are obscure rules, fixing a limit on the total of these two charges, 22. 2. 4. 1. 3 C. 4. 33. 4. 4 22. 2. 6; 45. 1. 122. 1; C. 4. 33. 5. 5 D. 22. 2; C. 4. 33. 6 See reff. in Bertolini, *Obblig.* (*P. Sp.*) 204. 7 16. 3. 1. 39; Coll. 10. 7. 1; 16. 3. 31; 5. 1. 64. 8 Who has under Justinian an *actio utilis depositi*, C. 3. 42. 8. 1; cp. Coll. 10. 7. 8. 9 16. 3. 15. *Contra*, if he has become owner since, C. 4. 34. 11. 10 16. 3. 1. 14. 11 16. 3. 1. 15. 12 16. 3. 16. 13 *Ib.*; Coll. 10. 7. 8. 14 16. 3. 1. 24. 15 G. 3. 196; P. 2. 12. 5. 16 13. 6. 5. 2; 16. 3. 1. 47; Coll. 10. 2. 1; 10. 7. 6.

slight negligence, he was not liable, but gross negligence "*dolo aequiparatur*[1]." The restriction on his liability is due to the fact that he did not profit: the contract was wholly in the interest of depositor. Special pacts might make him liable to any extent, even for *casus*, but a pact to release him from liability for *dolus* was void[2]. And we are told that one who offered himself as depositee was liable for everything but *casus*[3]. If the depositee lost possession in a way which freed him from liability, but afterwards regained it, he was now in his old position, even though the recovery was after an action had been begun[4]. The fact that the liability might be varied by pact, and that men do not adjust their transactions to textbook classifications, led in many cases to doubts whether the transaction was or was not deposit. If there was reward it was *locatio*: the texts discuss many such cases[5].

As it was for the depositor's benefit, he was liable for *dolus* and *culpa*, and he must reimburse for all expenses involved in the care of the thing and damage caused by it, which care on his part would have avoided[6]. If the contract was for return at a place other than that of deposit, he must pay any reasonable resulting charges. For the recovery of expenses the depositee had besides the action a right of retention analogous to pledge, but it is noteworthy that, while this right of retention in other cases where it existed, gave an *actio furti* if the thing was stolen from the holder, this was not so in the case of a depositee[7].

The action against depositee was the *actio depositi*. The original action was *in factum*[8], but in classical law, though this still existed, there was an alternative *bonae fidei formula in ius* which is held to have appeared before it did in *commodatum* and pledge[9]. From *litis contestatio* the *res* was at his risk if he could have returned it[10]. If he allowed the action to proceed to *condemnatio*, he was subject to *infamia*[11]. On the other hand the judgment freed him from further liability in respect of the thing, which, if still in his possession, became his[12]. Under Justinian there could be no set off[13].

1 See on *culpa lata, post*, § CXC. 2 16. 3. 1. 6, 7; 2. 14. 7. 15. Where a holder commits *dolus* in respect of the thing, there is *condictio*, apart from *actio depositi*, 16. 3. 13. 1. Albertario, *Bull.* 26. 15 sqq. holds that all such pacts varying the liability (2. 14. 17. 15; h. t. 27. 3) were void till Justinian, but there is a great difference between pact against liability for *dolus* and pact for release from liability for past *dolus*. 3 16. 3. 1. 35 (? interp.). 4 16. 3. 1. 47–3; h. t. 20. If he sell the thing and recover it and afterwards lose it without fault he is liable: *dolus* perpetuates the liability, Coll. 10. 7. 10. 5 *E.g.* 16. 3. 1. 9–13. 6 13. 7. 31; 16. 3. 5. pr.; h. t. 23; Coll. 10. 2. 5 = D. 16. 2. 23. 7 Coll. 10. 2. 6. Justinian may have abolished this *ius retentionis*. C. 4. 34. 11. 8 Perhaps replacing a delictal liability to double damages under the XII Tables. 9 Lenel, *E.P.* 279 sqq. 10 16. 3. 12. 3. As to modification in later classical law, Girard, *Manuel*, 1028, n. 4. 11 Coll. 10. 2. 4; 10. 6. 1; G. 4. 60; D. 3. 2. 1. 12 41. 4. 3. 13 C. 4. 34. 11. Earlier law not clear, see P. 2. 12. 12.

The action against the depositor was the *actio depositi contraria*, a nomenclature which expresses the fact that the contract created liability primarily in the depositee: the contract was imperfectly bilateral. It was a *bonae fidei iudicium* and *condemnatio* did not involve infamy[1].

Three cases of Deposit have very special rules:

Depositum miserabile. Where a deposit was made in time of riot, fire, shipwreck or similar calamity, so that the depositor was unable to choose his man, the depositee was liable to double damages for denial or *dolus*, a survival of the general liability under the XII Tables[2]. The *heres* was equally liable for his own *dolus* or denial, but there is a curious rule that he was liable *in simplum* for his predecessor's *dolus*, but only for one year, actions on contract being usually perpetual[3].

Sequestratio. This was a deposit by several persons jointly. It arose usually from a dispute affecting the thing, often a lawsuit[4], and the deposit was to be returned only when the dispute was settled, and to the person in whose favour it was decided. But it might equally arise in any joint deposit if the thing was to be returned to one, on a certain condition[5]. Only one could have a right to it and he only when the condition arrived[6]. For the *sequester* to give it up before was a breach of contract[7], but it was possible for him in some cases, on application to the praetor, to give the parties notice to find another person, or, on the same application, to deposit the thing in a temple[8]. The sequestration itself was at times ordered by a *iudex*, but in later law he was forbidden to order *sequestratio* of money claimed[9]. *Sequestratio* applied to land as well as moveables and had the further peculiarity that it usually, but not always, gave possessory rights to the *sequester*[10]. This would prevent any party from acquiring it by *usucapio*. If the *sequester* had not *possessio*, but only detention, *usucapio* might still be running for the benefit of the winner[11]. The action bore the special name *actio depositi sequestraria*[12].

Depositum irregulare[13]. This was deposit of fungibles, usually money[14], commonly with a banker, on the terms that he was to return an equivalent on demand, so that the ownership passed to him[15]. It was very

1 3. 2. 1; 16. 3. 5. See *post*, § CCXXXIV as to the *actio contraria*. **2** Coll. 10. 2. 7; 10. 7. 3, 11. **3** 16. 3. 1. 1–4; h. t. 18. **4** 16. 3. 5; 50. 16. 110. **5** 16. 3. 6. If he gave it to a third person, presumably any of them could claim. **6** Arg. 16. 3. 6. **7** C. 4. 34. 5. **8** 16. 3. 5. 2. **9** 2. 8. 7. 2; C. 4. 4. 1. **10** 16. 3. 17. 1. Also a survival for practical reasons from the rule in *fiducia*—the fiduciary had ownership and *possessio*, *ante*, § CLI. **11** 41. 2. 39. See Karlowa, *R.Rg.* 2. 607. **12** 16. 3. 12. 2. *Sequestratio* is mentioned by Plautus, but it is not clear that it has legal consequences. For Cicero it seems commonly to mean dishonest concealment, *pro Clu.* 26. 72; *in Verr.* 1. 12. 36; 2. 2. 44. 108. For the word and the history of the institution, see Muther, *Sequestration und Arrest.* **13** Not a Roman name. **14** As to corn see 19. 2. 31. **15** 19. 2. 31; 16. 3. 7. 2, 3.

like *mutuum*: indeed on the same facts it might be *mutuum*. It might be agreed for instance that money was to be a deposit but that at any time the depositee might turn it into a *mutuum*, and use it[1]. There is but a fine line between this and the transaction we are considering, the difference being one of intent. This transaction was deposit throughout (though its purpose was not merely that of ordinary deposit) and from this fact many results followed, *e.g.*, *bonae fidei iudicium* and *actio contraria*, *infamia*, absence of set off under Justinian, recoverability at any time, and interest in any case from *mora*. Neither the *sc. Macedonianum* nor the *exceptio non numeratae pecuniae* had any application[2]. It is suggested by some texts that the subject-matter was at the risk of the depositor till actual use[3], but this is doubtful[4]. Where the money was to be used, interest was due, recoverable in the *actio depositi* itself[5]. But this involved one disadvantage. If the banker became insolvent, depositors were entitled to payment before ordinary creditors, but this did not apply where they had received interest[6]. It seems likely that the whole institution is post-classical[7].

CLXV. *Commodatum.* This was loan for use, the thing being returned. It seems to have been originally called *datio ad utendum*[8]. The lender was *commodator* or *commodans*, the borrower, "*qui commodatum accipit*" or the like[9]. It was usually for a short agreed time[10], and almost invariably for a specified purpose. If the time was not stated the purpose must be, or it would not be possible to fix a limit of time: it is held indeed by some writers that the purpose was always stated and that so far as land is concerned, this was the real difference between *commodatum* and *precarium*[11]. *Commodatum* was perhaps, at first, not applied to land, but this application appears in classical law[12]. As the same thing must be returned, it did not normally apply to things necessarily consumed in use, but if the things were lent "*ad pompam vel ostentationem*," fruits lent for ornament in a procession and so forth, this was a valid *commodatum*[13].

The essential of the contract was the delivery, as in deposit, a mere physical transfer, giving only detention[14]. Thus, as in deposit, there was

1 12. 1. 9. 9. **2** C. 4. 30. 14. 1. **3** 12. 1. 10; 16. 3. 1. 34. **4** 13. 6. 24; h. t. 26. 1. **5** 16. 3. 28; h. t. 29. 1; C. 4. 34. 4. **6** 16. 3. 7. 2. **7** The only pre-Justinianian text, a late one, Coll. 10. 7. 9, says clearly that such a thing is *mutuum* though called deposit. Some of the Digest texts are interpolated. See however Collinet, *Études Historiques*, 1. 114 sqq. who cites Papinian (16. 3. 24). But the only parts of this text which speak of restoring "*tantundem*" say that in this case it is not deposit. See also the document in Girard, *Textes*, 858. **8** 13. 6. 1. 1. The edict says "*commodasse*," h. l. pr. **9** *Commodatarius* is not a Roman word. **10** 13. 6. 5. pr. **11** See Bertolini, *op. cit.* 266. **12** 13. 6. 1. 1; 19. 5. 17. pr. **13** 13. 6. 3. 6; h. t. 4. Just as in this country exhibition fruits are sometimes lent for the decoration of a table. **14** 6. 1. 9; 13. 6. 8.

a valid contract even where the lender was not owner, and what was said as to deposit by a thief applies here also[1]. On the question whether there could be *commodatum* of a *res incorporalis* it is usually said that there could not[2], but this means merely that if *A* gave *B*, gratuitously, the enjoyment of usufruct of land or a slave, this was not *commodatum* but *precarium*. That rests on the doctrine that *commodatum* must be for a specific purpose, but there was nothing in the law of *commodatum* to prevent one who had a usufruct from giving a *commodatum* of the thing to another, as one could who had no right at all. The *commodatum* was valid though the act might be a breach of his duties as usufructuary.

The loan must be gratuitous: if it was not, and the reward was to be in money, it was *locatio rei*. If the payment took another form it was an innominate contract, *permutatio* or the like[3].

It was normally for the benefit of the borrower alone, but we learn that cases might occur in which it was for the benefit of both, *e.g.* where two people were giving a dinner in the rooms of one of them, and the other lent him objects to decorate his rooms[4]. We are told even that it might be solely for the benefit of the *commodator*, but the cases look like benefit of both, *e.g.* where a man lent his bride ornaments to wear at the wedding or where a praetor who is giving public games lends the players some outfit, or, the text goes on to say, someone lends them to the praetor[5]. We shall see that these distinctions were of some importance in relation to the liabilities of the parties.

The borrower might keep the thing for the agreed time, or, if none was agreed, for a time reasonable for the purpose of the loan[6]. This is subject to the obvious limitation that the lender could at once reclaim it if the borrower was misusing it in breach of the contract[7]. In early classical law it was doubted whether the owner could bring *vindicatio* against any but a *possessor*, but in later law the real action lay against any who held the thing[8]. If the owner and lender vindicated from the borrower, it is not clear whether the existence of the contract gave an *exceptio* or whether the borrower must return the thing and rely on his *actio commodati contraria*. The latter is the probable rule, except, indeed, where he had a *ius retentionis* for expenses: in this case he had an *exceptio doli* in the *vindicatio*[9]. In practice however the owner seems usually to have proceeded by the *actio commodati*, in which he had not to prove title.

1 13. 6. 15; h. t. 16; 5. 1. 64. **2** See Bertolini, *op. cit.* 262. **3** Inst. 3. 14. 2; 3. 24. 2; D. 13. 6. 5. 12. As to the history of the requirement of money consideration in *locatio, post*, § CLXXIV. **4** 13. 6. 18. pr. **5** 13. 6. 5. 10. The last case may be thought of as for the benefit of both, as the lender will see the games, but how it should be thought of as for his benefit alone is difficult to understand. **6** 13. 6. 5. pr.; h. t. 17. 3. **7** Arg. C. 4. 65. 3. **8** 6. 1. 9. **9** 47. 2. 15. 2; h. t. 60.

The borrower must return the thing at the proper time with its "*causa*," *i.e.* accessories, fruits, *fetus*, etc., and any profits he had derived from unauthorised use of it. If he lost it without fault he must transfer any rights of action[1].

In the normal case the borrower was liable for all damage to the thing or its accessories, due to his *culpa*, having to shew the care of a *bonus paterfamilias*[2]. There were however exceptions extending and limiting this liability. If the loan was for the benefit of both, he was bound only to shew the care he did in his own affairs[3], and if it was for the benefit of the *commodator* alone he was liable only for *dolus*[4]. Conversely, the liability might be larger. As any pacts might be added it was possible to agree for any degree of liability, *e.g. casus*, except that here as elsewhere a pact excluding liability for *dolus* was void[5]. And he was liable for all risks, including *vis maior*, after he was in *mora*[6], for all casualties resulting from unauthorised use of the thing[7], and also for "*fatum*," *i.e.* everything, if when he might have saved the borrowed thing he preferred his own[8]. If condemned he could claim cession of any actions the lender might have against third parties, and, as the thing became his, to security for its delivery if the *commodator*[9] ever recovered it.

If the thing was stolen from the *commodatarius* he had, in classical law, an *actio furti* against the thief, and the owner had not. This is explained by Gaius as being due to the fact that the owner had no interest, since the borrower was responsible for the thing[10]. This implies liability in any case apart from negligence, if the thing was stolen: this liability, known as "*custodia*," will be considered later. Under Justinian a new rule was introduced, for the case of *commodatum*. The *dominus* was to have the choice. If he sued the thief, the *commodatarius* was freed from further liability. If he brought the *actio commodati*, the borrower might sue the thief. But if when the *dominus* brought the *actio commodati* he did not know that the thing had been stolen, he could change his mind, remit the *actio commodati* and sue the thief, unless the borrower satisfied him, in which case he in turn could sue[11].

The duties of *commodator* may be shortly stated. He must refund all extraordinary expenses and all but the simple everyday medical ex-

1 Inst. 3. 14. 2; D. 13. 6. 5. 10; h. t. 13. 1; 22. 1. 38. 10. If the unauthorised use was in bad faith, he was liable for *furtum*, 13. 6. 5. 8. **2** 13. 6. 5. 2; P. 2. 4. 3; Coll. 10. 2. 1. As to a possible further liability, for *custodia*, *post*, § CXCI. **3** 13. 6. 18. pr. In early classical law probably only for *dolus*. As to the history of "*diligentia quam in suis rebus*," *post*, § CXC. **4** 13. 6. 5. 10, applied no doubt originally to both cases. **5** 13. 6. 5. 2; h. t. 17. pr. Liability for *casus* implied if the agreement is expressly for return at a stated value. **6** *Post*, § CLXXXVIII. **7** 13. 6. 5. 7; h. t. 18. **8** 13. 6. 5. 4; P. 2. 4. 2. Exact meaning controverted. See Bertolini, *op. cit.* p. 282. **9** 13. 6. 13. pr.; h. t. 5. 1; h. t. 17. 5; 42. 1. 12. **10** G. 3. 203 sqq. As to the details and limitations, *post*, § CXCVII. **11** C. 6. 2. 22.

penses, even though the thing became extinct[1]. He must compensate for damages caused by defects in the thing of which he was aware, and, generally, for *dolus*[2], with the curious limitation, found in many contexts, that he was not to be liable for *dolus*, if it was a slave, beyond the man's value[3]. It is to be presumed that if the lender benefited by the loan he would be liable for *culpa*. He was also liable for loss resulting from his not allowing the borrower to enjoy the thing as agreed[4]. It must be remembered that for *impensae*, and, according to one text, for any claim, the borrower had a *ius retentionis*, till they were allowed for[5].

A *commodatum* by an unauthorised *pupillus* was, on general principle, binding on the borrower, but not on the pupil[6], though it is to be supposed that if he sued he could be met by an *exceptio doli* in respect of expenses which had improved his property[7]. A *commodatum* to a *pupillus* did not bind him in strict law at all, but a rescript of Pius gave an *actio utilis* to the extent of his enrichment[8]. There was no direct action even if the *commodatum* lasted after puberty, even for *culpa* after puberty[9], subject of course to ratification.

If several took a *commodatum* in common, the texts conflict on the question whether the obligation was *in solidum* or *pro parte*, but the dominant opinion seems to be that it was solidary, at any rate unless the contrary appeared[10]. *Coheredes* of a *commodatarius* were of course liable, under the rule of the XII Tables, only *pro parte* for fault of the deceased[11]. Each *heres* was liable in full for his own *culpa*[12], but we are not told how far he could be sued on the *culpa* of another *heres*.

The lender's action was the *actio commodati*, with alternative *formulae* as in deposit. The *actio commodati contraria* was wanted where *retentio* was not available (that being obviously the more convenient remedy), because it might be that on the facts no *actio commodati* lay, or they might exceed the claim, or the *iudex* might have refused to take them into account[13].

CLXVI. *Pledge.* In connexion with this topic it is convenient to give a short account of the evolution of real security, though it is only

1 13. 6. 18. 2, 4; P. 2. 4. 1; Coll. 10. 2. 5. **2** 13. 6. 18. 3. **3** 47. 2. 62. 6. Mommsen emends, inserting a passage. **4** 13. 6. 17. 3. **5** 13. 6. 18. 4. **6** 13. 6. 3; 26. 8. 5. pr. **7** Arg. 18. 5. 7. 1 etc. **8** See n. 6. **9** 13. 6. 1. 2. **10** h. t. 5. 15–7; h. t. 21. 1. It seems rather to be indivisibility. **11** C. 2. 3. 26; D. 13. 6. 3. 3 says that *heres* who has the whole may be sued *in solidum*. **12** On general principle. **13** 13. 6. 18. 4. See *post*, § CCXXXIV, as to the *actio contraria*. The distinction between deposit and *commodatum* and, *e.g.*, *mandatum* would be less clear in practice than in texts. *A* asks *B* to take care of silver in his absence, but he may use it if his own silver falls short on a festal occasion. There is but one contract, but it is *commodatum* on such an occasion, otherwise *deposit*. If *A* and *B* are common owners and *A* asks *B* to take care of the thing with permission to use it, but to lose no opportunity of selling it, all three contracts seem to be present, and perhaps *societas* as well. See D. 16. 3. 1. 11 sqq.

to a small extent part of the law of obligations. The essence of all these transactions is the giving to a creditor some right, essentially a right *in rem*[1], over property, by way of security for the debt. In its first phase this was effected by *fiducia*[2]: the ownership was transferred to the creditor, who undertook to reconvey the property, if the debt was duly paid, and it was usual to agree as to the circumstances in which the creditor might sell it. We have in the so-called *formula Baetica*[3] a model form for such transactions. The *fiduciarius* was owner and had as a consequence the rights of owner, any restrictions on them being matter only of contract between him and the debtor. Thus if he sold before the debt was due, or in any way contrary to his undertaking, he was liable to the debtor, but the sale was good, and the buyer had a good title not subject to the *fiducia*. Apart from sale, the debtor was deprived of the use of the thing, though it was not uncommon, at least in the case of land, for the creditor to leave it in the debtor's hands as a *precarium*[4].

The creditor might not make profit out of the thing, and thus anything he received by way of produce or rent or the like, was set off, in first instance, against interest due, and any excess against the debt, any further excess, *e.g.* on sale, going to the debtor[5], with interest in case of *mora*. He must not damage the thing and must restore it if the debt was duly paid. If the debtor found a purchaser and was prepared to pay off the debt the creditor must reconvey. An obvious means of oppression and fraud was checked by a rule that the creditor could not become owner, free from the *fiducia*, even through an intermediary. An agreement that the creditor should have no power to sell was void: he could still sell on giving notice. If the creditor had improved the thing he was entitled to the cost, and as account of this was taken in the *actio fiduciae*, it was, in effect, added to the debt[6].

The actions were the *actio fiduciae* of the debtor, and *contraria* of the creditor, for expenses. As we know the actions they were *in ius* and *bonae fidei*, but there are doubts about their history[7].

Fiducia as a form of security was not superseded by the appearance of *pignus* and *hypotheca*: it had such advantages for the creditor that it was kept in use[8]. It lasted throughout the classical age, and only dis-

1 It does not belong to the law of *iura in rem*. The right of *possessio* is not treated by the Romans as a *res*. It appears, in the institutional books, as part of the law of actions, so far as it appears at all. In strictness security should be treated as a separate head, but some repetition is saved by taking it incidentally, as is done in the case of personal surety, *ante*, § CLVI. 2 *Ante*, § CLI. 3 Girard, *Textes*, 822. 4 See 2. 8. 15. 2. 5 P. 2. 13. 1, 2. 6 P. 2. 13. 1–7; P. 4. 12. 6; D. 13. 7. 6. pr.; h. t. 22. Many texts in the Digest, there referred to *pignus*, were written of *fiducia*. 7 *Ante*, § CLI. 8 It must be remembered that *fiducia* could not be attached to *traditio* (*ante*, § CLI) so that this form of security applied only to *res mancipi*. It is held by Manigk (Pauly-

appeared with *mancipatio*: indeed it is possible that *mancipatio* and *cessio in iure* were kept in existence for some time because they could be used for *fiducia*[1].

The protection of possession by the praetor paved the way for the introduction of another form of security, *Pignus*[2], in which *possessio* passed to the creditor, *dominium* remaining with the debtor. It was in full operation before the time of the Empire. This protected the debtor from such wrongful sales as might occur in *fiducia*, but it still deprived him of the enjoyment of the thing, unless the creditor allowed him to hold it *precario*. The creditor's protection at first was only the right of *possessio* protected by interdicts, and a right of sale, if this had been agreed, but not otherwise[3]. There were so far as we know no special interdicts, but the texts suggest that *uti possidetis*, *utrubi* and *unde vi* were available[4].

A further development was the agreement which ultimately acquired the name of *hypotheca*, in which the possessory rights were vested in the creditor, but the thing was not actually handed over to him. There might or might not be an agreement that possession should not be taken till the debt was due: in either case it was *hypotheca* till the thing was actually taken over. The binding force of such an agreement was first recognised in the case of rents. A tenant could validly agree that his "*res*" should be pledged for his rent, the expression covering all his property "*invecta et illata*," except in passage, and the crops, after he had acquired them by *perceptio*[5]. The landlord had an *interdictum Salvianum* to recover them from the debtor as soon as rent was due[6], without which right his agreed security would have been worthless. He had also an *actio Serviana* for their recovery from any one who held them[7], and the interdict was ultimately made effective against third persons[8]. Similar agreements were made by urban tenants, but it is not clear that the interdict was here available, and it is certain that the *actio Serviana* was not. Early in the Empire, and perhaps before, this action was extended

Wissowa s.v. *Fiducia*) that the rules of this institution were so affected by reaction of those of *pignus* that the fiduciary creditor had, in effect, only a limited ownership.

1 See Girard, *Textes*, 821 sqq., for a model and an actual case. They shew that there might be various terms. In neither is it expressly said that the property is to be returned on payment. **2** The word *pignus* is very ancient in lay literature (Champeaux, *Mél. Girard*, I. 161 sqq.) and there are legal consequences, but it is not the "real" contract of *pignus*. The thing is to be forfeited in a certain event: it is in fact a conditional *traditio*. **3** 20. 1. 35. **4** 41. 3. 16; 43. 17. 2; h. t. 3. 8; 43. 16. 1. 9. The allusion in the first text seems to be to *utrubi*. **5** 20. 6. 14; 47. 2. 62. 8. **6** G. 4. 147. These pledges arose without express agreement in the later classical law, *post*, § CLXVIII. **7** Inst. 4. 6. 7. **8** 43. 33. 1; C. 8. 9. 1. Girard holds (*Manuel*, 792, n. 2) that it was ultimately extended to all pledgees. Chief texts, G. 4. 147; Inst. 4. 15. 3 and Theoph. ad h. l.; C. 8. 9. 1, "*debitoremve*."

under the name *utilis* or *quasi Serviana* to other cases of hypothec, probably first to urban landlords, later to all cases, when (or later) it acquired the name of *actio hypothecaria*[1], the pledge without actual transfer becoming very usual.

Between hypothec and *pignus* there was in strictness no legal difference[2], but there was the physical fact that in the former the thing was left in the hands of the debtor, with the result that it was possible to create successive charges on the same thing. But it was equally possible to create hypothecs on a thing already held by a pledgee, and the obligational rules were, *mutatis mutandis*, the same. We shall therefore deal with the two institutions together.

The contractual aspect of the matter can be shortly dealt with. It was a *bonae fidei* transaction. Each party was liable for *culpa levis*[3] and it is sometimes said that the creditor in possession was liable for *custodia*[4], but there is little evidence for this and some against it[5]. He must not use the thing or make profit out of it, any thing so received being imputable against the debt[6], as were damages received, *e.g.* for theft of it, except where the debtor was the thief[7]. (To these rules *antichresis* was an exception. This was an agreement, introduced towards the end of the classical period, that the creditor should have the fruits in lieu of interest[8].) He must restore the pledge when the debt was paid[9]. On the other hand he was entitled to reimbursement of expenses properly incurred in the care of the thing, and to compensation for damage to him caused by the thing, if there had been *culpa* of the debtor[10]. If the thing was not the property of the debtor, or, more generally, was in such a legal position that the creditor was lawfully deprived of his possessory right, *i.e.* of his security, the debtor was liable, under his contract, whether he knew of the defect or not[11]. The actions were the *actio pigneratitia* for the debtor and *contraria* for the creditor, with *formulae* both *in ius* and *in factum*[12]. But the debtor could not bring his action

1 It has been maintained that the words *hypotheca*, *hypothecaria* are always interp. (Mitteis, *Z.S.S.* 31. 489). But Erman seems to shew that *hypotheca* is in origin merely a Greek name for *pignus* (*Mél. Girard*, 1. 419 sqq.) and is used only in dealings with Greeks till Severus. Later jurists use it more freely and as synonymous with *pignus* (20. 1. 5. 1). He does not shew how Ulpian comes by the distinction in 13. 7. 9. 2, which is that in the text, but he regards it as older than Ulp. and merely a means of using both words. Apart from terminology, pledge by agreement is as old as the Empire. As to its source, see Girard, *Manuel*, 781. 2 20. 1. 5. 1. 3 13. 6. 5. 2; 13. 7. 13. 1; Inst. 3. 14. 4. 4 Heumann-Seckel, *Handlexicon*, s.v. *custodia*. 5 *E.g.* C. 4. 24. 5, 8, 9. 6 13. 7. 22. pr.; 47. 2. 55. pr.; 20. 1. 21. 2; C. 4. 24. 1. 7 13. 7. 22. pr.; 47. 2. 15. pr. 8 20. 1. 11. 1; 20. 2. 8. 9 13. 7. 9. 5; Inst. 3. 14. 4, with its *causa*. P. 2. 5. 2 says that such a pledge does not cover "*fetus* vel *partus*." Others say the opposite, C. 8. 14. 3; 8. 24. 1; D. 29. 1. 29. 1. P.'s text is probably defective. 10 13. 7. 8. pr.; h. t. 16. 1. 11 13. 7. 9. pr. 12 As in *commodatum* and *depositum*, Lenel, *E.P.* 246 sqq. See *post*, § CCXXXIV, as to the *actio contraria*. It is maintained by some writers (see Levy, *Z.S.S.*

unless he had paid or otherwise discharged the debt, or was ready to tender the amount when he asked for the *formula*[1]. The debtor's action was the same whether the transaction was *pignus* or hypothec, though there would be less occasion for it in the latter case[2].

CLXVII. The creditor's means of enforcing his security are the following:

1. Right of Sale. From early times a right of sale might be agreed on[3], but, later than Gaius, though before Paul, things were reversed and there was an implied right of sale unless it was expressly excluded[4]. It does not appear that the creditor need have actually taken possession before a sale, and though the creditor could not sell to himself, even *per interpositam personam*[5], the debtor could sell to the creditor[6]. There could be no sale by the creditor till the debt was due[7].

2. Foreclosure. In earlier classical law the creditor could not become owner by lapse of time, *i.e.* there was no foreclosure except under an agreement that the property should be his if the debt was not paid by a certain day—*lex commissoria*[8]. This was modified by a practice, introduced early in the third century, by which the creditor could apply to the court to have ownership conferred on him—*impetratio dominii*. There was an official valuation and, after notice and a year's delay, he received praetorian ownership, being compelled however, if he took the thing, to accept it in full discharge, though the valuation was less than the debt, and, if it was more than the debt, to pay the difference to the debtor[9]. Further, the debtor could it seems still redeem, before *usucapio* was complete[10]. The *lex commissoria* was forbidden under Constantine[11].

Justinian modified this law of sale and foreclosure in several ways. Either he, or some other late authority, provided that where there was an agreement that the creditor should not sell he could still do so after notice given three times[12]. He also provided that, subject to agreement, there could be no sale till two years after notice or judgment. If no purchaser was found a *iudex* would fix a time for payment. If payment was not made by that time a further decree was issued on application,

36. 1; Biondi, *Iudicia bonae fidei*, 233 sqq.) that in classical law there was only a *formula in factum*.

1 13. 7. 9. 5. **2** The *actio hypothecaria* is a distinct action, not on *obligatio*, but for the enforcement of the possessory right, and applies equally to *pignus*. See above. **3** It is possible that the earliest reff. (20. 1. 35; 47. 10. 15. 32) were written of *fiducia*. **4** G. 2. 64. If no agreement, triple notice to debtor, P. 2. 5. 1. **5** P. 2. 13. 4; C. 8. 27. 10. **6** 20. 5. 12; Vat. Fr. 9. **7** C. 8. 27. 14. On Cons. 6. 8, which says that, if the creditor has sold the *fiducia* or pledge, the *heres* has no action unless it was begun by the deceased, see Huschke, ad P. 2. 17. 15. **8** 20. 1. 16. 9, where the words "*iusto...aestimandam*" may be interpolated. **9** The chief texts on this institution are C. 8. 33. 1; h. t. 2; but these enactments assume earlier legislation which we do not possess. **10** Arg. 41. 1. 63. 4. **11** C. 8. 34. 3. **12** 13. 7. 4.

declaring the creditor owner. The debtor could still redeem within two years by paying debt, interest and costs. On a sale any excess must be paid to the debtor and if the price was less than the debt, the creditor had still a claim for the rest[1]. He further provided that where the thing had passed to a third person the creditor could not bring the *actio hypothecaria*, etc., against him till he had exhausted his personal remedies against the debtor and sureties[2].

The normal subject of a pledge was a thing owned by the debtor. If it was not his, he could not create possessory rights over[3] it, but a pledge to operate when it became his would be valid[4]. It could in any case be ratified when it became his, and in later law was so validated, *ipso facto*[5]. Praetorian ownership sufficed and even a *bona fide possessor* could pledge so as to bind himself, those claiming under him, and those against whom he had the *actio Publiciana*[6].

There might be pledges of rights other than ownership. A debt might be pledged, and here there would be no question of possessory rights. This was made effective by notice to the debtor, who could not then validly pay the original creditor, and could be sued by the pledgee, by *actio utilis*[7]. There might also be subpledge, pledge of a pledge, which seems to be contemplated rather as a second pledge of the thing itself, under powers implied in the original pledge[8]. There was also what is known in English law as a "floating charge," a hypothec of all a man's stock-in-trade on the terms that it was to apply to new stock as it came in and to cease to apply to stock disposed of in the ordinary way of business[9]. Usufruct, and no doubt *emphyteusis* and *superficies*, could be pledged, but as nothing could be pledged which could not be sold, *usus* and *habitatio* doubtless could not[10]. It was indeed possible to create a potential usufruct by way of pledge, *i.e.* to authorise the creditor to sell a usufruct in the property if the debt was not paid[11], and this might apply equally to *usus* and *habitatio*. There is a further remarkable case. A right of way or water to be created could be pledged, though urban servitudes could not. The creditor, if he was a neighbouring owner, could use the servitude till the debt was paid, and, if it was not, he could sell the easement to any other neighbouring owner[12]. Apart from the creditor's right to enjoy the way, this is like the last case—a neighbour might be willing to buy a right of way. But the text assumes it existing in the hands of the creditor, and such a servitude cannot shift from one *praedium* to another. It is sometimes explained as meaning that the

1 C. 8. 33. 3. **2** Nov. 4. 2. **3** 13. 7. 2. **4** 20. 1. 16. 7. **5** 13. 7. 41. **6** 13. 7. 29; 20. 1. 18. **7** 20. 1. 20; 13. 7. 18. pr.; 42. 1. 15. 8; C. 8. 16. 4. **8** 13. 7. 40. 2; 20. 1. 13. 2; C. 8. 23. 1, 2. **9** 20. 1. 34. pr. It is excluded by the modern Codes in France and Germany. **10** 20. 1. 9. 1; h. t. 11. 2, 3. **11** 20. 1. 15. pr. **12** 20. 1. 12.

debtor has a servitude over adjoining land, and pledges that, but this equally involves the apparently inadmissible giving to third persons of rights over the servient land[1].

Pledge was indivisible: so long as any part of the debt was unpaid the whole thing was still pledged, and, where it had passed into several hands, any of the owners was liable to *actio hypothecaria* for the whole[2].

The pledge was ended if the creditor sold the thing or renounced his right[3]. And the right of action might be barred, in later law, by a lapse of 30, or, in some cases, 40 years[4]. It was also of course extinguished by payment of the debt, but if the thing was in the hands of a third person, and he, when sued by the creditor for it, paid him off, he was regarded as buying the debt, and was entitled to *cessio actionum*[5].

It may be added that the texts shew, as might have been expected, that *pignus* was mainly used for moveables, and hypothec for land and *iura*.

CLXVIII. So far we have discussed rules applying to both forms: we have now to consider points involving a hypothec.

The great difference between *pignus* and hypothec was that in the latter the thing remained in the hands of the debtor. Hence it was possible to hypothecate the same thing to a number of persons in succession, which did not necessarily, or usually, involve any fraud. This institution, which seems to belong to the late classical age[6], led to a number of special rules. It was "*stellionatus*" to give a hypothec without declaring existing charges, or to alienate without declaring any charges[7]. But the more important rules had nothing to do with fraud. If there were several charges, it was necessary to determine their priorities. The rule was simple: apart from privileged hypothecs, to be dealt with shortly, the earlier in date had priority, even though a later had gained actual possession[8]. This was modified by Leo, who gave priority to any hypothec registered with the public authority or made formally before three witnesses[9].

The first hypothecary could effectively bring the *actio hypothecaria* against the debtor or third persons (apart from the question of adverse title) or later hypothecaries[10]. These had the same right, except against earlier hypothecaries[11]. It was only the first creditor who destroyed the

1 The text is sometimes said to be mainly due to Justinian, Pomponius having in fact said the opposite. Perozzi, *Inst. di dir. Rom.* 1. 487, cited Albertario, *Il pigno della superficie*, 4. **2** 13. 7. 8. 2; h. t. 11. 3; C. 8. 27. 6; 8. 31. 2. **3** 13. 7. 9. 3; h. t. 8. 1; 50. 17. 158. **4** C. Th. 4. 14. 1; C. 17. 39. 3. **5** 20. 6. 12. 1. **6** Herzen, *Mél. Gerardin*, 299 sqq., holds that it is not older than Marcellus. He explains otherwise 16. 1. 17. 1 and 20. 3. 3. In early classical law a second hypothec was presumably conditional on discharge of the first. **7** 13. 7. 36. 1; 47. 20. 3. 1. **8** 20. 4. 11. pr. **9** C. 8. 17. 11. **10** 20. 4. 12. pr. **11** 20. 4. 12. 7.

pledge by selling the thing[1]: he was entitled to pay himself out of the price, giving any surplus to the later pledgees in order, and any ultimate surplus to the debtor[2]. But all pledgees had a right of sale: if a later one sold, the sale was not void, but the lien of prior creditors was not affected: they could recover the thing from the buyer[3]; later ones could not.

The order of priority might also be modified by *successio in locum*, a principle under which a later charge could in some cases be put in the position of an earlier one. These cases were apparently (1) where the money was applied to discharge of the earlier incumbrance, at least if advanced expressly for that purpose, and a pledge agreed for at the time of the loan[4], (2) under the *ius offerendae pecuniae*. A later charger could step into the shoes of an earlier, by tendering to him the sum due to him, the substantial difference between this and the former case being that here the dealing was direct between the two creditors[5].

Renunciation by one pledgee affected no one but himself, except that it caused the next in order to step into his shoes[6].

These rules of priority were much affected by the creation of privileged hypothecs. Of these the clearest cases were those of a creditor who lent money, under hypothec, to secure the preservation of goods[7], of the fisc for taxes (and, later, some other debts[8]), and, under Justinian, of a woman for her *dos*[9], over the husband's whole property. There were many privileged debts, *i.e.* taking priority of other insecured debts. In some cases these were transformed into tacit hypothecs, and it is hard to say in what cases they gained priority here too. The fisc, at least for taxes, seems always to have had priority, but apart from this it is disputed how priorities were arranged between privileged hypothecs.

Hypothecs may be classified as general, over a whole mass of property, or specific, over a specific thing. They might arise by operation of law, or, as in the ordinary contractual case, by express agreement. Of the former class there were two types, and it will be seen that some of each of these classes are specific and some general.

1. Those established by a Court. These were (*a*) *pignus praetorium*, resulting from various cases of *missio in possessionem*, which was hardly a pledge till Justinian gave the *actio hypothecaria* on it[10]; (*b*) *pignoris captio* under a judgment. In later law if a judgment was not satisfied, the creditor could seize property of the debtor and ultimately sell it to pay himself[11].

1 20. 4. 12. 7; 20. 5. 5. pr.; C. 4. 10. 6; C. 8. 19. 1. **2** 13. 7. 42; 20. 4. 12. 5. **3** 20. 4. 12. 7. **4** 20. 3. 3; C. 8. 18 *passim*. **5** P. 2. 13. 8; D. 20. 4. 19; 20. 5. 5; C. 8. 17. 5; h. t. 10; C. 8. 18. 4, etc. **6** 20. 6. 12. **7** 20. 4. 5; h. t. 6. **8** 49. 14. 28; C. 4. 46. 1; C. 12. 62. 3. **9** C. 5. 12. 30. **10** C. 6. 54. 3; 8. 21. 2; D. 13. 7. 26. pr. See Ramadier, *Missio in bona*, 131 sqq. **11** 42. 1. 40; C. 8. 22.

2. Tacit hypothecs imported by law into certain dealings without agreement. They might be general, *e.g.* that of the fisc for all debts, dating at latest from Caracalla, covering all the debtor's goods, that of wards over the goods of *tutores* and *curatores*, for debts in respect of their administration, said to date from Constantine[1], that of *furiosi*, under Justinian, against *curatores*[2], that of children over their parents' property in certain events, to secure their rights to *dos* and certain successions[3], that of widows for *dos*[4], that of legatee for his legacy over all goods of deceased in the hands of the person liable[5]. Some of these and several others were introduced by Justinian.

They might be special, *e.g.* that of landlord for rent over crops of a farm, and, in an urban *praedium*, over *bona invecta et illata*[6], that of one who had lent money for repairs, over the house[7], that of *pupillus* over goods bought with his money by a third person[8], etc.

A special hypothec had no priority over an earlier general charge, but if the creditor was the same, he could not proceed under the general hypothec, at least if it was later, till it was clear that the other would not suffice[9]. It does not seem that *A* with a special hypothec had any priority over *B* with a general hypothec of the same date[10].

CLXIX. The Consensual Contracts. These were transactions in which the mere agreement was a binding contract. They were all bilateral, though mandate was imperfectly so, and they were of great commercial importance, a fact which accounts for the attribution of contractual force to the mere agreement. They were *Emptio Venditio*, *Locatio Conductio*, *Societas* and *Mandatum*.

Emptio Venditio. The most important of all contracts. It was essentially sale for a price, the double name expressing the fact that it was bilateral but the duties on the two sides were different. The only other contract which had this characteristic was hire and that also was called by a double name—*Locatio Conductio*.

The primary essentials of the contract were consent, object sold, and price.

Consent. No form was needed: consent could be shewn in any way[11], but in classical and later times it was usual to embody agreements for sale, if of any importance, in written documents[12]. These were good evidence, but they were no more, till Justinian provided that, where it had been agreed to embody the bargain in such a document, the contract

1 C. 5. 37. 20. 2 C. 5. 70. 6. 3 C. 5. 9. 6. 2; h. t. 8; C. 6. 61. 6, etc. 4 *Ante*, § XL. 5 C. 6. 43. 1. 6 20. 2. 3; h. t. 4; h. t. 7; 20. 6. 14. 7 13. 7. 21; 20. 2. 1. 8 20. 4. 7. pr.; C. 7. 8. 6. 9 20. 4. 2; C. 8. 27. 9. 10 But a general hypothec, even to the fisc, was postponed to an earlier special hypothec, 20. 4. 8. 11 P. 2. 17. 13. 12 Instances, Girard, *Textes*, 843 sqq.; Bruns, 1. 329 sqq.

should not be binding till this had been completed[1]. But here another factor came in. It was usual, as in all countries, to give something, as it is said, to "bind the bargain," *arra*, earnest, either money or some article. In classical Roman Law there is no indication that ordinarily it served any but an evidentiary purpose. In Greek law it was more important: forfeiture of it was often the remedy if the agreement was not carried out, and it is likely that in the Eastern Empire the same had been true in practice, at least in small transactions[2]. Justinian, in the Code, provided that where there was *arra* and it was agreed that the contract should be embodied in writing, a party who withdrew before the writing was complete should forfeit the *arra* or its value, though he was not liable on the contract. Such is at least the ordinary interpretation of the provision, though it is not clear. In the Institutes, after saying that in purely unwritten contracts of sale the *arra* is mere evidence, and that he has made no change in these, he adds what seems to be a statement of the enactment in the Code, remarking that it is to apply whether the contract is in writing or not. The apparent contradiction has been explained and explained away by many writers[3], but the matter is not cleared up, and it remains uncertain whether under Justinian an unwritten contract, even complete, could be renounced without further penalty than loss of *arra*, or whether the law of unwritten contracts was unchanged.

Object sold. The main principles were that there was no sale without an object sold and that anything could be sold which could enter into the *patrimonium*[4]. Further, it must be a thing in which the buyer could have an *interesse*. Thus a sale to a man of what was already his was void, and if he did not know of the fact he could recover any price paid[5]. If it was in part his, the sale was good for the rest[6]. And a man might buy the right of possession of a thing which was his, if that right

1 Inst. 3. 23. pr.; C. 4. 21. 17. The *lex* lays down the same rule for other transactions and instances exchange and gift. 2 Collinet, *Études Historiques*, 1. 89 sqq. 3 Of recent writers Collinet, *loc. cit.*, holds that there is no real contradiction, but does not deal with the opening words of the passage in the Inst. Cornil (*Mél. Girard*, 1. 255 sqq.) sees a contradiction. Senn (*N.R.H.* 37. 575 sqq.) holds that in classical law forfeiture of *arra* might serve as the sole penalty for withdrawal. Naturally the parties could so agree, but he gives no texts. Those he cites merely say the *arra* shall be forfeited, and say nothing of the rest. They are all on *l. commissoria*, where the point could hardly arise, for here breach gives vendor the option of enforcing or setting aside (18. 3. 2, 3). On avoidance he will have only *arra*, but clearly vendee cannot set it aside on the same terms. He holds J.'s rule as merely stating as law what had been practice. But if the rule in the Inst. does actually allow the parties to a completed contract to withdraw with no penalty but loss of *arra*, it is a change of great importance. 4 18. 1. 34. 1. As to sale of things in fact inalienable, *post*, p. 481. 5 18. 1. 16. pr.; C. 4. 38. 4. If the ultimate object was delivery of a thing for a price, the maker providing the materials, this was sale, not hire of services, *post*, § CLXXVI. 6 18. 1. 18. pr.

was vested in another[1]. So too he might buy conditionally what was his, the sale being operative only if it had ceased to be his when the condition operated[2]. And he could buy what would be his on the occurrence of a condition: he was in effect buying release from the condition[3]. In cases of this kind, if he bought without knowledge of the conditional right, and the condition was satisfied, he could claim the price of the thing as if he had been evicted: he had, so to speak, evicted himself[4].

As there must be a real object, sale of a non-existent thing, *e.g.* a hippocentaur, was a nullity[5]. The thing must be still existing. This point is discussed in two much interpolated texts and the classical law is not certain. The texts say that if the thing had wholly ceased to exist, when the contract was made, the sale was void: this is no doubt classical. If it had partly ceased to exist, and both were in good faith, then if the major part still existed the sale was good, allowance being made for what was lost[6]. Thus where land was bought in view of the timber on it, and this was burnt at the time of the contract, there was no sale[7]. If, in such cases, the vendor knew and the buyer did not, then, if anything was left, the vendor must pay the *interesse*[8].

A future thing might be sold, *e.g.* "my next year's crop[9]," and an important distinction was drawn between *emptio rei speratae*, such as this, in which case there was no sale unless the thing sold came into existence, and an *emptio spei*, *e.g.* a shilling for the next cast of the net, which was good though the net came up empty. The first case gave a result which often recurs. If there was no crop, there was no contract, but, if the vendor had prevented the crop from coming, he was liable *ex empto*, *i.e.* there was an *actio ex empto*, though there was no contract[10].

A *hereditas* might be sold, like anything else, but it must be one already existing. The sale of the *hereditas* of a living or imaginary person was void, and price and expenses could be recovered: it was not allowed to speculate on chances of succession[11]. Under Justinian persons likely to succeed to a person yet living could make valid pacts as to the ultimate

1 18. 1. 34. 4. **2** h. t. 61. **3** Arg. 19. 1. 29. **4** *Ib.* **5** Arg. 45. 1. 97. pr.; 18. 1. 8. **6** 18. 1. 57. **7** 18. 1. 58. So where two slaves were bought at a lump price and one was already dead, the sale was void; the unity of price implied that the point was to get the two, h. t. 44. **8** 18. 1. 57. 1. The text goes on to discuss further cases, even the improbable one in which they are agreeing for the sale of a house which both of them know to have ceased to exist. **9** 18. 1. 8. pr.; h. t. 39. 1. **10** 18. 1. 8. pr. **11** 18. 4. 1; h. t. 7. If there was a *hereditas*, not belonging to vendor, then, apart from *dolus*, he must give its value. If no *hereditas* at all, price paid and expenses (18. 4. 8). It was permissible to sell any rights in an existing *hereditas*, whatever they might prove to be—*emptio spei*—but not if the *hereditas* was of a living man (h. t. 9–11). See Vassali, *Miscell. crit. d. D. R.* 1, but interpolations are somewhat freely adopted. See review by Koschaker, *Z.S.S.* 36. 433.

sharing of the succession, if the person whose *hereditas* was in question assented. But this does not amount to sale, and he expressly restates the rule that there can be no contracts affecting future *hereditates*[1]. It is to be noted that in sale of an inheritance there were debts as well as assets, and the same may be said of sale of a *peculium*.

The sale must be legally possible. Thus the sale of what was not *in commercio*, a freeman or a *res sacra* or *religiosa*, was void, and it was not thought fitting to allow the sale of a freeman "*si servus erit*[2]." But if the buyer of a man thought he was a slave, classical law held that there was a valid contract, because it was difficult to tell a slave from a freeman, and the vendor was liable for eviction. The same rule, at least as to the existence of a contract, was applied under Justinian to the other cases[3], but in classical law there seems to have been only an *actio in factum* for the innocent buyer of *res religiosa*[4], while another text, perhaps altered by Justinian, tells us that an innocent purchaser of *res sacra religiosa* or *publica* has an *actio ex empto* for his *interesse*, though "*emptio non teneat*[5]." If only a small part of the property was such, this did not affect the contract, but there was an *actio ex empto* for compensation[6].

Not only must the thing be *in commercio*; it must be one with which the actual party could deal. It must be *in commercio* to him. Thus a guardian could not buy his ward's property or a provincial official property in the province[7]. It was forbidden to sell the materials of a house, and thus a contract of sale was void[8]. It may be, as is sometimes said, that the same was true wherever the law forbade alienation, *e.g.* of dotal land, or of *res litigiosae*: it is at least consistent with the texts to say that there was an *actio ex empto* to a buyer in good faith[9]. The sale of fugitive slaves, who were *res furtivae*, was expressly forbidden, so that this was void, in any event[10]. Of other *res furtivae* we are told that if the buyer was in good faith there was a valid contract[11].

There was nothing to prevent the sale of a third person's property. It might be difficult to carry it out, but that was the vendor's fault. It is plain that such a sale might be in good faith, with full knowledge of the facts; the vendor might intend to acquire from the owner, or induce him to convey to the buyer[12].

A *res incorporalis* might be sold, *e.g.* a usufruct or *usus* to be created in favour of the buyer. The enjoyment of an existing usufruct might be

1 C. 2. 3. 30. 2 18. 1. 34. 2. 3 18. 1. 4–6; h. t. 34. 1. 4 11. 7. 8. 1 5 18. 1. 62. 1. Cp. Inst. 3. 23. 5. 6 18. 1. 22–24. 7 18. 1. 34. 7; h. t. 46; h. t. 62. pr. 8 18. 1. 52. 9 23. 5. 4, etc. See reff., Moyle, *Sale*, 20, 21. Analogy suggests an evolution like that in the case of *res sacrae*. And probably a conditional sale was valid as in the case of purchase of *res sua*. 10 18. 1. 35. 3. 11 18. 1. 34. 3. Some things were excluded from sale for other reasons, *e.g.* poisons, except recognised medicines, h. t. 35. 2. 12 18. 1. 28.

sold, but not of *usus*, which was inalienable and could not become alienable: the buyer was presumed to know the law[1]. So a right of way to be created might be sold[2], and *A* might sell to *B* a right of way over *C*'s land, if *B* had adjoining land, though it might be difficult to carry it out.

The sale need not be of a specific thing; it might be, *e.g.*, of a choice and it might be of a *genus*, *i.e.* a thing of a kind, without specifying the particular thing. But a distinction must be drawn. We have instances of sales of *genera* in the sense of so much, or so many, out of a given quantity belonging to the vendor[3], but no clear instance of a sale of that kind not out of an existing mass. This fact, and *a priori* considerations, have led to a general opinion that such a transaction was not sale. It must have occurred; it is found in *stipulatio* and legacy[4], and a *bonae fidei* consensual contract might be expected to be at least as widely construed as a *stricti iuris* transaction[5]. But no such cases are recorded. In a sale of an alternative, this or that, the vendor might choose, but, if one ceased to exist before delivery, he must give the other[6].

CLXX. Price. The price must be in money, must be fixed, and must be real. It must be in money, or it would be impossible to distinguish buyer from seller and their duties were different. The rule and the reason are given by Gaius as the Proculian view. The Sabinians held that it might be sale though the price was not in money, and Gaius tells us that Caelius Sabinus urged that if a thing was given, clearly as the price for a thing offered for sale, the difficulty would not arise. But Justinian did not adopt this[7] and it is clear that the Proculian view prevailed[8]. But the Code adopts an enactment of A.D. 238, which declares, on such facts, not that it was sale, but that there was an action "*ad exemplum ex empto actionis*[9]."

The purpose of the rule was served if some of the price was in money, and this sufficed: it was still a sale, though something was undertaken besides payment in money[10]. And where a money price was agreed, there was nothing to prevent a subsequent arrangement that something else should be rendered instead, on the principles of *datio in solutum*[11].

The price must be *certum*. An agreement to sell, with no price fixed,

1 7. 1. 12. 2; 7. 8. 8. 2 8. 1. 20; h. t. 80. 1; 19. 1. 3. 2. 3 18. 1. 35. 5. 4 30. 37. pr.; 45. 1. 54; Ulp. 24. 14. 5 See Karlowa, *R.Rg.* 2. 616. See however, Haymann, *Haftung des Verkäufers*, 1. 71 6 18. 1. 34. 6. As to alternative obligations, *post*, § CXCIII. 7 G. 3. 141; Inst. 3. 23. 2. 8 Gaius is definite, though he speaks of dispute as still existing. See D. 18. 1. 1. 1; 19. 4. 1. 9 C. 4. 64. 1. The thing given had been handed over and there was a complete *permutatio*. The action was, it should seem, *praescriptis verbis*. *Post*, § CLXXXI. 10 18. 1. 79. 11 C. 4. 44. 9. As to *datio in solutum*, *post*, § CXCIII.

was not a sale[1], nor was one expressed as "at a fair price." The normal price was a fixed sum, but there were other forms: "the price at which I bought the other," "the rate fixed in the market to-day" would do as well—*id certum est quod certum reddi potest*[2]. Although pacts might be freely added to a contract of sale, a subsequent agreement that the price should be altered in a certain event was regarded as creating a substituted new contract in that event[3]. There was difficulty as to an agreement for sale at such a price as a third party should fix. Labeo and Cassius (of different schools) held that there was as yet no contract. Others held that there was. Justinian held that there was a contract conditional on the fixing of the price by the person named, but only if a specific person was named[4]. It is also clear that there was no sale if the price was left to be fixed by one of the parties[5].

The price must be real. This rule was intended to prevent evasion of rules on *donatio*[6], by making the transaction look like a sale. It was no sale if a price was named, but there was no intention to exact it[7]; it was *donatio*, governed by the rules of *donatio*. There was some difficulty where the price was absurdly low. Where the price was derisory, "*nummo uno*" or the like, there was, no doubt, no sale, but a masked *donatio*, but this is not stated for sale, though it is for *locatio*[8]. But where the price was merely low, here, whatever the object, it was sale, if the price was to be exacted, unless the parties were husband and wife, when it was more severely scrutinised. On Julian's view the whole was void in this case if the price was plainly too low. On another view, which seems to rest on a rescript of Severus and Caracalla, there must be evidence that it was *donationis causa*, and not in good faith. In that case it was void; otherwise it was *pro tanto* a *donatio*[9], and therefore *pro tanto* void.

There was no rule that the price must be adequate[10]; the court would not prevent ordinary people from making their own bargains. To this there was in later law one exception, the so-called *laesio enormis*. Two texts in the Code say that if land had been sold at less than half its value, the seller could have the sale rescinded unless the buyer would make up the price to the full value[11]. They are attributed to Diocletian, but both shew signs of interpolation. The rule is not known to the framers

1 Inst. 3. 23. 1. 2 18. 1. 7. 1, 2. The parties do not know it, but it is certain what it is. We are here told that a sale for "100 and whatever more I may sell it for" is good: there is a *certum*, with a further contingent right. See also Vat. Fr. 9. 3 18. 1. 72. pr. 4 Inst. 3. 23. 1; 19. 2. 25. pr.; C. 4. 38. 15; G. 3. 140. 5 18. 1. 7. pr. 6 *Ante*, § XCI. 7 18. 1. 36; C. 4. 38. 3. 8 19. 2. 20. 1; h. t. 46. 9 18. 1. 38; 24. 1. 5. 5; h. t. 7. 6; h. t. 31. 3, 4; h. t. 32. 25. 10 As to temporary regulations of price, *e.g.* of corn (*L. Sempronia*), see Moyle, *Sale*, 75. There were certain cases in which sale was compulsory, and here there was sometimes a fixed price. See C. 6. 43. 3; 7. 7. 1. Buckland, *Slavery*, 577. 11 C. 4. 44. 2, 8.

of later *leges* in the Theodosian Code[1], so that, in view also of the crudeness of the rule, it is likely that it is due to Justinian. It does not appear to have applied to anything but land, and there is no reason to think that the buyer had an analogous right in the converse case[2].

CLXXI. Confining ourselves for the present to simple cases without subsidiary terms, we have now to consider the duties of the parties.

Duties of the vendor. Sale was a *bonae fidei* contract in which both parties benefited. The Vendor must abstain from *dolus*, and must take care of the thing till delivery, being liable for *culpa levis*[3], *i.e.* he must shew the care of a *bonus paterfamilias*. He was also, we are told, bound to "*custodia*[4]." It is a question to be considered later whether this meant, here, merely *maxima diligentia* in preventing theft, or an absolute liability if it was stolen. He was not liable for *casus*, apart from agreement or *mora*. Thus if the thing was damaged by accident, after the contract was made, or wholly or partially ceased to exist, without his fault, he was bound only to deliver what was left and the buyer must still pay the price; the risk was on him[5]. The effect was to imply in the contract an agreement that the maxim *res perit domino* was not to apply. The rule is clear, but its supposed injustice has led to a great variety of explanations of it, according to the writer's views on the origin of the contract of sale[6].

To account for the origin of the rule on logical grounds is not to justify or account for it at a time when it had ceased to be logical. It may be a mere traditional survival[7]. The rule existed when sale and transfer occurred at the same moment, and though sale changed its character the rule remained. There is no doubt that this sort of survival did occur; *fiducia* left its mark on the institutions derived from it. But there we can see that those which were undesirable disappeared. This rule remained and seems to have raised no question. The fair inference is that it corresponded to commercial needs[8]. It must be remembered that the rule could always be excluded by agreement. We shall see later that the rule as to total destruction did not apply if the sale was conditional, or was not "*perfecta*" in other ways. On the sale of fungibles, at so much a unit, the risk did not pass till the counting or weighing or measuring was complete, and this whether what was bought was the whole mass or part of it[9]. This required the presence or consent of the

1 C. Th. 3. 1. 1; h. t. 4; h. t. 7; cp. C. 4. 44. 15. 2 Exceptions, Moyle, *Sale*, 186. The rule has been much discussed, Windscheid, *Lehrb.* § 396. Later continental systems have adopted it with modifications. See Code Civil, §§ 1674 sqq. The new German Civil Code does not adopt it. 3 18. 6. 3; Vat. Fr. 13. 4 19. 1. 31; 47. 2. 14. pr. 5 18. 6. 8; 21. 2. 11; Inst. 3. 23. 3; Vat. Fr. 23 = C. 4. 48. 5. 6 See Dernburg, *Pand.* 2. § 96; Girard, *Manuel*, 556 sqq.; Bertolini, *op. cit.* 508. Haymann (*Z.S.S.* 41. 44 sqq.) maintains that it is a Byzantine notion. 7 Girard, *loc. cit.* 8 Appleton (*Rev. Gén.* 36. 518) finds some advantages in it. The same rule exists in English law, but here it is logical, as ownership passes, and where it does not, the risk does not. 9 18. 1. 35. 5, 7; 18. 6. 8. pr.

buyer. If he did not appear on the fixed day, or on reasonable notice the vendor was no longer liable for *culpa*[1], but only for *dolus*, so that all risk passed to the buyer[2].

The fact that the goods were the property of a third person did not affect the law of *periculum*, unless the vendor fraudulently represented them as his own: in that case it is commonly held that the risks were with him[3]. And in all cases in which the risk was with the buyer the vendor was bound to assign to him any rights of action he might have against a third party in respect of the goods[4], since the buyer, having as yet no actual right in the goods themselves, would have no remedy of his own[5].

The next duty of the vendor was to deliver the goods, assuming that the buyer had paid, or was ready to do so, or in some way had fulfilled, or was ready to fulfil, his part. As the buyer took the risk of diminution, so he had the benefit of increase; he was entitled to the thing as it was on delivery. All accessions and fruits since the contract was *perfecta* went to him[6]. If, on land sold, a tree had since blown down, it belonged to him[7]. There is however some doubt in the case of money received under a contract of hire of the thing. Day to day earnings of the slave sold in the meantime, the price of *fructus*, ripe at the time of the contract, received later, and other acquisitions of the same type went to the buyer[8]. But where land sold was at the time let to a tenant we are told that any rent paid belonged to the vendor, apart from agreement[9]. These words, and the fact that other texts shew that such agreements were made[10], make it clear that this does not mean merely that the rents were his, with a duty to account for them: though this is what we should expect, since he was not to keep the *commoda* of the thing sold[11]. It appears that he kept them. No doubt the rule applied only to cases in which the agreement was made before the contract of sale.

The duty of delivery may be shortly stated thus. The vendor must put the buyer into control of the thing; he must give him *vacua possessio*, and must in practice guarantee him against defects of title, but was not bound to make him owner[12]. Why the rule was put in this way is un-

1 18. 6. 5; h. t. 18, and *culpa lata*?, *post*, § cxc. 2 Elaborate rules as to disposal of goods thus left on vendor's hands, 18. 6. 1. 3, 4; h. t. 2. 3 Arg. 18. 1. 35. 4; 19. 1. 30. 1; 21. 2. 21. pr. (? interp.): the inference is rather uncertain. 4 47. 2. 14. pr.; h. t. 81. pr.; Inst. 3. 23. 3 a. 5 47. 2. 14. 1. 6 18. 6. 7. pr.; C. 4. 49. 2. 2; Inst. 3. 23. 3. 7 Arg. 18. 6. 9. Acquisitions from outside to *peculium* of slave sold *cum peculio*, children born to a sold *ancilla*, P. 2. 17. 7; D. 19. 1. 13. 13. 8 Vat. Fr. 15; P. 2. 17. 7. 9 19. 1. 13. 11. 10 *E.g.* 18. 1. 68. pr. 11 C. 4. 48. 1. 12 19. 1. 11. 2; h. t. 2. 1; 18. 1. 74. In 12. 4. 16, "*dedi tibi pecuniam ut mihi Stichum dares*," Celsus says that this is not sale, and the money can be recovered if the property in *S* is, for any cause, not transferred. It is "*ob rem datio*." This seems to make a special agreement that ownership should be given inconsistent with sale. It does not exactly conflict with

certain. It can hardly have been in order to facilitate dealings with peregrines, provincial land and things held *in bonis*; these were more appropriately met by special rules. In *permutatio*, which was probably common with peregrines, the rule was otherwise; ownership must be given[1]. Probably it was in order to relieve the vendor from the obligation, which might be troublesome, of proving a perfectly good title until it was disputed by a third person[2].

To give *vacua possessio* was to put the buyer into exclusive possession, not defeasible by interdict, and free from any burdens interfering with it except such as had been agreed on[3]. The existence of praedial servitudes grounded no claim (as they did not prevent possession) unless they were known to the vendor and concealed, or the land was sold free of them, *optimus maximusque*[4]. Though the vendor was not bound to make the buyer owner, the rule gives a similar result; the simple way of satisfying the rule was to make him owner. The rule leaves one point open; it is true that the vendor had not to make the buyer owner, but is it true that he had not to do what in him lay to make him owner? If the owner of a *res mancipi* sold it, was he bound to mancipate it? This might make a great difference, *e.g.* the buyer of a slave might wish to free him so as to make him a *civis*. Good faith seems to require that the vendor should transfer all the right he had so that the affirmative view is the most probable[5]. If the law was so the system is convenient; the vendor need not shew title, and could not be disturbed till the buyer was interfered with, and the latter was protected.

The obligation to guarantee the buyer against eviction was a very important part of his protection, with a long history[6]. Under the XII Tables there was an action, probably called the *actio auctoritatis*, in all cases of *mancipatio*, by which a *mancipans* who failed to defend the right of his transferee (by successfully acting as *auctor* if he was sued) was compelled to pay double the price, the action being barred by lapse of the time of *usucapio*[7]. The action remained in use throughout the classi-

19. 5. 5. 1, where it is sale, as the expression is different, "*ut rem accipiam.*" But the rule seems absurd. It has been explained as a corruption, *pecuniam* being properly some other word, and as an interpretation of intent, the undertaking being expressly conditional on transfer of *dominium*, but this is to give extreme weight to "*ut.*" But the text can hardly be accepted at its face value. See *N.R.H.* 1907. 100; 1910, 709.

1 *Post*, § CLXXXI. 2 See Girard, *Manuel*, 650. 3 19. 1. 3; h. t. 11. 13; 21. 2. 1. 4 18. 1. 59; 19. 1. 1. 5 Girard considers it proved by the texts, and cites P. 1. 13 a. 4; G. 4. 131 a; D. 19. 1. 11. 2 (*Manuel*, 563). Bonnet (*Mél. Gerardin*, 43 sqq.) adds 22. 1. 4. pr., but his argument turns mainly on the probable history of the evolution of sale from *mancipatio*. 6 Our knowledge of this history is mainly the result of the researches of Girard, summarised, with reff. to the actual essays, *Manuel*, 564 sqq. The propositions in the text do no more than state his account in outline. 7 It does not seem to have been possible to exclude the warranty in *mancipatio*, and thus when it was a

cal law[1], but Justinian sought to delete all references to it in the texts. It had nothing to do with *emptio venditio* as a contract; it is far older than the contract. Where the thing, though a *res mancipi*, was not mancipated, or where it was a *res nec mancipi* of considerable value, it was usual from early times to exact a promise of double the price in case of eviction. In some places, and in cases of small value, the stipulation was merely "*habere licere*," for a simple indemnity. In time the rule appeared that, in sale, as it was not good faith not to give the usual undertakings, these promises or one of them could be required, and an *actio ex empto* brought to enforce this, and then that it would be implied, and damages recovered in *ex empto* as if such a promise had actually been made[2], but it was usual to make the promise expressly, perhaps to avoid the doubt under which class the sale came. Later, but still early in classical law, the rule appeared that apart from this implication the buyer had a right to an indemnity if he was in effect deprived of the value of his purchase by reason of a defect in title[3]. When this rule appeared, the *stipulatio habere licere* practically disappeared. There were thus two cases, that of the *stipulatio duplae*, express or implied, and that of simple compensation.

(*a*) *Stipulatio duplae*, where it was actually made or could be implied, *i.e.* in cases of considerable value (including no doubt all *res mancipi*) in those parts of the Empire where the promise was usual, which seem to have been the most important. The action would be on the *stipulatio* or *ex empto*, in effect for breach of the duty to make the promise. It was normally for double the price, as in the *actio auctoritatis*[4]. It lay only if there had been an actual eviction, *i.e.* judgment under which the buyer had given up the thing or paid the damages[5]. If he abandoned it without action, though he knew there was no defence, or if he compromised, he lost the right[6]. If after the judgment the claimant, instead of taking the *res*, gave it to him[7], or died leaving no successor, there was no claim under the rule. So if the thing ceased to exist before the eviction[8]. The right was lost if the buyer allowed judgment to go without notifying his vendor[9]. The eviction was not necessarily of the whole; *evictio partis* gave a right to a proportionate part[10], but as a part is not the thing, it was necessary, and clearly usual, to stipulate for the case of eviction of

gift, or for any reason there was to be no warranty, an imaginary price, *nummus unus*, is stated. See Girard, *Textes*, 826 sqq.

1 P. 2. 17. 1–3. 2 P. 2. 17. 2. 3 C. 8. 44. 6. 4 21. 2. *passim*. See h. t. 56. pr. 5 21. 2. 16. 1; h. t. 21. 2. 6 21. 2. 24; h. t. 56. 1. 7 21. 2. 57. 1. 8 21. 2. 21. pr.; C. 8. 44. 26. 9 21. 2. 49; C. 8. 44. 8. It does not arise if the adverse judgment was wrong through an error of the *iudex*, 21. 2. 51. pr.; Vat. Fr. 8. 10 21. 2. 1; P. 2. 17. 4.

"*rem vel partem*[1]." A part might be physical or legal, *e.g.* a usufruct, but not praedial servitudes or mere accessories[2].

(*b*) Cases in which the *stipulatio* did not apply. Here what was recovered was not a fixed sum, but the amount of the damage of all kinds, an indemnity[3]. Thus it might be more or less than the price, according as the thing had fallen or risen in value, though, in later law, it might not exceed double the price[4]. But there need have been no actual eviction. It was enough if the title was invalid, and the buyer held only by another title, *e.g.* the owner had given it to him[5]. Thus there need have been no action at all[6]. It applied also where what was lost was only an accessory[7]. Apart from this, if the *res aliena* was sold knowingly, and the buyer was in good faith, he could recover *ex empto* without waiting for actual eviction[8]. If he had improved the property, he could usually secure reimbursement by the *ius retentionis*, but where he could not, *e.g.* not having possession, he could recover it in this action[9].

All these rights might be varied by agreement[10].

CLXXII. A further obligation of the vendor was warranty against secret defects[11]. Here too there was much evolution. Apart from the ancient *actio de modo agri*[12], the civil law knew no remedies for undisclosed defect except that it was *dolus* to conceal important defects of which the vendor knew[13], a poor protection, since it would be difficult to prove knowledge. The Edict of the Aediles[14] carried the matter further, but only in a limited field. It dealt originally[15] only with sale of slaves, the slave-dealer having a very bad reputation. It provided, in classical law[16], that on such sale in open market the vendor must declare all of a long list of defects that the slave had, mental, moral and physical. He must further promise that no such defects (*morbus, vitium*) existed other than those declared, and if he refused to do this an *actio redhibitoria*, to set the contract aside, lay for two months, and an action for damages, perhaps the *actio quanto minoris*, for six[17]. The purpose of the

1 21. 2. 56. 2. See Girard, *Manuel*, 570, n. 4. If no *stipulatio* at all was made presumably the complete form was implied. 2 21. 2. 43; h. t. 49; h. t. 16. pr. There is much controversy as to *evictio partis*. See Bertolini, *op. cit.* 543, and his references. It may be that the "*pars*" for which the insertion is necessary is an undivided part or a usufruct or the like. 3 21. 2. 8; h. t. 43; h. t. 44. 4 19. 1. 44 (interp.); 21. 2. 70; C. 7. 47. 1. 5 21. 2. 9; P. 2. 17. 8. 6 19. 1. 29. 7 21. 2. 8. 8 Arg. 19. 1. 11. 12. 9 19. 1. 45. 1. 10 Vat. Fr. 17; D. 22. 1. 18. pr.; 19. 1. 11. 18. This last text seems to imply that if the warranty was expressly excluded, there was no obligation even to return the price (though Julian disagreed), the thing being treated as an *emptio spei*, the vendor being however liable in full if he knew he had no title. 11 Bechmann, *Kauf*, 1. 361 sqq.; Eck, *Festgabe für Geo. Beseler*, 161 sqq. 12 P. 2. 17. 4. For double the proportionate part of price, where area less than vendor stated, Lenel, *E.P.* 189. 13 18. 1. 43. 2. 14 Lenel, *E.P.* 529 sqq.; Biondi, *Studi sulle Actiones Arbitrariae*, 1. 119 sqq. 15 Aul. Gell. *N.A.* 4. 2. 1. 16 Original form, Aul. Gell. *loc. cit.* 17 21. 1. 28.

promise is not clear since in any case if serious[1] defects appeared, or *dicta* or *promissa* made proved untrue, the *actio redhibitoria* was available under the edict for six months to set the contract aside and the *actio quanto minoris*, for damages, for twelve[2]. It may be that the promise represents an earlier phase in which there was no liability except on actual promise.

The edict was soon extended to similar sales of any live stock, but here it does not seem to have expressly required a promise, though in practice it was so understood[3], and the defects, *morbus* and *vitium*, were all practically physical[4]. The action did not arise unless the defect affected value[5], or if the buyer knew or ought to have known of it[6]. That the vendor did not know was immaterial[7]. The general effect of the action was to end the transaction. The goods were returned, and the price was repaid, with compensation for damage from the defect[8]. The thing, with its accessories, and damages for any deterioration, and all acquisitions through it, must first be returned[9], so that the action did not lie if the buyer had put it out of his power to restore, though, in general, if the impossibility was not due to his *culpa*, he was still entitled[10]. The price must be repaid with interest[11]. In circumstances which are obscure the *actio redhibitoria* might result in a *condemnatio in duplum*, but there is much controversy about this[12].

The other action, *quanto minoris*, was available for damages, wherever the *actio redhibitoria* was, and also after the six months had expired[13], and presumably where it was a minor defect. If it was brought where the defect was so great as to destroy the value of the thing, *redhibitio* might be ordered instead of damages[14]. Bringing of the action for one defect did not prevent its renewal, within the twelve months, for another[15].

The Edictal system as stated covered only a small range of cases. In the Digest the rules apply to all sales. Two texts attributed to Ulpian say this, and one of them attributes the view to Labeo, but both texts shew signs of interpolation[16]. Probably the extension was gradual, first to sales of slaves and beasts not in open market, and then to all

1 Arg. 21. 1. 4. pr.; h. t. 6. **2** 21. 1. 21; h. t. 43. 6; h. t. 48. 2; P. 2. 17. 5. **3** See the edict, Lenel, *E.P.* 539, 541. **4** The edict contained other provisions. The date of the introduction of the edict as to *iumenta* is uncertain. Varro does not know of it, for he recommends buyers to get express warranties and speaks of customary stipulations, and "*prisca formula*" resembling the terms of the edict, *Res R.* 2. 2, 2. 5. Cicero speaks of the edict as to slaves (*de off.* 3. 17. 71) in a way which suggests that the other edict did not yet exist. **5** 21. 1. 10. 2; h. t. 12. **6** 21. 1. 14. 10; h. t. 48. 4. **7** 21. 1. 1. 2. **8** 21. 1. 23. 7; h. t. 60; P. 2. 17. 11. **9** 21. 1. 23. 1, 9; h. t. 25. pr.; h. t. 31. 2, 3. **10** 21. 1. 31. 11, 12. **11** 21. 1. 25. 9; h. t. 29. 2; h. t. 30. 1. **12** 21. 1 23. 4; h. t. 45. See Buckland, *Slavery*, 64, for discussion and reff. **13** 21. 1. 19. 6; C. 4. 58. 2. **14** 21. 1. 43. 6, ? within the six months. **15** 21. 1. 31. 16; 21. 2. 32 1. **16** 21. 1. 1. pr.; h. t. 63.

sales. It does not follow that this is due to Justinian. A text of Ulpian says that there may be *redhibitio* of land if it is pestilential[1]. But this, even if genuine, does not expressly refer to the *actio redhibitoria*, and may represent only what seems an early rule, that even in the *actio ex empto*, if the thing was not substantially what was bargained for, and there was *dolus*, it could be handed back in the *actio ex empto*[2]. But Diocletian, in the Code, expressly gives *actio redhibitoria* in the case of pestilential land[3]. It seems however probable that, in classical law, the rights which could be enforced by the *actio redhibitoria* could also be dealt with in the *actio ex empto*[4], but the matter is obscure[5].

The *actio quanto minoris* plays a small part in the texts. Though it cannot be proved that *redhibitoria* lay for serious and *quanto minoris* for minor defects, it is likely that they were so employed, and that the *actio ex empto* absorbed the principles of *quanto minoris* before it did those of *redhibitoria*. The texts dealing with measure of damages in these cases are confusing; their general effect seems to be that where there was express warranty the vendor was liable for resulting loss of any kind, but apart from this only for the difference between value and price, unless he knew of the defect, in which case he was liable for the whole *interesse*[6].

The rights could be varied by agreement. Sales in which all warranty was excluded were called *venditiones simplariae*[7].

The chief duties of the vendee can be shortly stated. He must pay the price and make the vendor owner of it[8]. It will be remembered that only when he had done this did the property vest in him, at least in later law, even if the goods were delivered, apart from agreement for security or credit[9]. Interest was due if payment was delayed beyond the agreed time, at once, if the sale was for cash[10]. As he took profits from the time of sale, he must pay expenses[11] *bona fide* incurred by the vendor since then. He was liable for *culpa levis* in his dealings with the thing in any case in which the interest in it might under the rules revert to the vendor[12].

As the obligations were concurrent, neither could compel the other to perform unless he had done, or tendered, his own part[13]. Otherwise

1 21. 1. 49. 2 19. 1. 11. 3; h. t. 6. 4. The text does not require *dolus*, but Pernice, *Labeo*, 2. 1. 180, considers this necessary. 3 C. 4. 58. 4. 4 19. 1. 11. 7, Neratius. 5 See, *inter alios*, Partsch, *Z.S.S.* 33. 600, reviewing Haymann, *Haftung des Verkäufers*. 6 18. 1. 45; 19. 1. 6. 4; h. t. 13. pr.; h. t. 21. 2; P. 2. 17. 6, 11. 7 21. 1. 48. 8. Perhaps also excluding liability for eviction, see Esmein, *Mélanges*, 414. 8 19. 1. 11. 2; Inst. 2. 1. 41. If the title is disputed before the price is paid, Papinian says (Vat. Fr. 12) that it need not be paid even if vendor offers security. In the Digest this is altered to "unless," 18. 6. 19. 1. See C. 8. 44. 24. 9 18. 1. 19; *ante*, §§ LXXXIII, LXXXVI. 10 19. 1. 13. 20; P. 2. 17. 9; Vat. Fr. 2. 11 19. 1. 13. 22. 12 13. 6. 5. 2; 19. 5. 20. 1. 13 19. 1. 13. 8.

he would be met by the so-called *exceptio non adimpleti contractus*. The better view seems to be that this was not an *exceptio*, even implied, as an *exceptio* would be in a *bonae fidei iudicium*. It is clear that the plaintiff must prove his performance, while in a true *exceptio* the burden of proof was normally on the defendant[1].

Apart from the special actions just discussed, the remedy was an *actio ex vendito* for vendor, *ex empto* for vendee, both giving *bonae fidei iudicia*[2].

CLXXIII. The obligations could be varied to almost any extent by agreement, but an agreement excluding responsibility for *dolus* was void here as always[3], and it is sometimes said, on poor evidence, that an agreement that *dominium* should be transferred was excluded in early classical law[4]. Apart from this, there might be any number of pacts, and they are prominent in the texts. Many of them were mere subsidiary terms which appear only on account of difficulties of interpretation, but there were others of a more important type. These amounted to conditions, and as they were of great practical importance they need discussion. We have already considered[5] the nature and effect of conditions, and the distinction between suspensive and the so-called resolutive conditions, cases in which a contingency is stated in which the agreement is to be inoperative: "*pura emptio quae sub condicione resolvitur*[6]." It is necessary however to refer to some special points of importance in the law of Sale. The risk of destruction did not fall on the buyer till a suspensive condition was satisfied[7], but if the thing was merely deteriorated this did not release the buyer, apart from *culpa* of vendor[8]. The price was not due, and there was not even a *naturalis obligatio*, so that price paid could be recovered if the condition failed[9]. The fact that the *res* belonged to the vendee was no objection to the bargain if it ceased so to belong before the condition was satisfied[10]. The buyer could not usucapt *pro emptore* while the condition was pending[11], and was not entitled to fruits for that time[12]. The case was very different under a resolutive condition. Here the contract produced its normal effects, so long as the event did not occur. If it occurred before anything was done, the whole was nullified, and there is nothing to be said. But if performance had already begun, machinery was necessary for undoing it. There was a personal action, which seems to have differed in form in the different pacts, by which, in general, the buyer could recover price and ex

1 There is no real authority for the name, and some of the reff. to the thing deal with verbal contract. See Girard, *Manuel*, 544, n. 3. **2** G. 4. 62. **3** 2. 14. 27. 3. **4** 12. 4. 16. See *ante*, § CLXXI. **5** *Ante*, § CXLVIII. **6** 18. 1. 3; 18. 3. 1, 2. **7** 18. 6. 8. pr. **8** *Ib.*; Vat. Fr. 16. **9** 12. 6. 16. pr. **10** 18. 1. 61. **11** 18. 2. 4. pr.; 41. 4. 2. 2. **12** 18. 2. 4. pr.; C. 4. 48. 1; 4. 49. 2.

penses[1], and the vendor the thing (or its value), presumably with compensation for deterioration due to the buyer's fault, and fruits and profits, or their value[2]. This implies, what might be expected, that the event itself did not annul the transfer of property and its effects, but some texts seem to imply that the rescission had effect *in rem*, the property reverting *ipso facto*, and the cases must be taken separately.

Pactum de retrovendendo. The vendor was to have the right to buy the thing back at an agreed price, usually, perhaps always, that at which it was sold. With it may be taken *pactum de retroemendo*, an undertaking to buy it back on similar terms in certain events. Texts disagree as to the action. One gives a choice between action on the contract and the *actio praescriptis verbis*[3]. Another gives *actio in factum*[4]. It may be that classical law gave an action on the contract, the compilers adding *praescriptis verbis*, but it is also possible that classical law gave only *actio in factum*, the others being post-classical, but earlier than Justinian, the text, an enactment of the third century, being, on that view, genuine. There was no effect *in rem* even under Justinian.

Pactum protimeseos, right of pre-emption. The vendor was to have the right to buy at the price offered by any other bidder. The Digest gives *actio ex vendito*[5]. There was no effect *in rem*[6].

Emptio ad gustum. Pactum displicentiae. These look like two applications of the same kind of pact. In sales of wine, and similar commodities, it was usual, almost a matter of course[7], to make the sale depend on approval by the buyer, a limit of time being commonly fixed. The pact ordinarily created, as it seems[8], a suspensive condition and the risk, not only of destruction, but also of deterioration, was on the vendor till approval or the *dies praestitutus*[9]. The rejection must be within the time fixed, usually short, but if no time was fixed it seems that rejection might be made at any time, so that the risks might be on the vendor for an indefinite time[10]. It is to be observed that in this case the testing was a momentary matter, not a question of continuous trial.

Pactum displicentiae was an agreement that the buyer might reject the goods if, on trial, he found them unsatisfactory. His discretion seems to have been absolute. It is found applied mainly to things of

1 18. 2. 16. 2 18. 2. 6. pr.; h. t. 16. Bertolini, *op. cit.* 479 sqq. 3 C. 4. 54. 2. 4 19. 5. 12. 5 18. 1. 75. 6 Difficult to distinguish from pact not to resell which in classical law may not have been valid unless tempered in some way. 19. 1. 21. 5. 7 18. 6. 4. 1; Cato, *R.R.* 148. 8 18. 6. 4; Cato, *cit.*, where the ownership has not passed. The contrary inference sometimes drawn from 18. 1. 34. 5 seems not justified. 9 18. 6. 4; 18. 1. 34. 5. The agreement in 18. 6. 1 is of a different character. It is disputed whether the right to reject is absolute, or proof of non-merchantable character is needed. The reference to *periculum acoris vel mucoris* (18. 6. 4. 1; see however Vangerow, *Pandekten*, 3. § 635) is not to be taken as excluding other risks or as limiting the right of rejection. 10 18. 6. 4. 1.

which an extended trial would be needed, *e.g.* slaves or horses or land[1]. Though it might be framed as a suspensive condition (*si placuerit, erit tibi emptus*[2]) it was usually resolutive. It appears in more than one form; it might be "*si displicuisset inemptus erit*[3]," or "*si displicuisset, reddatur*," or "*redhibeatur*[4]," but it does not seem to be made out that any difference of rule resulted[5]. The disapproval must be within the agreed time. If none was fixed, it must be within 60 *dies utiles*[6]. The power of rejection makes the rule of *periculum* rather illusory, for if the thing was damaged by accident it would be rejected. If it was destroyed by accident the loss, on the principles of resolutive conditions[7], ought to fall on the buyer, but the rules applied seem to have been those of the *actio redhibitoria*[8], so that destruction without fault would not bar the right to reject[9], but this is hardly clear. All profits must be accounted for[10]. The remedy was an *actio ex empto* or one *in factum*[11]. No text gives any effect *in rem* and one expressly negatives it; a hypothec created by the buyer was not affected by his rejection of the thing[12].

Lex commissoria. This was an agreement that if the price was not paid by a certain time (it might perhaps be applied to other undertakings of the buyer), the vendor might declare the sale void. It was not void *ipso iure*, as this would enable the buyer to cry off, if he did not like his bargain, by not paying the price[13]. It might be suspensive or resolutive, but was presumed to be the latter, so that risks were normally on the buyer[14]. It seems to have been the rule, unless the contrary was agreed, that if the clause came into operation, anything given as *arra* or part payment was forfeited, and, conversely, that if such forfeiture occurred the buyer need not account for profits[15]. The vendee must actually offer the price unless this was prevented by the vendor[16]. The vendor must exercise his right of rescission promptly, and having declared either way, could not alter his mind: any act implying that the contract was still on foot bound him[17].

The personal remedy was the *actio ex vendito*[18], but it is a vexed question whether the rescission did not operate *in rem*, *i.e.* cause reversion of ownership, *ipso facto*. A text of Scaevola and one of Severus Alexander give vendor a *vindicatio*[19]. Another of the same emperor,

1 19. 5. 20; Vat. Fr. 14; C. 4. 58. 4. **2** Inst. 3. 23. 4; D. 19. 5. 20. 1. **3** 18. 1. 3; 41. 4. 2. 5; 43. 24. 11. 13; Vat. Fr. 14; C. 4. 58. 4. **4** 18. 5. 6; 19. 5. 20. pr.; 21. 1. 31. 22. **5** See however Windscheid, *Lehrb.* 2. § 387, n. 7. **6** 21. 1. 31. 22, extended for cause. **7** *Ante*, § CXLVIII. **8** *Ante*, § CLXXII. **9** See 19. 5. 20 1, which seems to apply the ordinary rule for resolutive conditions. **10** 13. 6. 13. 1 Vat. Fr. 14. **11** 18. 5. 6. **12** 20. 6. 3. The rules under these pacts are not fully stated and have been the subject of much controversy. See Windscheid, *Lehrb.* 2. § 387 Girard, *Manuel*, 733 sqq.; Moyle, *Sale*, 80 sqq., 174 sqq. **13** 18. 3. 2; h. t. 3. **14** 18. 3. 1, 2. **15** 18. 3. 4. 1; cp. h. t. 5 and 6. **16** 18. 3. 4. 4. **17** 18. 3. 4. 2; h. t. 6. 2; h. t. 7; Vat. Fr. 4. **18** 18. 3. 4. pr. **19** 18. 3. 8; C. 4. 54. 4.

immediately preceding the last, expressly refuses it[1]. It may be that in the first cases the ownership had not passed; an agreement that the vendor may cry off if the price is not paid by a certain time is not necessarily an agreement for credit[2]. On the whole the better view seems to be that rescission had no effect *in rem*, even under Justinian, but many views are held[3].

In diem addictio. This was an agreement that the vendor should be entitled to set the contract aside if a better offer was received by a certain time. This too might be suspensive or resolutive, but was usually resolutive[4]. We need not consider what amounts to a better offer; it is however clear that it must be such: a vendor could not avoid the contract by saying another offer was better, if it was not[5]. But he need not take advantage of it unless he liked[6], apart from special agreement that the buyer might claim release, if there was a better offer, in which case he was free whether the vendor took the other offer or not[7]. Where he did propose to accept another offer, he must give the first vendee the chance of improving his bid[8]. The personal remedy seems to have been an *actio ex vendito*. But in this case there is a good deal of evidence for an effect *in rem*[9]. It will be noticed that here and in the *lex commissoria*, the only two in which any case can be made out, the price would not in the ordinary way be paid, so that, apart from the nature of the condition itself, the ownership might not have passed. It is possible that it is this fact which gives rise to the decisions which seem to give an effect *in rem* to the pact. For the cases in which the price had been paid, and a hypothec created by the buyer is declared to be void[10], this may it is said be due to the fact that though there had been *traditio* there had been no *mancipatio*, and the *traditio* was invalid, since, the condition having occurred, there was no *causa*[11]. But the general form of the texts in the *corpus iuris* indicates that at least in the case of *in diem addictio*, and perhaps in a wider field, Justinian inclined to recognise an effect *in rem*[12]. But all possible opinions are held[13].

CLXXIV. *Locatio Conductio.* This was the contract of letting and

1 C. 4. 54. 3. 2 But as to this rule of payment of price see *ante*, §§ LXXXIII. LXXXVI. 3 See Girard, *Manuel*, 735; Bertolini, *Obblig.* (*Parte Sp.*) 484 sqq. 4 18. 2. 2; 41. 4. 2. 4. Senn (*N.R.H.* 37. 275) discusses the history of the institution; he holds that as it dates from Plautus it cannot at first have been a condition, since there was doubt as to the possibility of conditions till far later (G. 3. 146). See also Vernay, *Servius et son École*, 206 sqq. 5 18. 2. 4. 5. 6 18. 2. 9. 7 *Ib.* 8 18. 2. 7; h. t. 8. 9 18. 2. 4. 3; 20. 6. 3; 6. 1. 41. pr. (prob. interp.); 35. 2. 38. 2. 10 18. 2. 4. 3; 20. 6. 3. 11 Windscheid, *Lehrb.* 1. § 90, n. 1. But a *traditio* which is put out of action *ex postfacto* seems unroman and in fact this is giving the rule as a reason for itself. 12 See the conclusions of Girard, *Manuel*, 735 sqq. 13 *Ib.*; Windscheid, *loc. cit.* See Pringsheim, *Kauf mit fremdem Geld*, 123 sqq., for a discussion of the various cases of *vindicatio utilis*, on the assumption that they are all Byzantine.

hiring for a price, bilateral, and having a double name because the rights and duties of the parties were different, as in *emptio venditio*. The transaction had three forms: *locatio rei*, the letting of an object to be used and enjoyed; *locatio operis*, the letting out of a job, or contract; and *locatio operarum*, the letting out of services.

Locatio rei, the letting out of a thing by mere agreement, for hire. The letter is *locator*, the hirer *conductor*, but the names do not express that distinction (and in one of the other types the *conductor* is not the hirer), but are supposed to indicate what is evidenced in some other ways, both for this contract and for that of sale, an earlier phase in which the contract was completed only by handing over the *res*—a contract "*re*[1]." In some cases it was difficult to tell whether the case was sale or hire. Gaius mentions leases in perpetuity, which he says were hirings[2], though in later law they merged in *emphyteusis*. Where gladiators were hired at a certain sum for those who were returned and a much larger sum for those who were killed, this, he says, was hire of the first, sale of the others, a conditional sale, in fact, of all[3]. Where money was given to a goldsmith, to supply a ring made of his own gold, Cassius treated this as sale of the gold, hire of services, but it was finally held to be sale[4].

The rules as to consent, object and price being much as in sale[5], few remarks are needed on these points. As to consent, there seems to be no good evidence that Justinian's rule on the effect of agreement to reduce the contract to writing applied here. As to object, this was as it seems, always a *res corporalis* in the sense that there was a physical thing. But there was nothing to prevent a usufructuary from letting the enjoyment of the usufruct[6], just as he could sell it. It might be a moveable or an immoveable[7], but not a consumable, except as in *commodatum*, where it was hired "*ad pompam vel ostentationem*[8]." The hirer of a house or part of it was called an *inquilinus*, one of land was a *colonus*[9]. The rules as to what *res* may be the subject of *locatio* were much as in sale. There is no evidence that the rule about error in the case of *res sacrae* applied, and the letting of the services (it is not contemplated as *locatio rei*) of a *liber homo bona fide serviens* was valid as a contract[10]. The rules prohibiting sale or alienation of certain things, such as dotal land, did not apply to *locatio* of them, since that was often the only way in which they could be utilised[11].

1 *Locare* and *conducere* both originally imply physical displacement. **2** G. 3. 145. **3** G. 3. 146. **4** G. 3. 147. Apparent exception, *post*, § CLXXVI. **5** Inst. 3. 24. pr.–5; G. 3. 143; D. 19. 2. 46. **6** 7. 1. 12. 2. **7** See 19. 2. 19. 1, 2. **8** Arg. 13. 6. 3. 6. **9** In later law *colonus* usually means *colonus adscriptitius* (*ante*, § XXXIII), who cultivated under persons who hired large tracts, *conductores*. But the free *colonus* still existed, no doubt mainly near large towns. **10** See *e.g.* 41. 1. 19; h. t. 23. **11** 23. 4. 22. pr.; 23. 5. 4.

The rules on reality and certainty of price were as in sale, with two modifications. The rent of land might be fixed in produce[1]. This raises the question whether in classical law the "*merces*" or rent had to be in money, though Justinian is clear that it must[2]. There was not the same reason as in sale, since there was not the same difficulty in distinguishing the parts. Gaius discusses the case of something lent in return for something lent, and doubts whether this is *locatio* or not[3]. Here the difficulty did exist, but it does not seem that Gaius can have thought money an essential, and he nowhere states it. On these grounds it has been held that the rule is due to Justinian. Texts in the Digest which appear genuine lay down the rule[4], and perhaps the better view is that it was a rule of late classical law[5]. Again, the *merces* might take the form of a proportionate part of the crop[6], *locatio partiaria*. As Gaius tells us that the *merces* must be *certa*[7], this is an exception. It has indeed been contended that *locatio partiaria* was really *societas*[8], but the texts shew that while it had affinities with *societas* it was really *locatio*, though subject to some special rules[9], and the facts of a given transaction might sometimes leave doubts whether it was *locatio* or *societas* or an innominate contract[10].

There was the same doubt where the *merces* was to be fixed by a third party, settled in the same way[11]. The price was not necessarily a lump sum; it was usually a number of periodical payments[12], a point of some importance in dealing with the rights of the parties.

Obligations of the Lessor. He must hand over the thing to the lessee with the accessories, if any, usual in such cases[13]. The *conductor* had not *dominium* or *possessio*, but only detention[14], which it was the duty of the *locator* to maintain, so that he was responsible if the *conductor* lost it either from a defect in the title of the *locator*, or because he had conferred some *ius in rem* on a third person[15], who would not be bound by the contract. In that sense he had to guarantee the *conductor* against eviction, and thus, if he sold the thing, he commonly made an agreement with the vendee to respect the right of the *conductor*[16]. The *locator* must maintain this detention throughout the term, which in the case of rural leases was usually five years[17]. At the end of the term, if the tenant still remained in possession, with consent of the *locator*, there was a tacit

1 19. 2. 19. 3. **2** Inst. 3. 24. 2. **3** G. 3. 144; cf. Inst. *cit.* **4** 16. 3. 1. 9; 19. 5. 5. 2. **5** Ferrini, *Archiv f. c. P.* 81. 1, holds that it is Byzantine, but see Longo, *Mél. Girard*, 2. 105, who holds it classical. **6** 19. 2. 25. 6, the *métayer* tenancy of later times. **7** G. 3. 142. **8** See, however, Pernice, *Z.S.S.* 3. 57. **9** *E.g.* 47. 2. 83. 1. **10** 17. 2. 52. 2; C. 2. 3. 9. **11** Inst. 3. 24. 1. **12** 19. 2. 15. 4; h. t. 24. 2. **13** 19. 2. 15. 1; h. t. 19. 2. **14** 19. 2. 39; G. 4. 153; C. 7. 30 1. **15** 19. 2. 15. 1, 2, 8; h. t. 25. 1. **16** 19. 2. 25. 1; *post*, p. 499. **17** Esmein, *Mélanges*, 219.

relocatio for one year, and so on[1]. But in the case of houses, and wherever there was no agreed term, any such *relocatio* might be ended at any time[2]. *Relocatio* depended on consent: there was none if at the expiry of the term the *locator* was insane[3].

The *locator*, like the vendor, need not be owner[4]. Indeed it was a very usual thing for the tenant to sublet, *sublocatio*, especially houses[5].

The *locator* must keep the thing in substantial repair throughout the tenancy, subject to agreement, not of course being responsible for damage due to negligence of the tenant, who was liable for *culpa levis*[6]. The lessor also was liable for *culpa levis* in relation to the thing, and must compensate for damage due to defects, not disclosed, of which he knew or ought to have known[7]. If the thing was in such a state that it did not serve for the ordinary uses of such things, he was responsible, not on any ground of negligence, but as he had not supplied what he contracted to supply[8]. But the Aediles' Edict had no application to *locatio conductio*[9].

He must refund to the *conductor* any expenses. This does not mean the ordinary expenses of husbandry, etc., but money spent, either *necessariae impensae*, or, as it seems, even *utiles*, in maintaining the thing, expenditure, that is, for the benefit of the permanent interest in the thing[10]. He must also pay taxes and other public charges[11].

CLXXV. Obligations of the hirer. He must accept delivery and enter into possession. He must deal with the thing as a *bonus paterfamilias*, being liable for *culpa levis*[12]. In particular, he must keep agricultural land in proper cultivation, not abandoning it, as land out of cultivation lessens in value[13]. A question arises as to his liability for *culpa* of employees, slave or free[14]. The texts are confused and interpolated. The better opinion seems to be that the dominant classical view was that where a slave committed *culpa* under his master's contract, the master was not liable, *ex contractu*[15], but there was another view, which prevailed under Justinian, that he was liable, but could release himself by surrendering the slave[16]. All this of course assumes that he was not himself negligent in the choice of slaves to do the work[17]. For free employees, on the same assumption, he ought not to be liable beyond

1 19. 2. 13. 11. 2 *Ib.* The case of lease in writing is excepted. The text is very obscure. See Monro, *Locati conducti*, ad h. l. 3 19. 2. 14. 4 19. 2. 9. 5 19. 2. 7; h. t. 30. A whole block, *insula*, is hired and sublet in "flats." As to rural holdings, see *ante*, § CLXXIV. 6 19. 1. 15. 1; h. t. 25. 2; P. 2. 18. 2; Inst. 3. 24. 5. 7 19. 2. 19. 1. 8 *E.g.* if he supplies jars which will not hold water, 19. 1. 6. 4 in f. 9 21. 1. 63. 10 43. 10. 1. 3; 19. 2. 55. 1. As to *utiles impensae* it is possible that he has only a *ius tollendi*, h. t. 19. 4. But see h. t. 55. 1. 11 39. 4. 7. 12 19. 2. 25. 4. 13 19. 2. 25. 3; h. t. 51; h. t. 55. 2; P. 2. 18. 2. 14 *Ante*, § CXLIII. 15 19. 2. 45. pr.; h. t. 60. 7. 16 9. 2. 27. 11; Coll. 12. 7. 9. 17 9. 2. 27. 11; 13. 6. 11; 19. 2. 11. pr.; Coll. 12. 7. 7.

cession of any actions he might have against them, while they might be liable *ex delicto*. But there are texts of Ulpian and Alfenus which make the *conductor* absolutely liable for *culpa* of outsiders, apparently on a sort of implied contract in the hiring. If this was law it seems to have applied only to this contract, and *societas*[1].

The *conductor* must not change the character of the *res*: he must restore it at the end of the tenancy in its original condition, subject to ordinary wear and tear[2]. He must not deal with it in unauthorised ways[3].

The risk of accidental destruction was on the *locator*[4], not in the sense that he had still to provide the thing, but that he could claim no rent unless the tenant could enjoy[5]. This is true whether the cause was his refusal to permit enjoyment, or the operation of some external cause, other than one due to *culpa* of the tenant[6]. This principle, that the rent was in respect of enjoyment, allowed the tenant to claim a rebate if climatic or other conditions had been such that he had not been able to utilise the land properly, or his crops had been destroyed or much damaged[7]. Small damages, such as might be expected, the tenant bore, but anything more fell on the *locator*[8]. If, however, such a rebate had been allowed, and later years proved profitable, the arrears which had been released must be paid[9]. But where the bad year was the last, no account was taken of previous profitable years[10]. Where a man was entirely prevented from enjoying, the rent was not due even *naturaliter*, so that if paid it could be recovered[11]. If sureties had been taken for the rent, and, the term having expired, there was a *relocatio*, express or tacit, they were not liable, but any "real" security the tenant had given was still under the charge[12].

On expiration of the hiring the thing must be restored, and the tenant was not allowed to dispute his lessor's title, so that if he claimed the thing as his own, in which case the *locatio* would be void, he must still give it back and raise the question of title independently[13]. An enactment of Zeno seems to have imposed a double penalty if he did not[14], but these rules did not affect the right of retainer for expenses[15].

1 19. 2. 11. pr., 30. 2, 41; *post*, § CLXXVII. **2** 19. 2. 11. 2. **3** Inst. 3. 24. 5; D. 19. 2. 25. 3. **4** If accessories received at a valuation, the risk of them is on *conductor*, 19. 2. 54. 2. As to the liability for *custodia*, *i.e.* absolute responsibility if the thing is stolen, *post*, § CXCI. This possible liability, and the fact that fruits are the tenant's only when *percepti* (*ante*, § LXXXI) and are usually hypothecated to the landlord (*ante*, § CLXVIII), create difficulties in the law of theft where the crops are stolen, *post*, § CXCVII. **5** 19. 2. 33; h. t. 60. pr.; h. t. 9. 1. **6** P. 2. 18. 2. **7** 19. 2. 15. 2, 3; h. t. 27; h. t. 34. **8** 19. 2. 25. 6. **9** 19. 2. 15. 4. **10** *Ib.* So at least the text is commonly understood, but it may mean the exact opposite, which would be a more rational rule. **11** 19. 2. 19. 6. **12** 19. 2. 13. 11. **13** C. 4. 65. 25. **14** C. 4. 65. 33. **15** 19. 2. 61. pr.

Locatio conductio being essentially a terminable relation, we have to consider how it might end. As it was essentially a *ius in personam*, it is sometimes said that it ended if the property was in some way alienated to a person on whom the contract was not binding. But that is not so: the contract was still binding, but the lessor by conferring a *ius in rem* on a third person had made it impossible for himself to fulfil it. For this he would be liable, and thus it was usual in such a case to make the transferee agree to respect the tenant's rights[1]. If there was such an agreement the tenant if ejected could no doubt get cession of the lessor's action, though it does not appear that this would release the lessor[2]. If the transfer was not due to his act, *e.g.* he was a usufructuary and died, the term was ended, on the assumption of a tacit agreement that it was subject to his survival. But if he concealed the fact that he was a usufructuary, the term continued and his *heres* would be liable[3]. There was another side to the rule. The tenant was not bound to a buyer. If he refused to continue, the lessor, having no *interesse* had no action to cede to the vendee[4]. If he had agreed with vendee to keep the tenancy going this might give him an *interesse*, so that if the tenant gave up the land he could cede his action to the vendee. But the effective plan was to make the *colonus* a party to the arrangement.

Death of a party did not affect the contract unless expressly: we are told that if it was agreed that the tenancy should be as long as one party chose, the death of that party would end it[5]. Apart from this the main causes of determination were:

Expiration of the term, apart from renewal express or tacit[6].

Renunciation by either party if there was no agreed term. Even if there was a term, in late classical law the *locator* might renounce in the case of a house if he had personal need of it or if it wanted repair, without incurring any liability on the contract[7]. But a renunciation must be at a reasonable time: if a tenant was ejected from land, apart from breach of contract on his part, except at the end of a year (so that he could save his crops), there would presumably be a claim for damages. Mere release from further liability for rent would not do justice. He might for instance have incurred heavy expenses in reliance on his contract in respect of a business to be carried on on the premises, all rendered useless

1 19. 2. 25. 1. The same point arises if the locator creates *iura in rem* in any other way, *e.g.* gift of usufruct (7. 1. 59. 1), or by a legacy (19. 2. 32). 2 As to later history of the rule, Meynial, *Mél. Gérardin*, 413, with special ref. to C. 4. 65. 9. The rule no doubt had no application to *colonus adscriptitius*, but there seems no ground for the view that the free cultivating tenant had wholly disappeared in later law. 3 19. 2. 9. 1. 4 19. 2. 32. 5 19. 2. 4. May have ended by death in early law, h. t. 60. 1. Vermond, *Possession*, 276. See Inst. 3. 24. 6; C. 4. 65. 10. 6 C. 4. 65. 11. 7 C. 4. 65. 3 (? interp.).

by the landlord's re-entry. But the whole rests on a single text in the Code, probably interpolated[1].

Destruction of the subject-matter. If it was not imputable to either party there were no liabilities. If it was due to *dolus* or *culpa* of either, he was liable for the full *interesse*[2]. No doubt the rule of determination applied where the property was expropriated by the State[3].

Forfeiture, at discretion of *locator*, notwithstanding the existence of a term, for gross misuse, or non-payment of rent for (in an actual case stated) two years[4]. Conversely, the tenant might end the tenancy, notwithstanding the existence of a fixed term, if the *locator* refused to allow enjoyment or made it impossible. The *locator* was not entitled to exclude him from one year on undertaking to give him another later on[5]. But a mere temporary interruption, not substantially affecting his enjoyment, did not entitle the tenant to determine the lease[6]. The term was equally ended if the prevention was by a third person, but, here, if the *locator* was in no way privy, there would be no other liability, while if it was with his concurrence or privity he would be liable in damages[7]. To bring these rules into operation the deprivation need not be total, but must be substantial.

If the *locator* was not the owner and the title vested in the *conductor*, he was entitled to be discharged from further liability[8].

Here, as in sale and *societas*, there were doubts whether there could be conditions on the contract[9]. The doubt is mentioned by Gaius[10] in connexion with the ever recurring question whether a given transaction was sale or hire.

The actions were: *locati* for the *locator* and *conducti* for the *conductor*[11]; *bonae fidei iudicia*, and it may be added that any pact could be added to the bargain except a pact not to be liable for *dolus*[12].

CLXXVI. We have now to consider the other forms of *locatio conductio, operis* or *operarum*. Before distinguishing these it must be noted that not all service could be the subject of this contract: it must be such service as "*locari solet*[13]." This excludes, in the first instance, all liberal arts: for these a direct wage was unseemly, but gradually, in one case after another, it became possible to recover an *honorarium* in respect of

1 *Ib.* An enactment of Zeno (C. 4. 65. 34) allows renunciation by either party without liability, within one year of the commencement of the tenancy, even where there was a fixed term, unless there was a pact not to take advantage of this right. Not applied to houses till much later. See Cuq, *Manuel*, 486. 2 19. 2. 9. 4; h. t. 19. 6; h. t. 30. pr.; C. 4. 65. 29. 3 19. 2. 33. 4 19. 2. 54. 1; C. 4. 65. 3. 5 19. 2. 24. 4; h. t 60. pr. 6 19. 2. 24. 4. 7 19. 2. 25. 2. 8 19. 2. 9. 6. 9 *Ante*, § CXLVIII. 10 G. 3. 146. See D. 19. 2. 20. 11 Lenel, *E. P.* 290. See, *e.g.*, 19. 2. 9. 6; h. t. 10. 12 2. 14. 27. 3. 13 19. 5. 5. 2.

them, when they were, in some cases, regarded as mandate[1]. It is not always obvious what is a liberal art: the Roman and our points of view are not the same: it was not thought that painting pictures was a liberal art[2]. Some other services were excluded from various historical causes. A *mensor*, a surveyor, did not "locate" his services, perhaps from religious associations in early days[3]. In general the contract was confined to work on a material object, and this is sometimes held to have been the rule, on the strength of a text which does not treat as *locatio* a case of employment as a messenger[4]. But no such rule is stated, and it is hardly consistent with the fact that Cicero mentions among the illiberal or sordid arts those of attendants on fashionable people[5]. In any case the overwhelming majority of cases would be for work on a material thing[6].

Where a slave was the subject of such a contract it is difficult to distinguish it from *locatio rei*: usually an agreement by the master that a slave should work for hire for a third person was called *locatio servi*[7], while if a freeman contracted to do the same thing it was *locatio operarum*[8].

The contract of service for hire took two forms: *locatio operarum*, the letting of services, as in *locatio rei*, the *locator* being the person who let the services and took the hire[9], and *locatio operis faciendi*, in which the names were inversely applied: the man who did the work being the *conductor* and taking the hire. The probable cause of this is that in the usual case something was handed over to be worked on and "*conducere*" means "to take with you." But the names are confused: in one text a party is called both *conductor* and *locator*[10]. The case of *locatio operarum* was in general that of a worker at a day wage, or of that type: the other has more responsibility in it.

Locatio operarum[11]. The general principles being the same it is necessary only to mention a few points. Both parties were liable for *culpa*, and it was *culpa* in the workman not to be competent for the work he undertook[12]. He must carry out his work, but there was a rule that if he was prevented from doing the work by some *cause* extrinsic to himself, he was still entitled to his wage, unless he had succeeded in getting other

1 See *post*, § CLXXIX. Some work, *e.g.* that of professor of philosophy or law, was too dignified even for this in classical law, 50. 13. 1. 4, 5. 2 19. 5. 5. 2. 3 11. 6. 1. pr. 4 12. 4. 5. pr., but this is only construction of the meaning of a particular arrangement, and the text has been altered. 5 *De Off.* 1. 42. 150. In the case of a beautifier, the material object must be the employer. 6 19. 2. 19. 10 may be read to shew that *comites* of a legate "located" their services, but it was mandate, 50. 13. 1. 8. 7 19. 2. 42; h. t. 43; h. t. 45. 1; h. t. 60. 7. 8 19. 2. 19. 9; h. t. 22. 2; h. t. 38. 9 P. 2. 18. 1. 10 19. 2. 22. 2; cf. 19. 3. 1. pr. 11 See on this contract Deschamps, *Mél. Gerardin*, 157 sqq. 12 19. 2. 9. 5.

work[1]. The death of the employer, where the service was personal, was such a case, and here (and probably in all cases) death of the server ended the contract[2].

Here, as in *locatio rei*, the *merces* accrued due from time to time, which has one noticeable result. If a slave let out his services, the contract was not affected by alienation of the slave, but the right to the wage for the period after the alienation was in the new master, though not the right to sue for it[3]. The rule would apparently be the same if the master had made the contract[4].

Locatio operis. This was the putting out of a piece of work on contract. It differs from the last case in that here what was contemplated was not services but a completed piece of work[5], a house to be built, a slave to be trained, a coat to be dyed, and so forth: practically it was always a piece of work with a physical subject-matter. We have seen that where a man was to make a thing out of his own materials, the contract was sale[6], but there was an exception. One who contracted to build a house, finding the materials, was a *conductor operis*[7], perhaps because the site was part of the finished product so that he only provided part of the material, or because the result of his work merged in the land, and had, when the work was finished, no independent existence.

Work of this kind was not necessarily, or usually, done by the contractor himself, so that death of either party did not affect it[8]. The *conductor* (*redemptor*) must do the work properly, being liable for *culpa levis*, including *imperitia*, as in the last case[9]. The same questions arose as to his liability for *culpa* of his assistants as in *locatio rei*, and no doubt the answer was the same. The price fixed might be a lump sum or so much for each part of the work: the latter arrangement did not of itself prevent the *locator* from claiming for bad work when the whole was completed, unless it was arranged that the work should be approved at each stage[10]. The work must be done in the agreed time, or, if none was fixed, a reasonable time[11].

It was usual to agree that the work should be such as to satisfy the *locator* or a nominee. This means what ought to satisfy: the judgment must be that of a *bonus vir*. If the approval was obtained by fraud it was void, which seems to mean that there could still be a claim for fraudulently concealed defects after the work had been approved[12].

1 19. 2. 19. 9; h. t. 38. pr. 2 Arg. 12. 6. 26. 12. 3 19. 1. 13. 13. 4 If instead of a sale it was the ending of a usufruct, the owner could sue on the outstanding part of the slave's own contract, for he could acquire through the slave when the contract was made, 45. 3. 18. 3. 5 50. 16. 5. 1. 6 *Ante*, § CLXXIV. 7 19. 2. 22. 2. 8 Arg. C. 8. 37. 15. 9 19. 2. 51. 1. 10 *Ib.* 11 19. 2. 13. 10; h. t. 58. 1. 12 19. 2. 24. pr.; h. t. 51. 1.

The employer must accept the work when completed, and if, as was usual, it was subject to approval, must approve within a reasonable time on demand[1]. This is important on the question of risks, on which the conclusions to be drawn from the texts[2] appear to be the following. Apart from special agreement the risk was on the *locator* (*i.e.* he must pay the *merces*, whatever happens to the work) so far as it had been approved, or, he having delayed approval (*mora*), was such that it ought to have been approved, and this, at least *pro tanto*, if the approval was of a part. Further, it was at the risk of the *locator* if, though not approved, it was destroyed by *vis maior*, *e.g.* earthquake, on the principle that this loss would have happened if it had been approved or not, and the *conductor* was not bound to supply more than the *locator* would have had if he had done the work himself, and also if the destruction was due to defect in the material or basis supplied by the *locator*. Apart from this it was at the risk of the *conductor*, so that the *merces* would not be due if the work was destroyed. Thus, as it was primarily on him, the burden of proof that the case came under one of the other heads was on him.

Two special cases of *locatio conductio* need mention.

Locatio irregularis (so-called). This occurred where the *conductor* received property, to return not the same but an equivalent, as in *depositum irregulare*. Such cases were those of the goldsmith who received gold to make a ring but might use other, of the same fineness, and the carrier who received grain in bulk on his ship, having to deliver not to each consignee his own, but the right amount out of what was on the ship[3]. The important point is the question, whose was the risk? As the ownership was in the *conductor*, it ought logically to be his, and no doubt this was so in the case of the goldsmith. But in the carrier's case it seems that it was a term in the contract that apart from *culpa* he was liable only for goods which arrived safely. We have, however, very little information[4].

Carriage by sea. *Lex Rhodia de iactu*[5]. There was a rule said to be adopted from Rhodian sea law, that where goods were thrown overboard to save a ship in peril from storm or other cause, and the ship was saved, the loss was shared between all those concerned. As this included the shipmaster and all who had goods aboard, the rule was enforced by the *actiones conducti* or *locati*. The owner of the sacrificed goods proceeded against the owner of the ship and he in turn against

1 Implied in 19. 2. 36. 2 19. 2. 36; h. t. 37; h. t. 59; h. t. 62. But see Monro, *Locati Conducti*, ad h. t. 36. 3 19. 2. 31; 34. 2. 34. pr. in f. 4 On the old *actio oneris aversi* which seems to have lain for failure to deliver the cargo, Huvelin, *Études sur le furtum*, 1. 511 sqq. 5 D. 14. 2; P. 2. 7.

the various freighters[1], a roundabout method which is supposed, though there is no evidence, to have been superseded by direct actions for contribution.

CLXXVII. *Societas.* This was essentially the union of funds, or skill, or labour, or a combination of them, for some common purpose or exploitation which might have, and usually had, but need not have, profit for its aim. Mere common ownership was not of itself *societas*[2]: the essence was joint exploitation. Thus if two men jointly bought the land at the back of their houses in order to keep it clear of buildings this was *societas*[3]. The relation involved "*affectio societatis*[4]," and the existence of this set up specially confidential relations sometimes called "*fraternitas*[5]." It differed from English partnership in that it did not necessarily aim at commercial profit, but still more in the fact that while in our law partners are, within limits, agents for each other, and bind each other by dealings with third persons, this aspect of the matter did not appear in Roman Law in ordinary cases, since one man could not in general contract so as to affect another[6], and thus the law dealt almost entirely with the relations of the *socii, inter se*[7].

There were several types of *societas*[8], the chief being:

1. *Societas unius rei, i.e.* in one transaction, which might or might not be commercial. The above instance is of this type, and uncommercial.

2. *Societas alicuius negotiationis.* This was probably the most usual form. It was the carrying on in common of some one kind of business[9]. A specially important case of this was *societas vectigalis*, partnership in taxfarming. As it had special rules[10] it will call for separate discussion.

3. *Societas omnium bonorum quae ex quaestu veniunt.* This was *societas* in all business transactions, and there was a rule of construction, that if there was a *societas* but no evidence as to its type, it was assumed to be of this kind[11]. All business profits must be brought in, and all business debts might be charged against the *societas*[12]. The texts shew, and indeed it is obvious, that it might be difficult to say what was trade and what was private profit[13].

4. *Societas omnium bonorum.* All the assets of the parties formed a common fund. Here, too, there were special rules which will need statement[14].

1 14. 2. 2. 2. **2** 17. 2. 31. **3** 17. 2. 52. 13; cf. 52. 12. **4** 17. 2. 31. **5** 17. 2. 63. pr. **6** *Ante*, § CXLIII. **7** Exceptional cases, *post*, § CLXXVIII. **8** G. 3. 148 gives only two types, *alicuius negotiationis*, and *omnium bonorum*. **9** 17. 2. 52. 4, etc. **10** *E.g.* 17. 2. 5; *post*, § CLXXVIII. **11** 17. 2. 7. There usually would be evidence. **12** 17. 2. 7; h. t. 8, etc. A legacy would not come in (h. t. 9) or house hold expenses. **13** *E.g.* 17. 2. 7. How if one lets his house furnished? **14** *Post*, § CLXXVIII. Apart from this case the classification is not important. It is not exhaustive. A man might have joint dealings in more than one transaction of a type, but not in all, in more than one type of business but not in all. But see 17. 2. 52. 14.

The chief requirements of *societas* were the following:

Each must contribute something, funds, skill, or labour, or a combination: otherwise it was *donatio*[1]. Contributions might differ in kind and amount[2]. The purpose must be lawful and possible: one of a band of robbers could not bring proceedings for division of the spoil[3]. All must consent, thus no *socius* could introduce a *socius* without consent of the others: if he sought to do so, he was personally liable for what the intruded person did[4]. It might be conditional[5], though Justinian tells us that the possibility of conditions had been doubted[6]. It was possible to agree that the shares should be determined by a third person: here there was no *societas* at all, even conditional, till this had been done[7]. The agreement might be for a transaction or transactions, a term or for life (*perpetuum*[8]). No form was necessary, and thus the consent might be tacit (*re*[9]).

Effects of *societas*. It was perfectly bilateral, and, the duties on each side being the same, it had only one name. It was *bonae fidei*, even in a special sense, having a "*fraternitas*" which led to special rules. The main points as to the relations of the parties are the following:

The agreed capital must be duly provided. In some cases the ownership was to be common, in others only the use (*societas quoad sortem, quoad usum*). In the former case the law of warranties was probably as in sale, but the Edict of the Aediles did not apply[10]. On the same principle the risks would be common, as if it were a sale, but if only the use was to be common, the rule was perhaps as in *locatio rei*: the risk was on the owner, and destruction, though it did not impose on him a duty to replace, gave him no right to contribution[11].

The shares might be unequal, at least if the contributions were[12], and, after dispute, it was settled that a man's share in the profits need not be the same as his share in the losses[13]. He might even be wholly excluded from loss, which was not *donatio*, for his co-operation might be worth buying at that price[14]. But he could not be excluded from profit: this was a *societas leonina*[15]. The shares might be fixed by an arbitrator, and if his decision was unfair the *societas* was not void, but the assignment might be corrected[16]. It might even be left to one of the parties,

1 G. 3. 149; D. 17. 2. 5. 1. **2** 17. 2. 6; h. t. 80. **3** 17. 2. 3. 3; h. t. 57. **4** 17. 2. 19; h. t. 23. **5** 17. 2. 1. pr. **6** C. 4. 37. 6. **7** 17. 2. 75 sqq. **8** 17. 2. 1. pr. **9** 17. 2. 4. pr.; cp. Inst. 4. 1. pr. **10** On the question when it was *quoad sortem* and when *quoad usum* (the expressions are not Roman) views differ. It is a matter of interpretation of the contract and of the nature of the contribution, see 17. 2. 52. 3; h. t. 58. 1. **11** There is little textual authority on the matter. **12** 17. 2. 29. pr. **13** 17. 2. 30; G. 3. 149; Inst. 3. 25. 2. **14** 17. 2. 29. 1. **15** 17. 2. 29. 2, from the well-known fable. More complex arrangements, h. t. 44; h. t. 52. 7. **16** 17. 2. 76 sqq.

a result of the *fraternitas*, for the rule has no parallel in any other contract[1]. Here too it must be done fairly, or was corrected. If no shares were agreed, they were equal whatever the contributions: if inequality was wanted it must be agreed for[2]. Where one's share in loss differed from that in profits, the periods at which accounts were taken would be material[3]. It is commonly held that account was taken at the end of the partnership, with, no doubt, interim drawings, which would be inconvenient if the *societas* was for life or a long term. The difficulty did not arise if the *societas* was for a transaction or transactions. There is no textual authority.

Apart from agreement each shared in the administration, and might use the firm property, but the business might be left to a manager who might or might not be a *socius*[4]. Apparently any *socius* might veto an administrative proposal of any or all the others, so as to make persistence in it a wrong[5], but if the prohibition was unreasonable or dolose, he would be liable for any resulting loss. Contracts of a *socius* could, on general principle, bind and entitle only himself, subject to account, but he could alienate firm property, with authorisation, which might, no doubt, be tacit, *e.g.* in the case of ordinary stock in trade[6].

Socii were liable for *culpa levis*[7], and could not set off, against damage due to this, profit resulting from other activities[8]. They were liable, exceptionally, for the *culpa* of slaves or others employed by them in the business[9].

They were bound to account for receipts on firm business[10] and entitled to contribution for expenses properly incurred[11]. They must pay interest on firm property in their hands if they were in *mora* or had used it, and the liability was not limited to the ordinary rate of interest, but went to the full *interesse* of the *socii*[12]. The texts conflict as to the position of the *socius* if he had not used the money and was not in *mora*[13]. If one had sold firm property and received the price he must divide it, but might require security in respect of anything he might have to return,

1 17. 2. 6; cf. 18. 1. 35. 1. 2 17. 2. 29. pr.; C. 4. 37. 3; G. 3. 150. 3 If *A* was to have half the gains and a quarter of the losses, and in the first six months the firm made £100 and in the second lost £100, on an annual account *A* gains and loses nothing, on a six-monthly he gains £25. 4 17. 2. 24; h. t. 67. pr. 5 See 10. 3. 28. 6 17. 2. 44; h. t. 58. pr. See Perozzi, *Mél. Girard*, 2. 355. In 17. 2. 68. 1 the allusion is to sale of his share. 7 P. 2. 16. 1; D. 17. 2. 36; h. t. 52. 2. In h. t. 72 Gaius limits this to the care he shews in his own affairs, and gives the reason that a man who takes a careless partner has himself to blame: this is no reason, for it would apply to any contract; so far as the limit exists it may be because it is *pro tanto* his own affair, or it may be an application of *ius fraternitatis*, but it is probably due to Justinian. See *post*, § CXC, and Inst. 3. 25. 9 where the passage recurs. 8 17. 2. 25, 26. 9 17. 2. 23. 1, *ius fraternitatis*. As to liability for *custodia*, *post*, § CXCI. 10 17. 2. 8–11; h. t. 52. 5: h. t. 74. 11 P. 2. 16. 1; D. 17. 2. 27; h. t. 38. 1. 12 17. 2. 60. pr.; 22. 1. 1. 1, *ius fraternitatis*. 13 See the same passages.

e.g. in *quanto minoris*, and if one of his *socii* was insolvent, this increased the liability of the others to him[1]. Thus they were in effect sureties *inter se*. There might be difficulties as to what expenses were properly chargeable. Thus where a stock in trade of slaves revolted, and a *socius* was hurt in quelling the outbreak, Labeo held that his doctor's bill could not be charged, but Julian rejected this view[2].

The general remedy for enforcing these claims was the *actio pro socio*, a *bonae fidei iudicium*, which usually ended the *societas*, but could be brought, where occasion arose for adjustment of disputes, without this effect[3]. There might be other remedies. If the wrong done was a delict, there was the appropriate action *ex delicto*. More important was the *iudicium communi dividundo*, which, as it aimed at division, could be regarded as ordinarily ending the firm, but could be brought as a friendly suit to settle how a particular thing ought to be shared[4]. And there might be other contractual actions: a *socius* might have given another a mandate in firm business[5].

In general the *socii* were, as against third persons, so many individual men: one who had contracted with one of them had no right or liability as against the others. If all took part in the contract all were liable or entitled, either *pro rata*[6], or, if they were *correi*, *in solidum*. And there were exceptional extensions. The *actiones institoria* and *exercitoria* lay *in solidum* against any of them[7]. If a *socius* was acting under a mandate of another or others, the *actiones utiles* which arose out of mandate would apply[8]. Some special types of *societas* created solidary liability[9]. And under Justinian, but probably not before, a creditor of one could sue the others by an extended *actio de in rem verso*[10].

A *socius* could not, by taking a partner, himself add him to the *societas*. If he took such a partner, and allowed him to deal with firm business, he was responsible, as we have seen, for his acts, and could not get rid of liability by ceding his actions against him[11]. As between its parties the subpartnership was valid. An *actio pro socio* on it would not affect the main *societas*[12], but, so far as the subpartnership was formed merely in respect of the concerns of the principal firm, it was necessarily ended if that ceased to exist.

CLXXVIII. Termination of *societas*. The principal causes of termination were:

1 17. 2. 38. pr.; h. t. 67. pr. **2** 17. 2. 60. 1; h. t. 61. **3** 17. 2. 65. 15. As to *actio pro socio* as destroying the relation, *post*, § CLXXVIII. **4** 17. 2. 38. 1. **5** On the question how far one action bars another, *post*, § CCXLII. **6** Doubts as to principle of division: 14. 1. 4. pr.; 45. 2. 11. 1; 45. 3. 37. **7** 14. 1. 1. 25; 14. 3. 14. **8** *Post*, § CLXXX. **9** *Post*, p. 510. **10** Arg. 17. 2. 82. The interpretation of the text is disputed, see Von Tuhr, *De in rem verso*, 307. **11** 17. 2. 21; h. t. 23. pr. **12** 17. 2. 22.

Death of a *socius*, with notice[1]. This resulted from the personal relation, and it was impossible to agree *ab initio* that the *heres* of a *socius* should come in[2]. As always, what ended the *societas* for one ended it altogether: if the others continued, even if it had been agreed *ab initio* that they should, it was a new *societas*[3], into which the *heres* might of course be admitted as any other person could. But though the *heres* was not a *socius*, the rights and liabilities already existing descended on him, so that he might be a party to the *actio pro socio*. He must complete what was half done and shew the same care as a *socius*[4]. The end of the *societas* was not of course the end of the business: what it in effect meant was that there must be an adjustment of accounts, and the estate of the deceased *socius* had nothing to do with future happenings[5].

Renunciation. It could of course end by mutual *dissensus*, but the rule went much further. Any *socius* could, even in defiance of an agreement to the contrary, end the *societas* altogether at any time by renouncing it[6]. But though he ended the firm, he might be liable for damages. If he did it fraudulently, *e.g.* to keep an impending acquisition for himself or avoid an impending loss, he must account, whether it was for a term or not: he freed his *socii* from him, it is said, but not himself from his *socii*[7]. So too if, without fraud, he insisted on doing it at a time disastrous to the firm[8]. If there was an agreement not to renounce, it might still be done, with the same liability in the case of fraud or disastrous choice of time[9]. Hence Pomponius says that an agreement not to renounce is a nullity[10], but that is hardly the case. It seems to follow from the texts that apart from fraud or special circumstances he would in such a case be liable for damages if, *e.g.*, the loss of his services or capital made it impossible for the firm to go on[11]. Similar rules appear to have applied where the *societas* was for a fixed term[12]. On the other hand, there were circumstances, such as gross misconduct by a *socius*, or long and necessary absence on public affairs, which completely justified renunciation even where there was a term or a contrary agreement[13]. Renunciation might be express or tacit: alienation of the share was the chief case of tacit renunciation[14]. Such a sale was a breach of an agreement not to divide and the rules of renunciation applied[15].

1 17. 2. 4. 1; h. t. 63. 10; 65. 9, 10, etc. **2** 17. 2. 35; h. t. 59; G. 3. 152; Inst. 3. 25. 5. **3** 17. 2. 65. 9. **4** 17. 2. 37; h. t. 40; h. t. 63. 8; h. t. 65. 9. It must be remembered that though not a *socius* he is probably a common owner. **5** There was nothing to prevent all members of an existing firm from agreeing with a specific outsider, that on the death of a certain, or any, *socius*, a new firm should come into existence of which he should be a member, at least after the doubt about conditions was settled. **6** 17. 2. 4. 1; h. t. 63. 10, 64. **7** 17. 2. 65. 3; G. 3. 151; Inst. 3. 25. 4. **8** 17. 2. 65. 5. **9** 17. 2. 65. 6. **10** 17. 2. 14; cp. h. t. 17. 2. **11** Arg. 17. 2. 17. pr.; h. t. 65. See Monro, *Pro Socio*, ad h. t. 16. pr. **12** 17. 2. 14; h. t. 65. 5. **13** 17. 2. 14; h. t. 16. pr.; h. t. 52. 13. **14** 17. 2. 16. 1; h. t. 17. pr. **15** 17. 2. 16. 1.

Capitis deminutio. In later law this meant *maxima* or *media*, *i.e.* enslavement or deportation, with loss of property[1]. For Gaius, *minima* sufficed, though the parties could agree to renew[2]. Where there had been a *capitis deminutio minima* and the *societas* continued, there were complex questions as to the rights of action on events before and after the change. In fact *capitis deminutio* is of very small importance in later law, as a separate head, for we are told that *bonorum venditio* or *amissio bonorum* in any form, of which *c. d.* is ordinarily only one case, ended a *societas*[3].

Lapse of agreed time, arrival of determining condition, completion of purpose and destruction of subject-matter need only mention[4].

Actio pro socio. The normal purpose of this action was contribution, but *litis contestatio* in it ended the *societas*, where it was brought as a general action on the contract[5], though it could be brought as a friendly suit to adjust particular points without affecting the contract as a whole[6]. In any case it of course novated the rights on the actual points brought into issue[7]. It was *bonae fidei*[8], *directa* on both sides, and subject to "*beneficium competentiae*": the *socius* was not condemned beyond what he could pay, except where he had fraudulently made himself unable to pay. This rule seems to have applied at first only to *societas omnium bonorum*[9], and it never applied where the action was against a *heres*. What was unpaid remained due[10]. *Condemnatio* in the action involved infamy[11], but it is probable that this was so only in case of *dolus*. It may be noted that Paul says that *societas* is destroyed by *actio* where either an action is brought on it, or it is otherwise novated by *stipulatio*[12]. This odd statement is explained on the view that *actio* here is used in its widest sense to denote any juristic act[13].

It must be remembered that *socii* were commonly also joint owners, and thus the *actio communi dividundo*[14] also was available between them for adjustment of liabilities in respect of the property. As it affected only property questions and adjustment, *i.e.* not debts and credits, it was narrower but it contained *adiudicatio*, which *pro socio* did not. It

1 17. 2. 4. 1. **2** G. 3. 153. From 17. 2. 58. 2; h. t. 65. 11 it seems that there was a tendency even in classical law to ignore the *cap. dem. minima.* **3** 17. 2. 4. 1; h. t. 63. 12; h. t. 65. 1; G. 3. 154. A *relegatus* did not suffer *c. d.*, but *relegatio* might involve confiscation. What Modestinus exactly means by "*egestas*" (17. 2. 4. 1) is not quite clear. If a *deportatus* was allowed to keep part of his property (*ante*, § XXXVI) the *societas* would nevertheless be ended, which justifies the appearance of *capitis deminutio* as a mode of termination. **4** 17. 2. 63. 10. Knowledge of occurrence of the condition, completion or destruction would presumably be necessary. From h. t. 65. 6, it seems that even if a time was fixed the *societas* did not determine *ipso facto* on expiry of the time, but there must be express withdrawal. Cp. 19. 2. 14. **5** 17. 2. 65. pr. **6** 17. 2. 65. 15. **7** 17. 2. 63. 10. **8** 17. 2. 52. 1. **9** 17. 2. 63. pr.; h. t. 63. 2; 42. 1. 16. **10** 17. 2. 63. 4, 5. **11** 3. 2. 1; Inst. 4. 16. 2. **12** 17. 2. 65. pr. **13** Girard, *Manuel*, 591. **14** *Post*, § CLXXXVI.

did not necessarily end the *societas* under Justinian: whether it did so in classical law is uncertain[1].

We have now to consider some types of *societas* which have special rules:

Societas venaliciorum. Partnership of slavedealers, who, we are told, were usually rascals[2]. The Edict of the Aediles was first introduced for them, and there was a rule that where one of them sold, the aedilician actions lay *in solidum* against any *socius* whose share was not less than that of any other[3].

Societas argentariorum. Banking firms. These were at the other extreme of commerce. They were a privileged and important body, through whom was done most of the serious business. Their books were relied on as records, and they were bound to produce them in litigation concerning their clients[4]. Of the many special rules affecting them only one bears on *societas*. It is that a contract by a firm of *argentarii* created a correal obligation both ways, whether so intended or not[5], and that a contract *literis* by any one of them had the same effect[6].

Societas vectigalis. This was a *societas* for taxfarming, and it seems that similar rules applied to other *societates* contracting with the State, *e.g.* for exploiting mines and quarries[7]. The contract with the State was usually for five years. The chief special rules are the following:

1. Besides the *socii* there might be investors (*participes*) whose position is imperfectly known[8], and who are not traceable in late law.

2. Death of a *socius* did not end the firm as to the others, unless the deceased was the manager or held the contract with the State[9]. This does not imply unusual permanence, as the *societas* was probably only for the five-year contract.

3. It was possible to agree, *ab initio*, that the *heres* of a deceased *socius* should become one[10]. Apart from such agreement, he would, unlike the *heres* of an ordinary *socius*, take his share of the rights and liabilities after the death, though, like a *particeps*, he had no voice in the management[11].

4. On some obscure texts[12], it is sometimes said that there was no right of renunciation.

5. On certain texts[13] it is suggested that such firms were corporate

1 17. 2. 43. Perhaps interpolated. **2** 21. 1. 37. **3** 21. 1. 44. 1. **4** 2. 13. 4; h. t. 6; h. t. 10. **5** 2. 14. 9. pr.; 4. 8. 34. pr., etc. Probably extended to all money loans and promises. Similar rule for joint *exercitores*, *ante*, § CLXXVII; *post*, § CLXXXIV. **6** *Rh. ad Her.* 2. 13. 19. **7** 3. 4. 1. pr. All called *societates publicanorum*, but *vectigalis* more strictly applied, 17. 2. 63. 8; 50. 16. 16. **8** Monro, *Pro Socio*, 79. **9** 17. 2. 59. pr.; h. t. 63. 8. The others were frequently "sleeping partners," providing capital but not service. The passage speaking of the exceptional case in which death dissolves the *societas* has been altered by the compilers, but the rule is probably classical, Mitteis, *R.Pr.* 1. 413. **10** 17. 2. 59. **11** 17. 2. 63. 8. **12** 17. 2. 63. 8; h. t. 65. 15. **13** 3. 4. 1. pr.; 37. 1. 3. 4.

bodies, *i.e.* the rights and duties attached to the corporate body and not to the individuals. But there is much controversy. The chief views are that they were corporate, that they might be, but were not necessarily, that the rule in either form did not apply to them but to *sodalitates* among the workers, that this last was the classical view, but that under Justinian, it applied to the *societates*, and finally that it applied not to *societates vectigales*, which usually had but a short existence, but to financial groups of a more permanent character which provided capital for them[1].

Societas omnium (*universorum*) *bonorum*. Partnership in all property and undertakings. It was not corporate. It was probably the oldest form of *societas*, descending from *consortium*, an early practice by which *heredes*, instead of dividing, kept the *hereditas* together and enjoyed it in common[2]. It did not necessarily cover future acquisitions. The contract had the exceptional effect, derived no doubt from its origin in *consortium*, that all *res corporales* of a member vested, by the mere agreement, in the firm as a whole[3]. How the lawyers constructed this tacit transfer is not clear[4]. *Iura in personam* could not be transferred and thus must be accounted for to the firm[5]. Future acquisitions, if they came in, had to be transferred[6], but nothing acquired by wrong came in[7]. There were special rules for cases in which the interest was terminable or inalienable, *e.g. dos* and usufruct[8].

As the property belonged to the *societas*, that body bore expenses[9]. But it was not responsible for penalties for delict or losses in gambling or the like[10]. This does not mean that the creditor would not be paid, but that, if the *socius* paid out of firm property, the whole was charged against his share, and it is clear that in such *societates* there was money belonging to individuals[11]. Revenue shared out was no doubt at the disposal of the party. Even apart from this, if judgment was obtained on such a liability, and was not satisfied, creditors could proceed to *bonorum venditio*, which would end the *societas* and make the debtor's

1 See Mitteis, *Rom. Privr.* 404 sqq. 2 10. 2. 39. 3; 17. 2. 52. 6; cp. h. t. 52. 8. The origin suggests—since *consortium* affected only present possessions, the *hereditas*, which in case of *sui* was all they had—that *s. o. b.* would cover only present possessions. In fact many of the texts say nothing of future acquisitions, and of those which clearly do, two suggest that it was exceptional, and of these one deals only with one specific future acquisition and excludes the rest (17. 2. 3. 2); the other, h. t. 73, speaking of "*universarum fortunarum*," required a gloss, "*id est earum quoque rerum quae postea adquirentur.*" Clearly cases dealing only with present property did occur, and they were probably the most usual so far as capital contribution is concerned, a much more reasonable sort of partnership. 3 17. 2. 1. 1. 4 The tacit *traditio* of Gaius (17. 2. 2) and the *constitutum possessorium* sometimes suggested are unsatisfactory, for it appears to have applied to everything, not merely to what was actually possessed by a party. 5 17. 2. 3. pr. 6 17. 2. 73. 7 17. 2. 52. 17; h. t. 53. 8 A usufruct could not be transferred. 9 17. 2. 73. 10 17. 2. 52. 18. 11 17. 2. 52. 18.

share available. There would usually be no need to proceed to this extreme: the amount would be paid out of the common fund and charged against the *socius* concerned.

The ordinary modes of ending the *societas* applied. Thus it might be renounced[1]. As in other cases the transactions were the transactions of the party himself: it was he who must sue and be sued[2].

CLXXIX. *MANDATUM.* This was the undertaking, by request, of a gratuitous service for another. The appointor was called *mandator*: *mandatarius* is a convenient though unauthorised name for the other party. The service might be of any kind connected with *patrimonium*, provided it was lawful and possible[3]. In recorded cases, it usually involved entry into legal relation with a third party, but this need not be so. Thus we read of a mandate to a *fullo* who was going to do the work for nothing[4]. Mandate seems to have begun as an isolated friendly service[5], to act as *adstipulator*, or surety, or as representative in litigation, but in classical law it had a much wider scope. It might be general, the management of the principal's affairs, the holder of such a mandate being properly called a *procurator*, though in the late classical law, this name is applied to mandatories for a single service[6], the earliest application of it in this sense being to a *procurator ad litem*. Mandate might be subject to *dies* or condition, and of course to a limit of time[7]. It might be express or tacit[8].

Mandate was gratuitous[9]. No agreed reward could be recovered in the action on mandate, but in classical law it was possible, where remuneration had been agreed, to recover it by a *cognitio extraordinaria*[10]. This makes its gratuitous character rather unreal but not unimportant: it would not be possible for a mandatory, sued on his mandate, to set off a claim for the *honorarium*, or to defend on the ground that it had not been paid. It was no part of the contract.

The mandate must concern the *mandator*: he must have an *interesse*[11]. This rule leads to a classification of mandates according as they interest *mandator*, *mandatarius* or a third party, or any combination of these. The classification would have had little meaning in the republic, but as

1 17. 2. 65. pr., 3. **2** See, *e.g.*, 17. 2. 52. 18; 47. 2. 52. 18. **3** 17. 1. 6. 3; G. 3. 157. **4** Inst. 3. 26. 13. **5** See, however, Karlowa, *R.Rg.* 2. 665. **6** 3. 3. 1. See Karlowa, *loc. cit.* **7** 17. 1. 1. 3. No sign of doubts as to conditions. **8** 17. 1. 53; 50. 17. 60. **9** 17. 1. 1. 4; G. 3. 162; Inst. 3. 26. 13. **10** These cases of recognised *salaria*, *honoraria*, grew more numerous as time went on, and services of almost any kind were dealt with in this way (50. 13. 1). It is not, however, clear that the notion of mandate was correspondingly extended, *i.e.*, that, *e.g.*, an *actio mandati* lay if the service was faultily rendered. Gaius and, even more clearly ,Justinian treat mandate as confined to cases which might have been *locatio* (G. 3. 162; Inst. 3. 26. 13). See 17. 1. 7; C. 4. 35. 1. The general language of h. t. 6. pr. is of small weight. Doubtless the limits of mandate and *locatio operis* were not precisely defined. **11** 17. 1. 8 6.

mandate grew commercialised the distinctions became more important[1]. Any of the forms was valid if there was an *interesse* of *mandator*, but a mandate in the interest merely of *mandatarius* or a third party, or both, gave no *actio directa*[2]. We are told that mandate in the interest of *mandatarius* alone was mere advice and no mandate at all[3], but we are also told[4] that if it was a thing he would not have done, but for the advice, there was an *actio contraria* on the mandate. The words must be taken to represent Justinian's law[5], but they are probably interpolated, the classical law giving only an *actio doli* in case of fraud. The rule that it must not be in the interest of a third party alone is rather unreal. There might be an indirect interest, not apparent on the contract. Thus where *A* gave *B* a mandate to assume a certain liability for *X*, *X* might be indebted to *A* and this would save him from insolvency. And it is said that in any such mandate the *mandator* was interfering in the affairs of the third party, liable *ex negotio gesto*, and thus interested[6]. It was agreed in classical law[7] that a mandate to lend money to a particular third person gave an action against the *mandator*, at any rate if it was at interest[8]. This form of mandate became an important form of surety[9], and it does not appear that it was confined to cases of loan at interest. In fact the doctrine that the *mandator* must have an interest rests mainly on a text of Ulpian[10] which requires it not for the existence of a valid mandate, but for an *actio mandati directa*. No one had an action who had no *interesse*. The limitation is denied by the same writer elsewhere[11], and is not hinted at by Gaius in his exceptionally full treatment of the matter[12].

The powers of the mandatary might be very varied: their extent must be judged by the terms of the mandate. In general he might do whatever was necessarily or reasonably involved in the mandate or ancillary to it, but a general mandatary, *procurator*, had not necessarily any power of alienation[13]. He could not of course in any case do things in which direct representation was impossible, *e.g.* convey his principal's property by *mancipatio*.

Subject to a right of renunciation, the mandatary must carry out what he undertook[14]. As he might not profit, he must account for receipts and transfer proceeds in whatever was the proper form[15]. In the execution of the mandate he was liable in early law only for *dolus*[16]. This

1 Justinian's classification is much more elaborate than that of G. in his Inst., though it purports to come from him. G. 3. 155; D. 17. 1. 2. 2 *Ib.*; Inst. 3. 26. 1–5. 3 G. 3. 156; Inst. 3. 26. 6; D. 17. 1. 2. 6. 4 *Ib.*; 17. 1. 6. 5. 5 See also 17. 1. 16. 6 Arg. 17. 1. 1. 2. 7 G. 3. 156. Servius had disagreed. 8 *Ib.*; 17. 1. 2. 5. 9 *Post*, § CLXXX. 10 17. 1. 8. 6. 11 17. 1. 6. 4. 12 G. 3. 155–162. There might be *actio contraria* without the direct action. 13 3. 3. 63. This needs "*administratio*." 14 Inst. 3. 26. 11. 15 17. 1. 8. pr.; h. t. 10. 3; h. t. 20. pr. 16 And *culpa lata*? *Post*, § CXC.

agrees with principle, as he did not profit. But in later classical law he was liable for *culpa levis*, both views appearing in the Digest[1]. The change is probably due to the fact that his services were only nominally gratuitous[2]. He was responsible not only for positive damage, but for damage resulting from neglect to perform[3]. A rule that he must not exceed his powers[4] gave rise to questions. Where he did so in a divisible operation, *e.g.* lent, or became surety for, a larger sum than was authorised, it was early agreed that he could recover *ex mandato* to the limit of the authority[5]. But there had been disagreement. Thus, where he sold for less or bought for more than the authorised price, the Sabinians gave him no claim, but the Proculian view prevailed, on which he could claim, if he bore the difference himself[6].

The *mandator*, who was liable for *culpa levis*[7], must accept performance, and take over any rights properly created on his behalf, and indemnify the *mandatarius* in respect of any liabilities[8] incurred, by payment or *transactio*, or taking them over by *novatio*, etc.[9] He must reimburse the mandatary for expenses properly incurred, with interest, for the mandatary as he must not profit, must not lose either[10]. But there was an illiberal rule that personal losses which had nothing to do with the mandate were not chargeable even though they would not have occurred but for the mandate[11].

Mandate ended of course by completion, impossibility, arrival of term or condition, mutual waiver, and so forth, but also by:

Revocation or renunciation. This right resulted from the confidential aspect of mandate. So long as nothing had been done, the *mandator* could revoke with impunity, but if he did so when the mandatary had incurred expenses or liabilities he must take these over[12]. The mandatary's power of acting within his authority lasted till he had notice of the revocation[13], while persons dealing with him were entitled to treat him as mandatary, till they had notice[14]. The mandatary could renounce, *re integra*, so long as his renunciation did not prevent the principal from conveniently getting the thing done at all[15], or in any case if he was attacked by illness[16], or had hostile interests[17], or the principal was insolvent[18]. If, apart from this, he renounced after having acted, he would still be, in a sense, within his rights, but was more likely to injure

1 17. 1. 10. pr.; h. t. 29. pr.; 19. 5. 5. 4; 50. 17. 23. **2** It can hardly be due to the confidential nature of the transaction, for the rule appears only when *mandatum* is becoming commercialised. **3** 17. 1. 8. 10; h. t. 12. 10; h. t. 5. 1. etc. **4** See Greg. Wis. 1. 1; Inst. 3. 26. 8; D. 17. 1. 5. **5** 17. 1. 33. **6** G. 3. 161; P. 2. 15. 3; Inst. 3. 26. 8; D. 17. 1. 3. 2, 4. **7** 47. 2. 62. 5. **8** 17. 1. 12. 9; h. t. 15; h. t. 26. 6. **9** 17. 1. 45. pr.–5. **10** 17. 1. 15; P. 2. 15. 2. **11** *E.g.* a man travelling under mandate is robbed by highwaymen, h. t. 26. 6. **12** 17. 1. 15; G. 3. 159; Inst. 3. 26. 9. **13** 17. 1. 15. **14** 46. 3. 12. 2. **15** 17. 1. 22. 11. **16** 17. 1. 23; P. 2. 15. 1. **17** *Ib.* **18** 17. 1. 24, 25; P. 2. 15. 1.

the *mandator*, in which case he would be liable for damages. He must therefore give prompt notice of any revocation[1], and in any case he must not leave a transaction half completed[2].

Death of either party, as it was a personal relation, with similar rules as to notice of death in the case of the *mandator*[3], the *heres* of a deceased mandatary being bound to attend to uncompleted matters[4]. Here however mandate for performance after the death of either party raises a certain difficulty. Such a thing is said to be void because an *obligatio* cannot begin in the *heres*[5], and so far as death of the mandatary is concerned, this is clearly stated[6] and nowhere denied. There is the further reason that the confidence one has in a man does not extend to his unknown *heres*. But it is different in the case of mandate for performance after the death of the *mandator*. The personal reason does not apply. The rule is not stated by Gaius, but is by Paul, in the Digest, with the reason that mandate ends by death of either party[7]. One text may possibly imply that a mandate to conduct my funeral gives no *actio mandati*[8], but another gives it on a mandate to build my monument[9], not easily distinguished. Another gives it on a mandate to buy land for my *heres* after my death[10], and Gaius gives it for *adstipulatio* on a *stipulatio* post mortem[11]. In one text in which the mandate was operative after death of *mandator*, the reason is assigned that on the facts (the text was written of *fiducia*) the *mandator* might have an action in his life so that the obligation did not begin in the *heres*[12]. In another, corrupt, it is said similarly that *mandatarius* might incur expense, with a right of reimbursement, before the death[13]. It is not easy to see why it should be possible to incur expense on a monument before the death, and not on other *funeraria*[14]. In fact since it is not easy to find a mandate in which it was not possible for money to be expended before the death, or, failing this, for the *mandator* to have some claim, the exceptional case practically negatives the rule.

The actions resulting from mandate were *bonae fidei iudicia*. They were the *actio mandati*, against the mandatary, condemnation involving infamy[15], and *actio mandati contraria* for reimbursement[16].

1 17. 1. 22. 11. **2** Arg. 17. 2. 40. **3** 17. 1. 26. pr.; G. 3. 160; Inst. 3. 26. 10. In C. 4. 35. 15 it is said "*mandatum re integra domini morte finitur*," a much more limited proposition. **4** Arg. 17. 2. 40. **5** *Ante*, § CXLIX. **6** G. 3. 158 (he gives that reason); D. 17. 1. 27. 3. **7** 46. 3. 108. **8** 11. 7. 14. 2. **9** 17. 1. 12. 17. **10** 17. 1. 13. **11** G. 3. 117. **12** 17. 1. 27. 1. In the original an *actio fiduciae* on revocation, under Justinian a *condictio ex poenitentia*. **13** 17. 1. 12. 17. **14** For the *actio funeraria* for expenses properly incurred in conducting a funeral, Lenel, *E.P.* 223; *post*, § CLXXXVII. **15** G. 4. 62; Inst. 4. 6. 28; D. 3. 2. 1, probably only in case of *dolus*. **16** 17. 1. 41; not infaming, D. 3. 2. 1. It is however maintained that the *actio contraria* is post-classical: the *actio mandati* in classical law having an *intentio* raising the claims on both sides, "*quidquid ob eam rem alterum alteri d. f. oportet, ex f. b.*" Biondi, *Iudicia bonae fidei*, 61 sqq.

CLXXX. We have now to consider some special aspects of *mandatum*.

The position of mandate among consensual contracts seems at first sight remarkable. It differed from the others in that it was gratuitous, and, on the view that it gave an *actio contraria*, only imperfectly bilateral, resembling in these respects the contracts *re*. It resembled them also in that either party could withdraw before anything was done. And the doubt about conditions which existed in the other consensual contracts is not suggested here. It may therefore be thought that it should be under the contracts *re*. But it differed from these in essential ways: there was here no question of delivery. The matter is not mended by regarding delivery as part performance, of which this is another case. The mere agreement created a definite obligation, which justifies the place of the contract. If *A* gave *B* a mandate, and *B* simply neglected it, to *A*'s loss, an *actio mandati* lay[1]. To avoid liability there must be an express repudiation and this must be under such conditions as not to upset *A*'s plans. The *mandator* could withdraw only by *revocatio*[2], which implies something to revoke. Agreements for a right of withdrawal were common on sale[3], but sale was none the less a consensual contract. There was a right of renunciation in *societas*[4]. The presence of consideration is not an essential of consensual contracts: it is merely one of the factors which made for recognition. Commercial importance was the real test: most commercially important contracts would have consideration, but not necessarily all.

Mandatum as agency. An agent is one who sets up relations between principal and third party, himself taking no rights and incurring no liabilities, but acting as a mere conduit. Roman Law never reached this institution in contract, but approached it in connexion with mandate. The praetor made an inroad on the principle that a contract affected only the actual parties, by giving an *actio institoria* against the principal who had appointed a man to manage a business and to contract in relation to it[5], a case of mandate. Papinian perhaps went further and allowed an "*actio ad exemplum institoriae*," where the mandate was only for an isolated transaction[6]: whether the third party must have known of the authorisation in this last case is not clear[7]. But there was no such principle the other way. One text indeed says that as the employer was liable he must also be entitled[8], but this is due to Justinian and probably does not really represent the law even for his time. The princi-

1 17. 1. 6. 1. See also *post*, § CCXXXIV. 2 Inst. 3. 26. 9. 3 *Ante*, § CLXXIII. 4 *Ante*, § CLXXVIII. 5 *Post*, § CLXXXIV. 6 14. 3. 19. pr. 7 In some texts this is not mentioned (14. 3. 19. pr.; 19. 1. 13. 25). In two it is, but in both there is another point. In 17. 1. 10. 5 the person seeking the action is one who did not make the authorised contract, but guaranteed it. A surety is entitled to know what other guarantees there are. In 3. 5. 30. pr. the same point arises for the *fideiussor*. 8 19. 1. 13. 25.

pal could not ordinarily sue on the contract unless he had taken an assignment of the action in the way shortly to be considered. In some cases of urgency, however, the matter was carried further: the principal could bring the agent's action as an *actio utilis*, and in all such cases an action by the mandatary after this would be met by an *exceptio doli*. This is stated only of cases where there was no other way of protecting the principal's interests, *e.g.* the agent was insolvent[1]. It has been suggested on the analogy of the case of *tutores*, that the same may have been true where the agent could not or could no longer be sued, so that there would be no injustice in depriving him of his actions, *e.g.* in unilateral transactions[2]. The texts make it clear that the principal did not in general acquire the agent's rights of action[3]: the notion formerly held that, where there was a right to have the action transferred, an *actio utilis* lay without transfer, is unfounded[4]. Further, the mandatary was not protected from being sued on his own contract, so that his position was far short of that of a true agent: the last point is important, for though he was entitled to an indemnity from his principal, this might be illusory.

Mandatum as a contract of surety[5]. The mandate to lend money, *mandatum credendae pecuniae* (the so-called *mandatum qualificatum*) imposed on the *mandator*, like all mandate, the duty to indemnify the *mandatarius*. If therefore the debtor did not pay, the *mandator* must, so that he was in effect surety to the *mandatarius* for the debtor. It differed from *adpromissio* in that it was created by an independent contract before the principal debt, and in that the creditor, *mandatarius*, owed duties under the mandate to the surety, the *mandator*, his principal. And the duty of the *mandator* was not to pay a certain sum if the debtor did not, but to indemnify the mandatary, which is not quite the same thing. This led to some practical differences in the rules, of which the chief were the following:

Action against the debtor did not release the *mandator*, since it was not *eadem res*[6].

Mandator, like *fideiussor*, could demand *cessio* of actions and securities against the debtor, etc., but he was better off. The *fideiussor* could claim only such as still existed[7], but as the mandatary was bound to look after the interests of *mandator*, the latter was released if the mandatary had abandoned any rights[8].

The *mandator* could withdraw before performance, while the *fideiussor*

1 14. 3. 1, 2; 46. 5. 5. 2 26. 9. 2; 45. 1. 79. Girard, *Manuel*, 689. 3 See, *e.g.*, 45. 1. 126. 2. 4 *Post*, § CLXXXIX. 5 Bortolucci, *Bull.* 27. 129; 28. 191. The author shews that the rules of this institution involve no anomalies, but are applications of the ordinary principles of mandate. 6 P. 2. 17. 16. 7 *Ante*, § CLVII. 8 46. 3. 95. 11.

could not. The *ll. Cicereia* and *Cornelia*[1] are supposed not to have been applied to *mandatores*, but this does not appear to be clear.

The *mandator*, being the originator, might be liable in circumstances in which a *fideiussor* would not, *e.g.* where there was a mandate for a loan to a minor who got *restitutio in integrum*[2]. A *fideiussor* would not be liable if he did not know the debtor was a minor[3].

Mandatum as assignment of contract. *Procuratio in rem suam. Obligatio*, being personal, could not be assigned. This principle was evaded by the use of mandate in the form of *procuratio ad litem*. The assignment was effected by giving the assignee a mandate to sue on the claim, on the understanding that he was not to be accountable for the proceeds—*procuratio in rem suam*. In its simple form this was imperfect, since the debtor could still pay the assignor and the assignor might revoke the mandate, at least till *litis contestatio*[4]. And death of either party revoked the mandate. All this was gradually remedied. If the mandate was revoked by death, or expressly, the *mandatarius* was allowed an *actio utilis* in his own name, though, in the last case, perhaps not till Justinian[5]. Again, in one case in the third century, but perhaps generally only under Justinian, it was provided that after notice given to the debtor or part payment by him to the assignee, the original creditor could no longer claim the money or release the debt, nor could the debtor validly pay it to him[6]. There was now an effective transfer of such assignable right as the creditor had. Anastasius introduced a modification which must have done some injustice. He provided[7] that any one who had so bought a debt could never recover more than he paid for it, whatever the amount of the debt[8].

CLXXXI. INNOMINATE CONTRACTS[9]. These contracts are commonly treated in close connexion with the contracts *re*, apparently as representing a generalisation of these, considered as resting on part performance. But the resemblance is remote and the evolution much later.

1 *Ante*, § CLVI. The previous declaration required by the *l. Cicereia* cannot well occur in this case, but it is not unlikely that practice imposed on the mandatary the duty to inform the principal. On the *l. Cornelia* there is no evidence. 2 See 4. 4. 13. pr.; 17. 1. 12. 13. The case of *m. credendae pecuniae* must be distinguished from that of a mandate to become surety, given by the debtor in every case of *fideiussio*. There might also be a mandate to become surety for a third person. 3 *Ante*, § CLVII. 4 The *litis contestatio* has brought the principal's right into issue and novated it, *post*, §§ CCXXXV, CCXXXIX. 5 3. 3. 55; C. 4. 10. 1, perhaps only where the revocation was unjustified. Where the transfer was by way of gift it was still avoided by death of *mandatarius* before *litis contestatio*, till Justinian. C. 8. 53. 33. 6 C. 8. 41. 3. There must have been actual *procuratio*, a mere agreement to assign was not enough. 7 C. 4. 35. 22. Justinian legislates against evasions, h. t. 23. 8 See for a full discussion, Gide, *Novatio*, Pt 3, and for another statement and criticism, Girard, *Manuel*, 743 sqq. 9 So called by modern writers. The principal instances have names, but they do not belong to a named class, and have no specially named actions, 19. 5. 3.

They represent a new principle, *i.e.* that in an agreement for mutual services performance on one side binds the other. The essence was the *quid pro quo*, which was absent in the contracts *re*. The service might be a transfer, an act, or even an abstention, having no relation to the delivery, which was the essence of the real contract, and might or might not be a service.

There is still much controversy about the evolution of these contracts[1], but in its broad lines the story seems to be as follows. There were cases in which it was clear that there was a contract, but not so clear what contract it was: it might be looked on as, *e.g.*, sale or hire. In many such cases the doubt was settled and the action on one or other of these contracts given[2], but in others Labeo is said to have held that an action should be given with a *formula in ius* expressing a civil duty (*oportere*) with words prefixed setting out the facts[3]. This may be called "*agere praescriptis verbis*," but it does not appear that it was the specific "*actio praescriptis verbis*" which we get later. Indeed it is not certain what it was called in this its earliest appearance—possibly *actio civilis incerti*[4]. But a more difficult case was that of transactions analogous to existing contracts, but not really within the definition of any. There was always the *actio doli*, if one party had done his part, and the other refused to do his[5], and if what had been done was the transfer of a *res* there was a *condictio ob rem dati* for restitution[6].

Neither of these remedies was enforcement of the contract. They undid what had been done, putting the parties, so far as might be, in the position in which they would have been if the agreement had never been made. What was needed was to put them, so far as might be, in the position in which they would have been had the bargain been completed.

The case of *aestimatum*, handing over a thing at an agreed price, for sale or return, was dealt with in the Edict. A civil action of the type just described was given and was called *actio aestimatoria* or *de aestimato*[7]. There was a *formula* but no edict: it was a civil action, and the principal text suggests that the transaction was contemplated as one of the type in which the doubt was merely under which contract it came[8]. This seems the proper view[9], though another text of the same writer seems to regard it as not under any contract and gives an *actio in*

1 See the literature cited, Girard, *Manuel*, 597. See also Partsch, reviewing Francisci, *Z.S.S.* 35. 335 sqq. 2 G. 3. 145, etc. 3 19. 5. 1. 1. The language of Gaius (n. 2) suggests that Labeo's method was little followed, and it has been suggested that the word "*civilis*" in the text is interpolated. 4 19. 5. 6. Neratius. Cp. 19. 1. 6. 1. 5 19. 5. 5. 3. 6 12. 4. 16 and *passim*. 7 Lenel, *E.P.* 290. 8 19. 3. 1. 9 It is not affected by acceptance of the suggestion of Gradenwitz (*Interpolationen*, 109) as to interpolation. The named action differentiates it from the others.

factum[1]. However this may be, other cases were protected only by the negative remedies above mentioned and an *actio in factum*, which is found very early[2] and no doubt by the time of Ulpian protected all such cases. But in some of these, as time went on, some jurists, at least, admitted the possibility of a civil action, *agere praescriptis verbis*, and while some of these cases were no doubt classical[3], it is commonly held that the general application of this action to all such cases was the work of Byzantine lawyers, probably before the time of Justinian. The compilers seem to have sought to fuse these remedies, and their terminology presents an extraordinary confusion. They speak of *actio in factum*, *actio civilis incerti*, *actio praescriptis verbis*, *actio praescriptis verbis in factum*, *actio civilis in factum*, of which none is certainly classical as applied to this action, though *actio praescriptis verbis*, *actio civilis incerti* and even *actio civilis in factum*[4] may be. No doubt the applications were gradually extended. Thus it seems that in the hypothesis "*facio ut des*," Paul did not admit the action, while Ulpian did[5].

The innominate contracts are usually grouped after Paul (or Tribonian) under four classes: *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*[6], an imperfect scheme which ignores, in form, the possibility of a service consisting in an abstention. The bargains were of innumerable kinds, but only two or three were important.

Permutatio. Barter or exchange. When we remember that throughout the classical age it was still matter of dispute whether sale involved a money price, and whether it was distinct from *permutatio* or not, it will be clear that we can know little of *permutatio*, as such, before Justinian. The contract was made only by the actual transfer of the ownership on one side[7]. Thereupon the risk in the thing undelivered passed to the party who had delivered, the holder being liable only for *culpa*[8]. As *dominium* must pass for the contract to arise, it passed though there had been as yet no performance on the other side[9], and as the duties on each side were the same one who had duly performed but had received only with a defective title, could proceed without waiting for actual eviction[10]. The law as to compensation for defects was apparently as in sale[11]. It was a *bonae fidei* transaction, but the rules as

1 19. 5. 13. pr. See Thaller, however, *Mélanges Appleton*, 639 sqq. It is difficult to understand how U. can have written both texts if the present one refers to *aestimatum*. See *post*, p. 521. 2 19. 5. 1. pr. Julian who must have handled the *actio de aestimato* gives an *actio in factum* in these cases, 2. 14. 7. 2. 3 2. 14. 7. 2. 4 See Audibert, *Mél. Gérardin*, 21. He thinks the last is Byzantine, *Mél. Fitting*, 1. 49. In C. 4. 64. 6 we get "*praescriptis verbis incerta civilis actio.*" 5 19. 5. 5. 3; h. t. 15. Attempts to determine the order of evolution can be little more than guesses. 6 19. 5. 5. 7 19. 4. 1. 3. 8 19. 5. 5. 1. 9 C. 4. 64. 4. 10 Arg. 19. 4. 13; h. t. 1. 1, 2; 2. 14. 7. 2. 11 19. 4. 2; 21. 1. 19. 5.

to *laesio enormis* did not apply. The action of the one who had performed, if the other failed, is variously stated as a civil action, an *actio in factum* and the *actio praescriptis verbis*[1], variations indicating the evolution just considered. There was also a *condictio ob rem dati* to recover the *res*, if the corresponding render had not been made, even where the failure was not imputable. Under Justinian it was called "*condictio causa data causa non secuta*[2]," and appears to have lain only where the *actio praescriptis verbis* would[3]. Where one had delivered but, for some reason, ownership had not been transferred, there could be no *actio praescriptis verbis*, as there was as yet no contract[4], but there was presumably a *condictio* for recovery.

Aestimatum[5]. This was, essentially, an agreement under which a thing was handed over by the owner to another person on the terms that he was to restore it, or an agreed price, usually within a fixed time. There might be variations in detail. Thus the profit of the receiver might consist entirely in the difference between the price he had agreed to give if he did not return the thing, and that at which he sold, or there might be some sort of reward. He might either keep the thing, or sell it (which was the real aim), or return it. It appears to be the only case in which the Edict gave an action with *praescripta verba*, but it is not called *actio praescriptis verbis*, but *actio aestimatoria* or *de aestimato*[6]. Its character has already been considered. The affinities of *aestimatum* with various contracts are discussed in the texts[7]. Nothing but the fact that the primary purpose was not purchase by the receiver differentiated it from sale, and it can be regarded as sale under a suspensive condition[8]. It is fairly clear that unless by express agreement the ownership did not pass by the delivery to the dealer, but it passed, presumably, on sale to a customer or on expiry of the time limited for return. There is difficulty on the subject of risks. In one text Ulpian puts the risk on the intermediary[9], and, in another, on whichever initiated the transaction, for which he cites Labeo and Pomponius[10], and, as Paul says the same[11], this must be taken to have been the law. If the point of priority was not clear, Ulpian makes the receiver liable for *culpa*, which leaves the risk with the principal[12].

The transaction was *bonae fidei*[13], and though we hear of an *actio in factum*, it is not clear that the text is really concerned with *aestimatum*[14].

Precarium. This is commonly treated as an innominate contract, but

1 19. 4. 1. 1; 19. 5. 5. 1; C. 4. 64. 4. 2 *Post*, § CLXXXVII. 3 19. 4. 1. 4; C. 4. 64. 4. 4 19. 4. 1. 3. 5 See Thaller, *Mél. Appleton*, 639 sqq. 6 *Ante*, p. 519. 7 19. 3. 1. pr.; 19. 5. 13. 8 See Thaller, *op. cit.* 651. 9 19. 3. 1. 1. 10 19. 5. 17. 1. 11 P. 2. 4. 4. 12 19. 5. 17. 1. 13 19. 3. 1. pr. The allusion to *bonae fidei* character is probably interpolated, but any civil action on such facts must have been *bonae fidei*. 14 19. 5. 13. Authority to sell at a certain price is not of itself *aestimatum*.

in fact we know little of it: it has been described as an enigma[1]. It seems to have originated in gifts by patrons to *liberti* and *clientes*, of property which they might hold and enjoy, but not alienate, revocable at will. In classical law it had lost its connexion with *liberti*, but had not changed its character. It was a gratuitous grant of the enjoyment of land or goods, revocable at will, even though a contrary agreement had been made[2]. It might be of a *res incorporalis*, such as a right of way[3]. Common applications of it were permissions by a creditor *in fiducia* or an unpaid vendor, to the debtor, to hold the property[4]. It was like *commodatum*, but differed in that it applied primarily to land, and gave a general use and enjoyment, with the fruits[5], and not, as *commodatum* usually did, only a particular use. The *precario tenens* ordinarily had *possessio*, but not always: it was a question of intent[6].

It was essentially a liberality, not a mutual benefit, differing from gift only in the right to take it back at any moment[7]. Thus the holder was not liable for *culpa* but only for *dolus*[8]. The appropriate remedy for recovery was the interdict *de precario*, and when this was issued, as the *precarium* had ceased, the holder became liable for *culpa* and "*omnis causa*," unconsumed fruits and the like[9]. The aspect of it as a gift is brought out further by the fact that, as Paul and Ulpian tell us, there was no special civil action against the holder: the rights under the interdict were all the owner had[10]. Paul indeed, in the Sententiae, seems to contradict this: he says there was a civil action as in *commodatum*[11], but this probably means only that there was a *condictio* for recovery, on general principle, as there was a *vindicatio*.

As it was a personal matter, it ended, in strictness, on the death of the holder. In classical law his *heres* did not hold *in precario*, and was not liable to the interdict *de precario*[12], nor was he responsible for the *dolus* of his predecessor[13]. In later law the *precarium* was regarded as continuing, so that he was liable *de precario*[14]. But the death of donor or even alienation by him did not end the *precarium*, though it could be at once stopped[15].

There is no sign of an innominate contract in this, but under Justinian two texts give an action apart from the interdict, one giving a "*condictio*

1 Bertolini, *op. cit.* 420. **2** 43. 26. 2. 2. **3** 43. 26. 3. **4** 43. 26. 6. 4; h. t. 20. **5** 43. 26. 8. 4. **6** 41. 2. 10. 1. **7** 43. 26. 1. 2. **8** 43. 26. 8. 3. **9** 43. 26. 8. 4, 6. **10** 43. 26. 14; 47. 2. 14. 11. **11** P. 5. 6. 10. **12** P. 5. 6. 12. This text coupled with D. 10. 3. 7. 5 suggests that the *heres* of *precario tenens*, holding over, was liable to the interdict *de clandestina possessione*. On this interdict, see Lenel, *E.P.* 453, n. 3. But Paul's text may merely mean that "*uti possidetis*" is available as he holds "*clam, ab altero*," 43. 26. 12. 1. **13** 43. 26. 8. 8, except for what he has received. **14** 43. 26. 8. 8; at any rate if he knew, 44. 3. 11; C. 8. 9. 2. See however Partsch, *Longi Temp. Praescriptio*, 16, n. 2. **15** 43. 26. 12. 1.

incerti, id est praescriptis verbis[1]," the other[2] an *actio praescriptis verbis*. Both are interpolated. If we treat this action as the mark of an innominate contract we may say that under Justinian, *precarium* became one. But it was essentially different, as the mutual element was entirely wanting[3].

Transactio[4]. Essentially the compromise of a dispute at law, impending, existing or even already decided, if an appeal of any kind was still admissible[5]. It was the abandonment of a claim in consideration of something given or promised, or of a defence in consideration of being allowed to retain something[6]. In the former, the usual case, there would be an Aquilian *stipulatio*, and an *acceptilatio* or a pact not to sue[7], the former extinguishing the claim altogether, the latter giving an *exceptio pacti*. It was the usual practice, either as alternative to the formal release, or in addition, to stipulate for a penalty in the event of disregard of the agreement[8]. Such a penalty was usually in substitution for the agreed compromise, but it might be provided that they were to be cumulative[9]. In the case of legacy of *alimenta* or the like, as the class affected was likely to be improvident and easily influenced, no *transactio* was allowed without consent of the praetor[10]. If the money promised was promised only informally, there was in earlier classical law only an *actio doli*[11]: an enactment of Alexander purports to give an *actio praescriptis verbis*, but it is probably interpolated[12].

1 43. 26. 19. 2. **2** 43. 26. 2. 2. The civil action mentioned in P. 5. 6. 10 is not defined. It is probably the *condictio* for recovery. **3** And it is not easy to define the scope of the *actio praescriptis verbis* under Justinian. See C. 4. 54. 2 (prob. interp.); D. 19. 5. 17. 2 (interp.). **4** Bertolini, *Della Transazione*. **5** P. 1. 1. 5; D. 2. 15. 7. pr.; h. t. 11; C. 2. 4. 2; h. t. 32. **6** C. 2. 4. 24; h. t. 38. **7** 2. 15. 2. **8** P. 1. 1. 3; D. 2. 15. 15; h. t. 16; C. 2. 4. 37. **9** 2. 15. 16; C. 2. 4. 17. **10** 2. 15. 8. pr. **11** C. 2. 4. 4; h. t. 28. **12** C. 2. 4. 6. See the adjoining enactments of the same Emperor. But the rule is stated in an enactment of Diocletian, C. 2. 4. 33.

CHAPTER XII

OBLIGATIO (*cont.*). *PACTA*. INCIDENTS OF CONTRACTUAL OBLIGATION. QUASI-CONTRACT. EXTINCTION OF OBLIGATION. DELICT

CLXXXII. *Pacta adiecta*, p. 524; *Pacta praetoria*, 525; *P. de constituto*, 526; CLXXXIII. *Receptum argentarii, nautae*, etc., *arbitri*, 527; *Pacta legitima*, 528; *Compromissum*, *ib.*; *pactum dotis, donationis*, 529; CLXXXIV. Agency in Contract, *ib.*; *Actio de peculio et in rem verso*, *ib.*; *tributoria*, 530; *quod iussu*, 531; *institoria*, *ib.*; *exercitoria*, 532; CLXXXV. *Obligatio quasi ex contractu*, 533; *Negotiorum gestio*, *ib.*; Guardian and Ward, 535; *Heres* and legatee, *ib.*; CLXXXVI. Common ownership, *ib.*; Money paid by mistake, 537; CLXXXVII. *Actio funeraria*, 540; *Missio in possessionem*, *ib.*; disputed boundaries, *ib.*; *Condictio ob rem dati*, 541; *ob turpem, iniustam causam*, *ib.*; *furtiva*, 542; *sine causa*, *ib.*; *ex lege*, *ib.*; *ex poenitentia*, *ib.*; *Actio ad exhibendum*, 543; *Aquae Pluviae arcendae*, 544; CLXXXVIII. Interest, 545; *Mora*, 546; CLXXXIX. *Obligatio naturalis*, 548; Transfer of *Obligatio*, 550; CXC. Theory of *Culpa*, 551; CXCI. *Custodia*, 555; CXCII. Extinction of *Obligatio*, Involuntary, 557; CXCIII. Voluntary, 560; *Solutio*, *ib.*; Alternative obligations, 562; CXCIV. *Novatio*, 563; CXCV. Release, 567; *exceptio pacti*, 569; CXCVI. *Obligatio ex delicto*, 571; *Furtum*, 572; CXCVII. *Interesse* in the *actio furti*, 574; CXCVIII. Actions for penalty in Theft, 576; *actiones ad rem persequendam*, 577; CXCIX. *Rapina*, *Vi bonorum raptorum*, 579; CC. *Damnum iniuria datum*, 580; *l. Aquilia*, *ib.*; CCI. Extensions of the action and analogous actions, 582; CCII. *Iniuria*, 584; *Iniuria* to a slave, 587; *Iniuria atrox*, *ib.*; CCIII. *Metus*, 588; *Dolus*, 589; *Servi corruptio*, 590; Fraud on creditors, 591; Fraud on patron, 592; CCIV. *Obligatio quasi ex delicto*, 593; CCV. Responsibility for another, 594; Noxal Liability, *ib.*; acts of *familia publicani*, 596; Delict by slave in contract, 597; *Pauperies*, etc. 598.

CLXXXII. *Pacta*. In the preceding chapter the kinds of agreement treated as contracts were discussed: we have now to consider what efficacy was allowed to such informal bargains as did not come within this conception, *i.e. pacta*.

The XII Tables contained a rule that proceedings for personal injury were barred by pact[1], and pact continued to be a complete civil defence to an action on delict, in later law[2]. The Tables contained other rules on pacts, which however do not directly concern us here[3].

The praetors generalised the rule of the XII Tables: a pact not to sue was a praetorian defence in any action, so that it could destroy an obligation, though it gave no action: *nuda pactio obligationem non parit, sed parit exceptionem*[4]. The next step was to allow pacts to vary obligations. The recognition of *pacta adiecta*, pacts added to contracts, was a

1 8. 2. Girard, *Textes*, 17; Bruns, 1. 29. 2 2. 14. 17. 1. 3 *E.g.* pacts by way of compromise to avoid execution of judgment, pacts between members of a *sodalitas* as to its rules (XII T. 3. 5; 8. 27, see also 1. 6). 4 2. 14. 7. 4; P. 2. 22. 2. Pacts must be lawful (Cons. 1. 7 sqq.; P. 1. 1. 4). An *exceptio pacti* might be met by a *replicatio* on a counter-pact revoking it, Cons. 4. 4.

gradual process and their effect in classical and later law varied with their nature and with that of the contract in connexion with which they were made. They might be either *continua* (*in continenti facta*), made at the same time as the contract, or *ex intervallo*, made later[1]. In an informal *bonae fidei* contract, a *pactum continuum* was in effect a term in the contract, and was thus enforceable by plaintiff or defendant, *i.e.* whether it increased or diminished the obligation[2]. In *stricti iuris* contracts there is some difficulty. In *mutuum*, as the contract rested on delivery, any term or condition was in effect a pact, and the rule was as in *bonae fidei* contracts[3]. As to *stipulatio*, all that can be said on the authorities is that in later classical law where other agreements accompanied the *stipulatio* they might be treated as implied in it though not expressed, and that concrete applications of this rule are found only in the interest of the defence[4], but general propositions of late classics shew that the *stipulator* also might avail himself of such agreements[5].

There is no evidence that *pacta ex intervallo* were effective except in defence, a basis for *exceptio pacti*[6]. But the nature of the consensual contract involved one great limitation on this proposition. Such a contract might, before performance, be set aside by *contrarius consensus*[7]. Similarly, the parties might agree to vary its terms, which would be in effect to discharge the old and substitute a new contract. And where a pact was made which substantially altered the contract it was so construed, whether it benefited one or the other[8]. But a pact, to be so treated, must affect essential terms, *e.g.* price; a pact touching merely subsidiary matters was not so treated and was good only as a defence[9]. It was a question of fact in each case to which class the pact belonged.

The next step was to give an action on some pacts not connected with a contract (*pacta vestita*), and this was done in several cases by the praetor (*pacta praetoria*), who gave an *actio in factum*. Of these the chief were[10]:

Iusiurandum voluntarium. It was open to a party to any dispute, whether litigation or not, to offer to the other party the opportunity to take an oath as to the truth of his claims, or himself to tender such an oath if the other party would allow it[11]. The other party need not take the oath or accept it from the offeror[12]. But whoever did take the oath

1 2. 14. 7. 5. **2** *Ib.* **3** But, here as elsewhere, interest can usually be attached only by *stipulatio*. *Post*, § CLXXXVIII; D. 2. 14. 17. pr.; h. t. 29; C. 2. 3. 10. **4** 2. 14. 4. 3; 12. 1. 40. **5** 12. 1. 40; h. t. 7. Same rule as to interest. **6** 2. 14. 7. 5. **7** *Post*, § CXCV. **8** 2. 14. 7. 6; 18. 5. 2. **9** 18. 1. 72. pr. **10** One has been considered—*pactum hypothecae* (*ante*, § CLXVI). It differs from the others in that its special action (*actio hypothecaria*) is in effect an *actio in rem*. When ultimately the *actio pigneratitia*, which has a *formula in ius*, was given on hypothec, it ceased to be, properly speaking, a praetorian pact. **11** 12. 2. 1–3. **12** C. 4. 1. 1; D. 12. 2. 5. 4.

in such conditions had *exceptio iurisiurandi*[1] if sued, and if he had to sue to enforce his right, he could bring an *actio iurisiurandi*, an *actio in factum* in which he need prove only that the oath was offered and taken[2]. The whole institution was quite distinct from the *iusiurandum necessarium* which could be required in certain cases[3]. Thus it could not be offered back (*relatum*) so as to compel the offeror to take it[4].

Pactum de constituto. This was an informal undertaking to pay an existing debt, the promisor's or another's, at a fixed time[5]. It might be to the original creditor or another person[6]. The action was the *actio de pecunia constituta*[7]. It was akin to the *actio certae pecuniae creditae* though it was an *actio in factum*: in particular there was (or might be) a penal *sponsio*, here of half the amount in dispute[8]. It covered debts of any origin, contract (or quasi) or delict[9], but it was at first confined to money, as the *actio c. p. c.* was, and extended, first to other things fungible, and, under Justinian, to anything at all[10]. The undertaking might be of less than the debt, or of one of alternatives due[11], or, as in *datio in solutum*[12], of something other than what was due, accepted instead. But it was void as to any excess over the debt and interest due[13]. The time fixed might be earlier or later than the due day of the debt, and though in principle it needed a fixed time, it seems in classical law to have been valid and to have given an action at once if no time was stated[14], but Justinian in such a case required a delay of ten days[15]. It might be a promise, not of payment, but of security[16]. There must however be a real debt, civil, praetorian or even natural, simple or *ex die* or conditional[17], and thus the promise was void if the original claim could be met by an *exceptio*[18]. If the debt was conditional, the *constitutum* was under the same condition[19], but it was immaterial that the debt was limited in time, *e.g.* that there was only an *actio annua*, and the year expired before the time fixed in the *constitutum*[20].

In later law the action was regarded as purely contractual, but there are traces of an original penal character. The heavy penal wager is one.

1 12. 2. 9. pr. There is difficulty as to the extent to which this *exceptio* could be used by others concerned, *e.g.* sureties, *correi*, etc. Beseler, *Beiträge*, 3. 115, 4. 174. 2 12. 2. 9. 1, 2; h. t. 11. 1; 44. 5. 1. 3. Remission of the oath by the party who had offered the oath to the other was equally effective. 3 *Post*, § CCXV, as to this and the confusion in the texts. 4 12. 2. 17. pr. 5 Inst. 4. 6. 9. 6 13. 5. 5. 2. 7 Inst. 4. 6. 8. Called *actio constitutoria* in 13. 5. 20. 8 G. 4. 171; Inst. 4. 6. 8. Not of one third as in the other case. 9 13. 5. 1. 6; h. t. 29. 10 C. 4. 18. 2. 11 13. 5. 5. 1; h. t. 13; h. t. 25. 12 *Post*, § CXCIII; 13. 5. 1. 5. 13 13. 5. 11. 1. 14 13. 5. 3. 2; h. t. 4. 15 13. 5. 21. 1. 16 13. 5. 14. 1, 2; h. t. 5. 3. 17 13. 5. 1. 7, 8; h. t. 3. 2; h. t. 19. pr. 18 13. 5. 3. 1. 19 13. 5. 19. pr. There had been doubts as to *constitutum* of postponed and conditional debts, 4. 18. 2. 1. 20 13. 5. 18. 1. It was valid though the original render was now impossible, if the impossibility had left an obligation outstanding, *e.g.* had supervened after *mora*, 13. 5. 21. pr.; h. t. 23.

Also in some cases (unknown) it had been *annua*[1], and there had perhaps been doubts whether it lay to and against the *heres*[2]. But for Ulpian it was clearly *ad rem persequendam*[3], and the penal wager was gone in later law, while Justinian, whose changes accompanied a fusion with the *actio receptitia*, shortly to be dealt with, made it *perpetua* in all cases[4]. The texts are not explicit on the question how far the action destroyed the old obligation[5]: it is generally held that it did not, apart from express intent. Where it did, as it was a praetorian defence, there would be an *exceptio*[6].

The most usual case was *constitutum* between the parties to the debt, but there might be *constitutum debiti alieni*[7]. This was in effect a case of surety, differing in some respects from *fideiussio*. Thus, though, as we have seen, it seems usually to have left the old debt standing, it might be made so as to operate as a praetorian novation. Where it left the old *obligatio* standing, action against one did not release the other[8]. It had no form, and it had consideration, *i.e.* suspension of the action. Hence a *fideiussio* which failed for defect of form was not construed as *constitutum*[9]. It could be used where there was no present debtor, *e.g.* on a debt of a *hereditas* on which no *heres* had yet entered[10]. As to the *ll. Cicereia* and *Cornelia* the position is as in *mandatum credendae pecuniae*[11]. The *beneficium divisionis* and *excussionis* are applied to it by Justinian[12], either of two *constituentes* having previously been liable *in solidum*.

Just as it might be by a new debtor, so it might be made by the debtor to a new creditor[13]. This seems always to have novated, in the sense that after it the debtor could not discharge himself from the new creditor by paying the old, even where the new promise was made to one of *correi credendi* in the old debt[14].

CLXXXIII. *Receptum.* This is a group of three cases having in common practically nothing but the name. *Receptum argentarii* was a transaction like *constitutum*, but with a special *actio in factum*[15], *actio receptitia*, and confined to bankers[16], and thus always for a third person's debt. It seems to have been of later origin. It does not appear to have had any penal wager. It applied even in classical law to any kind of subject-matter[17], and the banker was liable even though the original debt was non-existent[18]. Justinian abolished it, fusing the institution with *constitutum*[19].

1 C. 4. 18. 2. 1. **2** *Ib.*; C. 4. 18. 1. **3** 13. 5. 18. 2. **4** C. 4. 18. 2. 1. **5** 13. 5. 10; h. t. 18. 3; h. t. 28; 15. 3. 15; 50. 8. 5. 1. **6** See Girard, *Manuel*, 615. **7** 13. 5. 28; P. 2. 2. 1. **8** 13. 5. 18. 3. **9** 13. 5. 1. 4. **10** 13. 5. 11. pr. **11** *Ante*, § CLXXX. **12** C. 4. 18. 3. **13** 13. 5. 5. 2. **14** 13. 5. 8; h. t. 10. But texts are few and the matter is obscure. **15** See Lenel, *E.P.* 127. **16** Theoph. ad Inst. 4. 6. 8. **17** Theoph. *cit.* **18** *Ib.* **19** C. 4. 18. 2. Whether it was formal or informal is much disputed; see Lenel, *loc. cit.*

Receptum nautae cauponis stabularii. There are some puzzles about this, but the better view seems to be that where the goods had been received by the *nauta*, etc., with a special agreement "*res salvas fore*," the receiver was liable in any event if the things were lost, no matter by whom they were stolen[1]. Another provision, apart from this agreement, will be discussed later[2], but there is much controversy on the whole matter.

Receptum arbitri. If parties agreed to accept an *arbiter* in a dispute, and he accepted the responsibility, however informally, and the parties had undertaken to obey the decision[3], the praetor would compel the arbitrator to act, apart from certain grounds of excuse[4]. This however was not by action, but by a fine on him, enforced by seizure of pledges and other administrative measures[5]. Any freeman, *consularis*, *libertus*, *infamis*, might be such an *arbiter*, but not a slave[6].

Praetorian *pacta*, though in a sense unilateral, had in general a *quid pro quo*. So soon as the agreement was made for *iusiurandum* there was an agreement to abandon a claim or defence if an oath was taken. In *constitutum* and *receptum argentarii* there was suspension of the action. In *receptum nautae* the *nauta* was paid. *Receptum arbitri* may be an exception but here no action was given.

Pacta legitima. Besides these *pacta praetoria* there was a small group of pacts made enforceable by the Emperor—*pacta legitima.*

Compromissum. This was the above-mentioned agreement to submit to arbitration. If it was informal the decision of the arbitrator (who was not an *arbiter* in the technical sense) was in no way binding. If the agreement was formal it was still true that the decision did not directly affect the old rights. But it was usual to embody in the *stipulatio* an agreement for a penalty, if the decision was not obeyed. This might be what the parties chose, money, or "*quanti ea res erit*," and a mere promise to obey the decision sufficed in classical law. In all such cases there was an action on the *stipulatio*[7]. If the promise was to renounce a claim if the decision was adverse, this was in effect a conditional *pactum de non petendo*[8]. Or it might be a pact not to sue on some other claim, with a like result: in cases of this type the agreement might be informal[9]. This was the state of things in classical law[10], but Justinian provided, in 529, that the decision should be directly binding, if the submission was under oath authenticated by writing[11], and, in 530, that

1 47. 5. 1. 4; D. 4. 9. See on the controversies in this matter, Lusignani, *Respons. per Custodia*, 1. 26; Lenel, *E.P.* 126, 322. 2 *Post*, § CCIV. 3 4. 8. 11. 4. 4 4. 8. 9. 4 sqq.; h. t. 15. It must be noted that the praetor does not force the arbitration on the parties, but only at their demand on the arbitrator. 5 4. 8. 2; h. t. 3. 1; h. t. 7. 6 4. 8. 3. 3; h. t. 7. 7 4. 8. 27. 7; h. t. 28. 8 4. 8. 11. 2. 9 4. 8. 11. 3, on general principle. 10 4. 8. 2; C. 2. 55. 1. 11 C. 2. 55. 4.

where there was no such oath, if the parties accepted the decision in writing, or allowed ten days to elapse without notice of rejection, it was to bind in the same way[1]. Later, he forbade the machinery by oath, but left the provision of 530[2].

Pactum dotis. In 428 Theodosius allowed actionable validity to a pact to give a *dos*[3].

Pactum donationis. Justinian allowed such validity to a pact to make a gift[4]: here the notion of consideration was abandoned.

CLXXXIV. AGENCY IN CONTRACT. Roman Law did not readily accept direct representation, *i.e.* the notion that a legal transaction by *A* on behalf of *B* should bind or benefit *B*, leaving *A* without right or liability. It reached it in procedure[5] and in *traditio* of property[6], but not, generally, in contract: the personal nature of *obligatio* forbade such effects. This does not exclude the use of messengers, and the like, and it might on easily conceived facts be hard to say whether the intermediary was a messenger and the contract the principal's, or a representative and the contract his, though, in a practical sense[7], assignable to the principal. Apart from this, the principal steps were the following:

1. At civil law the *paterfamilias* acquired the rights resulting from contracts by subordinate members of the *familia*. This rests not on representation, but rather on the ancient view of these persons as his, the results of their activity in this, as in other fields, therefore enuring to his benefit[8]. But the slave's individuality was material in many ways. If a slave bought a *res litigiosa* it was on his state of knowledge, not on that of the master, that liability to the penalty depended[9]. It was his knowledge which barred the *actio redhibitoria*[10]. If a buyer from a slave was evicted he must ordinarily give notice to the slave himself[11].

2. At praetorian law he was liable on their contracts to varying extents[12].

(*a*) By the *actio de peculio et in rem verso*[13] he was liable on their *negotia* to the extent of the *peculium* at the time of the judgment, and so far as his own estate had profited[14]. In estimating the *peculium* he might deduct anything due to himself or another member of the *familia*[15], and must add anything due from them, or him, or outsiders, to it and any-

1 C. 2. 55. 5. 2 Nov. 82. 11. 3 C. Th. 3. 13. 4; C. 5. 11. 6. 4 Inst. 2. 7. 2. The enactment referred to is probably the somewhat obscure and imperfect C. 8. 53. 35. 5. 5 *Post*, § CCXXXIX. 6 *Ante*, § XCIX. 7 Not formally, *post*, § CLXXXIX, and *ante*, § CXLIII. 8 See as to acquisition by fructuary and *bonae fidei possessor*, *ante*, § XCIX. 9 44. 6. 2. 10 21. 1. 51. 11 21. 2. 39. 1. See also 41. 3. 4. 17, and, on the general case of *stipulatio* etc. by representative, *post*, § CLXXXIV. 12 As to persons *in mancipio*, see Desserteaux, *Capitis Deminutio*, 1. 284, who holds that the actions were available against his holder. 13 For details as to this and the other actions, Buckland, *Slavery*, 166 sqq. 14 15. 1. 30. pr.; 15. 3. 1. pr.; Inst. 4. 6. 10; G. 4. 69, 73, and for his personal *dolus*, *ante*, § CXLIII. For slaves in the *peculium* of a slave (*vicarii*) the *actio de peculio* was limited to *peculium vicarii*. 15. 1. 19. pr. 15 15. 1. 5. 4; h. t. 9. 3.

thing he had fraudulently removed from the *peculium*[1]. But he could not deduct for anything due to other creditors: the rule was, first come first served[2]. It lay on any contractual or quasi-contractual liability[3]. If the son or slave died or was freed or left the *familia*, in any way, the *paterfamilias*, if he still held the *peculium*, was liable for one year[4]. Any holder of a slave with *peculium*, *e.g.* the man himself[5], was liable, though the debt might have been incurred when the man belonged to some one else[6]. The *de in rem verso* clause was of little use in classical and later law (except that it was perpetual though the slave was dead[7]), as money spent on the master's affairs would ordinarily create a debt to the *peculium* which came into account in the *actio de peculio*[8]. All this is not agency, since the action lay even though there was no authority, even if the *negotium* had been forbidden[9], and there was a liability in the actual contractor, natural in the case of a slave[10], civil in the case of a son, though he had a certain praetorian protection if he was emancipated[11]. The true principle seems to be that one who provides the slave with the means of obtaining credit ought to take the limited risk[12].

(*b*) *Actio tributoria.* If a son or slave traded with the *peculium* or part of it to the knowledge of the *paterfamilias*, the latter was liable so far as that part of the *peculium* would go[13], with no right to deduct for debts due to him or members of the *familia*, the mode of estimation being in other respects the same as in the last case[14]. The action itself was the last stage of an elaborate process. Any creditor might call on the master to divide the *peculium* concerned among the creditors, including the master (*vocatio in tributum*[15]). This was a kind of bankruptcy of the slave, the master being the administrator[16], and it was this *vocatio in tributum* which gave the action its name. This lay only if he acted with *dolus* in the administration[17]. It had a certain delictal aspect and was in fact penal to the extent that he must hand over what he would have handed over apart from *dolus*[18], and the fund may have lessened in the meantime. But it was not treated as penal: Julian speaks of it as essentially *ad rem persequendam*[19]. It was *perpetua* even though the slave

1 15. 1. 7. 6; h. t. 9. 4; 15. 2. 1. pr. **2** 15. 1. 52. pr. **3** 15. 1. 1. 2; P. 1. 4. 5. Even on *condictio furtiva*, as this is quasi-contractual, 15. 1. 3. 12, and *actio iudicati*, even though the original debt of the son was delictal, 15. 1. 3. 11. As to a few cases in which it was barred, Buckland, *loc. cit.* **4** 15. 2. 1. pr.; difficulties as to what amounts to retention of the *peculium*. **5** Disputes, Buckland, *Slavery*, 232. **6** 15. 1. 47. 6. **7** 15. 3. 1. 1. **8** On the suggestion that *de in rem verso* lay only if the property had been handed over with a view to such application, see Buckland, *op. cit.* 181 sqq. **9** 15. 1. 29. 1. **10** 15. 1. 50. 2. **11** 14. 5. 2. pr.; Lenel, *E.P.* 269; *ante*, § L. **12** A fructuary or *b. f. possessor* is liable *de peculio* etc. if the debt was within his field of acquisition, 15. 1. 2. **13** 14. 4. 1. pr. **14** 14. 4. 1. 2. **15** 14. 4. 1. pr. Whether the *vocatio* is the act of the creditor or of the praetor on demand is not clear. **16** See 14. 4. 6. **17** 14. 4. 3; h. t. 7. 2; h. t. 12. **18** 14. 4. 7. 2. **19** 14. 4. 8.

were dead[1], but it lay against the *heres* only to the extent of his receipts[2], *i.e.* out of the property concerned. Only creditors of the slave could claim, and it does not appear that they need have known of the master's *scientia* or even existence[3].

(*c*) *Actio quod iussu.* On a *negotium* by his authority (not mere *scientia*) the *paterfamilias* was liable *in solidum*[4], the authority being revocable till the act was done[5]. This looks like representation, but it does not necessarily rest on that idea, since it was confined to the family, the legal unit, and the action did not exclude liability on the part of the actual contractor. As the authority is an inducement to contract, it would normally be communicated to the third party, but it cannot be shewn that this was legally necessary[6]. It may be noted that this action seems to be the least important of the group: it is treated with great brevity[7].

Gaius describes this system of remedies as available only for dealings by slaves and *filiifamilias*. For women *in manu* and civil bondsmen he tells a different story, puzzling by reason of the imperfection of the text. On their contracts the *paterfamilias* might be sued, and if he did not defend *in solidum* the goods which would have been the property of the man or woman might be seized and sold[8]. This, we know, is the law for contracts by an *adrogatus* before the *adrogatio*[9], and the present rule is no doubt for the analogous case. But neither a bondsman nor a woman *in manu* who had been a *filiafamilias* could have had any property and the text, probably corrupt, is amended in various ways[10]. As to their contracts made while in the family we have no information[11].

3. Outside the family there were further developments in commerce.

(*a*) *Actio institoria.* Where a man employed another, his slave or *servus alienus* or freeman[12], to manage a business undertaking, to be *institor*, he was liable on the contracts connected with the business[13]. The liability might be excluded by public notice, or express notice to one about to contract[14]. The action was *perpetua* and lay both to and

1 14. 4. 7. 5; h. t. 8. 2 14. 4. 9. 2. 3 The contrary is sometimes held on general principles of representation. 4 Inst. 4. 7. 1; P. 1. 4. 6. Ratification appears to be enough, 15. 4. 1. 6. See however 15. 3. 5. 2. 5 15. 4. 1. 2. 6 Modern writers frequently lay it down (*e.g.* Windscheid, *Lehrb.* § 482, n. 6; Karlowa, *R.Rg.* 2. 1165). This is because they rest the liability on representation: communication is essential on continental notions of representation though not on ours. 7 As to the development in classical law of a civil obligation (*condictio*) in this case, *post*, § CCXXX. 8 G. 4. 80. 9 *Ante*, § CXLI. 10 See, *e.g.*, Krueger, *Coll. libr. iuris anteiust.* ad h. l. and *ante*, § CXLI. 11 G. 3. 104 seems, but in a somewhat different connexion, to put them on a level with slaves in this matter. Lenel (*E.P.* 267) makes the edict on such cases deal only with those in "*potestas*," but his evidences are all from the Digest—which does not speak of the obsolete cases of *manus* and civil bondage. 12 P. 2. 8. 1, 2. 13 Inst. 4. 7. 2; D. 14. 3. 1; P. 2. 8. 1. The restriction led to great subtleties of interpretation, see, *e.g.*, 14. 3. 5. 11 sqq. 14 14. 3. 11. 2, 5.

against *heredes*[1]. The third party must know that the contract was connected with the business[2], and it is widely held, though it does not appear on the texts, that he must know of the principal's connexion with the business. The basis of the action as stated by Paul and Ulpian, *i.e.* that as we get the *commoda* we ought to bear the *incommoda*[3], hardly suggests this requirement.

(*b*) *Actio exercitoria.* If a principal (*exercitor*) set up a man, slave or free, to manage a commercial ship (*magister navis*) he was liable in the same way[4], and, with some exceptions[5], the principles are the same[6].

These cases resembled agency in that they involved authority and were outside the family. But they were not true agency. The principal did not acquire rights under the contract, except, in late law, where there was no other way of avoiding the loss in the *institoria*[7], or by special *cognitio* in the *exercitoria*[8]. The actions would ordinarily have to be assigned. And the *institor* and *magister* were liable[9], which is inconsistent with true agency.

4. The furthest point reached as a general principle was in mandate, already discussed[10]. The *actio de in rem verso utilis*, by which in some cases, under Justinian, a third party with whom an unauthorised person had dealt could sue the interested party to the extent of his profit[11], had nothing to do with agency.

In relation to these contracts by subordinates and agents a question arises, difficult in itself and rendered almost unanswerable by the state of the texts. The state of mind and knowledge of the parties is often material to rights and liabilities, in case, *e.g.*, of error, of redhibition for defect, of *dolus*, of dealing in *res litigiosae*, and so forth. The question is: whose state of mind is material, that of the principal or the actual contracting party? The texts, which have certainly been in many cases interpolated, tell a conflicting story. The point has recently been investigated by Schulz[12], who concludes that in classical law, where the

1 14. 3. 15. **2** 14. 1. 7. 2. **3** 14. 3. 1. pr.; P. 2. 8. 1. **4** 14. 1. 1. pr. **5** The *magister* might appoint a deputy, even against the will of the *exercitor*, whose contracts would bind the latter in the same way, a rule less readily allowed in the case of *institor* (14. 1. 1. 5). This rule makes against the conception of representation. *Exercitores*, if more than one, were always liable *in solidum* (14. 1. 1. 25). Another text states a difference where the *exercitor*, *i.e.* the principal, is *alieni iuris*, as compared with that of an *institor alieni iuris*, but the cases are not parallel and it is difficult to see in what the difference consists (14. 1. 1. 20). See also nn. 7 and 8. Paul tells us that contracts by "*discipuli*" of an *institor* or *magister* bind him *in solidum* (P. 2. 8. 3). This is analogous to the *actio institoria* itself. See 14. 1. 1. 2. Many difficulties might arise where the *institor* or *magister* was a *filius* or slave of another *paterfamilias* and where the *exercitor* was such. See P. 2. 6. 1; D. 14. 3. 1; h. t. 11. 8; 14. 1. 5. 1, etc. **6** The same questions arise as to knowledge of the principal by the third party, and see 14. 1. 7. 1, 2. **7** 14. 3. 1–2. **8** 14. 1. 1. 18. **9** 14. 1. 1. 17; 14. 3. 7. 1. **10** *Ante*, § CLXXX. **11** See C. 4. 26. 7 and Von Tuhr, *Actio de in rem verso*, 293 sqq. **12** *Z.S.S.* 37 sqq.

representation was indirect, *i.e.* the contract did not directly bind or entitle the principal, *e.g.* a contract by a mandatary, only the state of mind of the mandatary was material, but where it was direct, as in case of a *stipulatio* by a slave, that of the principal alone was material, except where the slave was acting independently, there being however differences of opinion among the jurists as to the drawing of this distinction. Sometimes the distinction is between contracts in respect of the *peculium* and those *domini nomine*, *i.e.* on the master's account. Sometimes it is between authorised and unauthorised. Sometimes it is between general and special authorisation, but these various distinctions greatly overlap. He holds that the compilers tend, but not consistently, to make the state of mind of both material in all cases[1].

CLXXXV. *Obligatio quasi ex Contractu.* This is Justinian's second head of *obligatio*, apparently derived from the "*liber aureorum*" or "*rerum cottidianarum*" of Gaius, but possibly interpolated in the text. He selects a few cases among the numerous class of obligations covered by the same conception, *i.e.* those having nothing delictal about them, and not contracts, but analogous thereto. It seems impossible to find any principle to which those he mentions can be reduced, or which, admitting these, will exclude a number which he does not mention. The cases he treats are:

Negotiorum Gestio[2]. This may be described as looking after another man's affairs, without his authority (which would be mandate). The primary action was *negotiorum gestorum* against the *gestor*, who had the *actio negotiorum gestorum contraria* for reimbursement. They were *bonae fidei*, but as the Edict promised a praetorian action there must at one time have been an alternative formulation *in factum*[3].

The service rendered might be of any kind, repair of a house, becoming surety, buying or selling stock in trade[4], etc., but to entitle the *gestor* to the *actio contraria* it must be shewn not only that the act was a reasonable one, but that it was in the circumstances reasonable for the *gestor* to do it, and not leave it to the person concerned[5]. It must also have been done in the interest of the principal: if it was also in the interest of the *gestor* he had the action only if he could have protected his own

1 The author perhaps hardly takes sufficient account of differences of opinion among the jurists or of the possibility that the solutions applied in defence might not always be the same as those in claim, or those in purely contractual actions the same as those in essentially penal actions. But he seems to make out a strong case. 2 D. 3. 5; C. 2. 18. Partsch, "Negotiorum Gestio," *Sitzungsb. der Heidelb. Ak. Phil.* 4 (1913). 3 G. 4. 62. Lenel, *E.P.* 100. L. thinks (*Z.S.S.* 35. 210) the original *formula in factum* was confined to the case of an absent principal. Partsch, *op. cit.* 10. P. also holds (*op. cit.* 4) that the Edict was understood as giving the action both ways, the *actio neg. gest. contraria* being post-edictal. 4 3. 5. 3. 2; h. t. 21; h. t. 29, etc. 5 *E.g.* absence, h. t. 2; Inst. 3. 27 1.

interest without the other. Thus one of common owners who repaired the house had not this action against his co-owner, but *communi dividundo*[1]. It must have been useful when it was done, or have been accepted as such by the principal[2]: in either case the fact that later events destroyed its utility was immaterial[3]. On ratification the *gestor* might treat it as mandate if he preferred, but it did not become mandate *ipso facto*, the point of which is that it did not become an infaming action and was not affected by the death of the principal[4]. It must not have been prohibited by the principal[5]. It must not have been done *donandi animo*[6], or in execution of a pious duty[7], or under mandate by, or legal duty to, the principal[8].

But the direct action lay in many cases in which the *contraria* did not, *e.g.* where the act was forbidden[9], or where it was not a reasonable act of administration[10], or where it was done for the purposes of the *gestor*, though an interpolated text gives the *actio contraria* even in this case, to the extent of the principal's enrichment[11]. Mistake gave rise to several questions. It was immaterial that the *gestor* was mistaken as to the identity of the principal[12]. If it was the affair of the *gestor*, but he thought it another's, neither had the action[13]. If it was another's, but he thought it his own, he had no *actio contraria*, but if still in possession of the thing he had a right of retention like any other *bona fide possessor*[14]. But this case may be affected by the fact that it was a building on the land, bringing the rule of merger into play. In a case of another type Africanus in one text[15] gives the *actio negotiorum gestorum* to the person really interested, where circumstances barred other remedies, and in another a *condictio* to the extent of the enrichment[16]. This seems the better view, *gestio* not entering into the matter at all.

The *gestor* must carry out what he undertook, and account for proceeds, his position not being affected by death of the principal[17]. He was liable for *culpa levis* unless the affair was urgent, in which case he was liable only for *dolus*[18]. The risks were not on him, unless the loss resulted

1 3. 5. 39; 10. 3. 6. 2. As to 3. 5. 30. 7; 10. 3. 19. 2, see Accarias, *Précis*, 2. 424. **2** 3. 5. 8; h. t. 9. 1. **3** 3. 5. 9. 1. **4** 3. 5. 8. See Girard, *Manuel*, 637; Van Wetter, *Pand.* 4. 304. It may concur with a mandate by a third party, 3. 5. 3. 11. Partsch, *op. cit.* 14, holds that the Edict did not give the ordinary action in this case, but that there was an *actio utilis* (3. 5. 20. 3; 3. 5. 27; 17. 1. 6. 1) and that later jurists ignored the point (3. 5. 3. 11; h. t. 5. 6). **5** 3. 5. 7. 3; 17. 1. 40. There had been disputes, C. 2. 18. 24. **6** 3. 5. 43; 17. 1. 60. 1. **7** 3. 5. 33; C. 2. 18. 5. **8** 3. 5. 3. 10; 17. 1. 6. 1; C. 2. 18. 20. **9** See n. 5. **10** 3. 5. 9. 1. **11** 3. 5. 5. 5. **12** 3. 5. 5. 1. **13** 3. 5. 5. 6. **14** 10. 3. 14. 1; 44. 4. 14. **15** 3. 5. 48. Partsch, *op. cit.* 37, also cites 5. 3. 50. 1; 5. 4. 10; 11. 7. 32. pr.; 11. 7. 14. 11, as proving that the *actio n. g. contraria* lay on such facts. But the last two are under another edict and the others deal with carrying out the wishes of a testator, and the language of some of them shews this as a determining factor. **16** 12. 1. 23. **17** 3. 5. 3. 7; h. t. 7. 1; h. t. 30. 2. **18** 3. 5. 3. 9; P. 1. 4. 1; Inst. 3. 27. 1.

from his doing something the principal would not have done, in which case he was liable for *casus* but might set off profit resulting from the same administration[1]. The principal must take over liabilities duly incurred and reimburse for "*utiles impensae*," though in the event they may have come to no good[2], the measure of damages being the benefit at the time to the *dominus rei*, not the cost to the *gestor*[3].

Tutor and Ward, *Curator* and Ward. The obligations in these quasi-contractual relations have been considered in the law of persons[4]. In the case of the *tutor* there were special remedies, but in that of the *curator* the remedy was *actio negotiorum gestorum*[5].

Heir and Legatee. The general nature of the obligation has already been set forth[6]. According to Ulpian it had been disputed what degree of care must be shewn, but he and Paul make the *heres* liable for *culpa levis*[7]. Africanus lays down the same rule for legacy and *fideicommissum*, with the corrective that if the person charged was getting nothing from the *hereditas* he was liable only for *dolus*. As the text says[8], this is applying the rule of *bonae fidei* contracts, which is correct for *fideicommissa*, but seems more questionable for legacy, since in classical law the personal remedy on legacy was *stricti iuris*, and the rules in *condictio sine causa* were different[9]. The obligation applied primarily to legacy *per damnationem*, but so far as legatee *per vindicationem* could use the personal action[10], the same rule would apply to him. In the real action the *heres* would be liable, as it seems, only for active interference with legatee's rights.

CLXXXVI. Common Ownership. This is the relation where two or more own a thing in common whether *socii* in the strict sense or not. The duties were similar to those in *societas*, but less in scope. It might arise in many ways, *e.g.* joint purchase, legacy or inheritance. The remedy in the last case, *i.e.* the mode of enforcing the duties, primarily that of dividing, was the *iudicium familiae erciscundae*: in all other cases it was *communi dividundo*[11], but so far as the present point is concerned, the rules were in general the same. The action was a *bonae fidei iudicium, duplex*, in the sense that its formula did not distinguish plaintiff and

1 3. 5. 10. 2 3. 5. 2; h. t. 9. 1; 46. 7. 5. 6. 3 3. 5. 9. 1. 4 *Ante*, §§ LV, LXI. 5 Some texts make the remedy an *actio n. g. utilis* (C. 5. 37. 26. 1; C. 2. 18. 17; C. 5. 54. 2; C. 5. 51. 7). Others give the *actio negotiorum gestorum* simply (26. 7. 5. 6; 27. 3. 13; 27. 3. 4. 3; C. 2. 30. 1; C. 4. 26. 1 interp.). The question which group represents the classical law is answered both ways, *e.g.* recently by Lenel (*Z.S.S.* 35. 203 sqq.) in the sense that the description of the action as *utilis* is due to Justinian. This seems on the evidence the better view (see however Partsch, *op. cit.* 66 sqq.). The reason for the change is not very clear: Lenel holds that it was in order to differentiate this action from the ordinary *neg. gest.* 6 *Ante*, §§ CX, CXVII, CXXII. 7 30. 47. 5; P. 3. 6. 9. 8 30. 108. 12. 9 *Post*, § CLXXXVII. 10 *Ante*, § CXXII. 11 D. 10. 3. As to the history of this action and its successive formulations, see *post*, § CCXXII.

defendant: it was expressed to apply to all parties alike[1], though, in view of questions of proof, the claimant of the action was treated as plaintiff[2]. We have already dealt with the peculiar function of the *iudex*, that of *adiudicatio*, distribution of parts among the claimants, as a part of the law of property[3]. In allotting, the *iudex* must follow the unanimous wish of the parties, but if that failed he must divide fairly, any inequality being adjusted by *condemnationes* for equalising payments[4]. The action need not cover all the property: a part might be divided without disturbing the rest[5], and it was possible for one or more of common owners to claim division without affecting the community among the others[6].

This division was the main, and at first, no doubt, the only, function of the action, but as we know it, any question arising out of the rights and duties of the parties as common owners might be brought into account in the division[7]. Thus profits and expenses properly incurred must be shared[8], and any damage by one of them, due to *culpa levis* (*in concreto*, at least in later law) must be allowed out of his share[9]. There was no question of *infamia*. No co-owner might erect a construction on the common property, without consent of all: the only way to get over the difficulty was to divide[10]. The right of division was essential to the relation, and an agreement never to divide was void[11]. But one not to divide for a certain time was valid, if the court thought it advantageous to common interests[12], and it seems that the effect was not to allow division with resulting liability for any loss to the others, but refusal of division[13]. Apart from this there was no liability for loss resulting from division at a disadvantageous time, as in *pro socio*[14]. There was nothing to prevent a co-owner from disposing of his share so that another would take his place in the community[15], or from pledging[16] it or giving a usufruct in it[17]. But he could not create a praedial servitude[18]. Apart from this, his power of dealing with the property is the subject of controversy on conflicting texts[19]. The relation was in no way affected by the death of a party[20].

1 Lenel, *E.P.* 204. **2** 10. 3. 2. 1. **3** *Ante*, § XC. **4** 10. 3. 3. 1; h. t. 6. 1; h. t. 21; Inst. 4. 17. 4, 5. **5** 10. 3. 13. Thus the action can be repeated, not so *familiae erciscundae*. 10. 3. 4. 2; 10. 2. 20. 4. **6** 10. 3. 8. pr. Exception, h. t. 19. 1. **7** 10. 3. 3. pr. **8** 10. 3. 4. 3; h. t. 11; h. t. 22. **9** 10. 2. 25. 16; 10. 3. 14. 1, a much debated text. See Berger, *Entwicklungsgeschichte der Teilungsklage*, 211, and review by Fehr, *Z.S.S.* 33. 576 sqq. The usual view is that it was not till Justinian that the action could be brought for these contributions alone, leaving the community undisturbed, but see Fehr, *loc. cit.* **10** 10. 3. 28. Perozzi, *Mél. Girard*, 2. 355, who rejects the view that mere non-prohibition sufficed. **11** 10. 3. 14. 2; C. 3. 37. 5. **12** 10. 3. 14. 2. **13** *Ib.* **14** There is no *fraternitas*, but the *iudex* has a wide discretion. **15** 10. 3. 6. 1; h. t. 14. 3; h. t. 24. 1. **16** 10. 3. 6. 9; C. 3. 37. 2. **17** 7. 1. 49. **18** 8. 1. 2; 8. 3. 34. pr. **19** See Girard, *Manuel*, 640, n. 6. **20** 10. 3. 4. 3; 17. 2. 65. 9.

The rights under the action applied only to matters accruing during the community. It was not available for reimbursement of expenses incurred before it began or after its end[1], and we are told that if a co-owner spent money, thinking he was sole owner, the principles of *bonae fidei possessio* applied: he had a right of retention, but no right of action, which here practically means that if another owner was the plaintiff it would be allowed, but not where he himself was[2]. Where he was mistaken as to the identity of the other owner, one text gives him the action, the error being immaterial, while another gives him only an *actio utilis*. But, as in *negotiorum gestio*, he had not the action if he did the act for his own purposes[3]. There is a conflict also where the right held in common was less than ownership, but the better view seems to be that if it was usufruct, or any other "*ius*" in the strict sense, the direct action lay, but a common pledge gave only the *actio utilis*[4]. As it was essentially for division it could not lie where there was nothing to divide[5]. It was not therefore available if the community had ceased, from destruction of the *res* or any other cause, but an *actio utilis* lay for expenses during the community[6].

MONEY PAID BY MISTAKE. *Condictio indebiti*[7]. The principle was that where a man made a payment in error, in discharge of an obligation which did not in fact exist, to one who received in good faith, he could recover by the *condictio indebiti*, a *stricti iuris actio in personam*. The case was, we are told, analogous to a *mutuum*, except that the payment made was in discharge, instead of creation, of an obligation. Thus it was recoverable from a *pupillus* (or in classical law, a woman) only where a *mutuum* would be[8]. But *mutuum* was always a transfer of fungibles, while here the render may have been of any kind possible in any obligation[9]. Thus though the remedy was always *condictio*, it might be either *certae pecuniae*, or *triticaria* or *incerti*.

There must have been no debt at the time of the payment. A debt valid at civil law, but defeasible by *exceptio peremptoria* was no debt[10]. Nor was a conditional debt so long as the condition was unsatisfied[11]. But one *ex die*, even *ex die incerto*, was an existing debt, and irrecoverable: it was only payment which was postponed[12]. And a *naturalis obligatio* always excluded *condictio indebiti*[13]. A debt due to *X* was an

1 10. 3. 4. 3; C. 3. 37. 3. **2** 10. 3. 14. pr., 1. **3** 10. 3. 6. 2; h. t. 29. **4** 10. 3. 7, 8. **5** C. 3. 38. 9. **6** 10. 3. 11. **7** D. 12. 6; C. 4. 5. **8** G. 3. 91; Inst. 3. 14. 1. **9** A security given may be recovered (12. 6. 31), and reimbursement for service rendered (12. 6. 26. 12). **10** Vat. Fr. 266, for exceptions, where the *exceptio* is of a penal character. See Accarias, *Précis*, 2. 436. **11** 12. 6. 16. pr. **12** 12. 6. 10; h. t. 16. 1; h. t. 17. As to a possible basis of these distinctions on that suggested between *debitum* and *obligatio*, see Cornil, *Mél. Girard*, 1. 205. But see *ante*, § CXLIII. **13** 12. 6. 51; h. t. 38. 1.

indebitum if paid to *Y*, unless *Y* was *solutionis causa adiectus*, or in some way authorised to receive it[1]. Payment of a debt due from a third person was an *indebiti solutio*, unless it was paid in the name of the third person, in which case the necessary error did not exist[2]. To pay one thing when another was due was an *indebiti solutio*, unless it was by consent as a *datio in solutum*[3]. If there was no real debt a *datio in solutum* was *indebiti solutio*[4]. If, owing one of two things a debtor gave both, he could condict one, and, after doubts, Justinian gave him the choice[5].

There must have been a real and reasonable error. If the money was paid with knowledge that it was not due, this was a gift[6], even where the payer intended to recover it. Though there is some doubt on the texts it seems that in classical and later law it must have been an error of fact, not law, except in the case of some specially protected persons[7]. Where the payer was in doubt whether it was due or not the classical rule seems to have been that he could recover by this action, unless he paid on the understanding that he was to have it back, if it proved not due—this, says Ulpian, was a *negotium*. Justinian decides that doubt is to be on the same level as error[8].

The receiver must himself be in good faith, otherwise his act was *furtum* and the remedy *condictio furtiva*[9], with the practical effect that if it was a specific thing the risk in *condictio indebiti* was with the payer[10], in the other case with the receiver: *fur semper in mora est*. The restitution must be with *fructus*, *partus* and accessories[11], but expenses might be deducted[12], rules which created certain difficulties of procedure[13]. Interest could not be claimed[14].

The question arises whether the action was for enrichment or for what was handed over. Where it was money, what was paid could be recovered by *condictio certae pecuniae*, whatever had happened to it[15]. Where it was a specific thing the receiver must return (apart from *dolus* or *culpa*) only his enrichment, allowing for expenses[16]. But where what was paid was fungibles other than money (*condictio triticaria*) the matter

1 12. 6. 22. pr.; C. 4. 5. 8. **2** 12. 6. 44. **3** 12. 6. 19. 3. Where the payment was with another's property, by mistake, one text allows *condictio* of the possession, another gives the payer no right, even where there was no debt. 12. 6. 15. 1; h. t. 19. 2. Difficult cases, h. t. 26. 4–6; h. l. 13. **4** Arg. 12. 6. 23. 2; h. t. 26. 4. **5** C. 4. 5. 10; *post*, § CXCIII. They are at payer's risk. **6** 12. 6. 50; h. t. 1; 22. 6. 6; 22. 6. 9. 2; 50. 17. 53. **7** 22. 6. 9. pr.; C. 1. 18. 6; C. 1. 18. 10; C. 6. 50. 9; C. 4. 5. 5. Women and children and probably soldiers and rustics; 22. 6. 1; h. t. 9. pr. and 3. Error of law seems to have been allowed where it was a point so difficult that it would not have been easy to get safe advice (22. 6. 9. 3). This would usually be "subsumption of facts under the rule" as Savigny puts it (*Syst.* 3, Beil. viii. v), but it is not clear why, as he suggests, it should be called fact in this case. **8** 12. 6. 2. pr.; C. 4. 5. 11. **9** 13. 1. 18, perhaps alternative. **10** See n. 16. **11** 12. 6. 15. pr. **12** 12. 6. 26. 12. **13** Girard, *Manuel*, 631, and for a similar difficulty, *ante*, § CLXII. **14** C. 4. 5. 1. **15** Von Tuhr, *Aus Röm. und Bürg. R.*, 301, on 46. 3. 66. **16** 12. 6. 65. 5, 8.

is not quite clear. In view of the analogy with *mutuum*, and of the language of some texts[1], the better view seems to be that the *quantitas* had to be restored, irrespective of its fate, which hardly seems to be negatived by a text which says that, corn being so delivered and consumed, the *pretium* must be restored[2].

The plaintiff must prove the payment and that the debt was not due[3] (except that if the receiver fraudulently denied the payment and this was proved, he must then prove that it was due, and the burden was in general on the payee, if the payer was a minor, a soldier, a woman, or a rustic[4]). It is a debated point whether having proved that it was not due he had still to prove that he thought it was due, or whether this was presumed, the creditor being allowed to prove that the payment was made in knowledge of the facts. The better view seems to be that he must prove the error, *i.e.* facts to account for the error. Unless these were proved it is not easy to see how the rule that the error must be reasonable was to be applied[5].

There remains an important exception. If the debt was one of those denial of which involved double liability, payment made in error could not be recovered as *indebitum*[6]. Such were claims under the *l. Aquilia*, judgment debt[7], *certa legata per damnationem* in classical law, and any legacy in favour of certain beneficiaries under Justinian[8]. The rule is clear: its reason is obscure. It has been suggested that otherwise it would be possible to dispute the debt without risking the double penalty. The debt would be paid and *condictio indebiti* then brought. If the payer lost he would be no worse off. But this was to take on himself the burden of proof which would otherwise be on the creditor. It would require proof of the facts which shewed that it was not due, and also proof that he did not know these facts. And the case supposed is one of doubt, and doubt was not enough in classical law[9]. A more probable suggestion is that it was in the nature of a compromise. By paying he avoided the risk involved in denial, and a compromise carried out ought not to be undone. But it was an odd compromise, under which he paid all that was claimed. In strictness there could be no *transactio* in such a case[10].

CLXXXVII. This completes the list of quasi-contractual obligations

1 12. 6. 7; 19. 5. 25; C. 4. 51. 6. 2 12. 6. 65. 6. See, however, Girard, *loc. cit.* 3 22. 3. 25. pr. 4 22. 3. 25. pr., 1. But the text is mainly due to Justinian. 5 See, however, Girard, *Manuel*, 631, who remarks that proof that it is not due ordinarily involves proof of the facts accounting for the error. 6 C. 4. 5. 4; Inst. 3. 27. 7. 7 5. 1. 74. 2. 8 G. 4. 9; P. 1. 19. 1; Inst. 4. 6. 19. 9 Even though, as is probable, the rule originated before distinction was drawn between fact and law in the matter, the fact that doubt is not error remains. 10 P. 1. 19. 2. See hereon, Bertolini, *Transazione*, 364.

as given by Justinian, but there were many others, more or less analogous, some of which need mention. Analogous to *negotiorum gestio* are *curatio*, already dealt with, the *actio funeraria*, the creditor *missus in possessionem*, and the case of *protutela*.

The *actio funeraria* is an *actio in factum perpetua*[1], akin to *negotiorum gestorum*, by which one who had undertaken funeral arrangements without legal liability could recover his expenses from the person actually liable[2], not exceeding what was reasonable in the given case[3]. The rules shew that this was to provide for absence or negligence of the *heres*[4]. The cost might not be excessive (since the *heres* paid the bill) even though the deceased had wished the excess[5]. Conversely the action did not lie if the thing was done so meanly as to be on the facts an insult to the memory of the deceased[6]. It did not lie if the service was done out of piety without thought of repayment[7], or where there was no reason for intervention[8], or, in strictness, to one who thought he was *heres* and so was not acting for another[9]. Prohibition by the *heres* did not necessarily bar the claim, for he might be going to neglect the matter, and, *e.g.*, a descendant not *heres* might reasonably think it ought to be done at the expense of the estate and so do it, not *donandi animo*[10]. The claim was a privileged debt, *i.e.* payable in preference to other unsecured debts, whether the claim was on the estate of the deceased or on that of the person liable[11].

Missus in possessionem. There were actions *in factum* to and against a creditor *missus in possessionem* for his duly incurred expenses and for profits received by him, and damage by his *dolus*[12]. There were many other cases of *missio in possessionem*[13], each with its own rules. In those cases in which the *missus* was not the interested party, the *actio negotiorum gestorum* and its *actio contraria* lay.

Analogous, but somewhat remotely, to common ownership was the case of disputed boundaries. The action, *finium regundorum*, was of the same double character, with an *adiudicatio*, but the quasi-contractual points could not so readily arise. Still, where the judgment transferred part from one to the other, the loser was liable for *dolus* affecting the value of that part and for its fruits from *litis contestatio*[14]. Till then, if in good faith, he was in the position of a *bona fide possessor*[15].

Actio protutelae[16]. This action lay against one who had acted as *tutor* without due appointment. The obligations were much the same as those

1 11. 7. 31. 2; Lenel, *E.P.* 224. **2** 11. 7. 12. 2. Payable out of the estate, h. t. 1; h. t. 14. 1. **3** 11. 7. 12. 5; h. t. 14. 6. **4** *E.g.* 11. 7. 14. 13. **5** 11. 7. 14. 6. **6** 11. 7. 14. 10. **7** 11. 7. 14. 7. **8** Arg. 11. 7. 14. 13. **9** 11. 7. 14. 11, "*ex causa*"; h. t. 32, "*utilis*." Possibly the concession is Byzantine. **10** 11. 7. 14. 13, perhaps due to Justinian, Beseler, *Beiträge*, 1. 65. **11** 42. 5. 17. pr. **12** 42. 5. 9. pr. *Heres* of *missus* liable only to extent of profit, if it rested on *dolus*, 42. 5. 9. 7, 8. **13** *Post*, § CCXLV. **14** 10. 1. 4. 1, 2. **15** *Ib.* **16** D. 27. 5; C. 5. 45.

of an actual *tutor*. Accounts were rendered in the same way[1]. The same degree of care must be shewn[2]. Interest was due[3]. The Digest expressly declares the action to be edictal. Doubts were expressed by Pernice as to the genuineness of this ascription[4], and it has recently been maintained that the action is a Byzantine invention, the case being essentially one of *negotiorum gestio* in classical law[5].

More important are the cases analogous to *condictio indebiti*. That case was merely an instance, perhaps the most important, of the application of the principle that a man was not to enrich himself at the cost of another. It cannot be said that there was any such general rule of law, but many cases were provided for by giving a *condictio* called *condictio sine causa*, using that name in its widest, perhaps the only classical, sense[6]. The chief cases were:

Condictio ob rem dati or *ob causam dati*[7], called under Justinian, *condictio causa data causa non secuta*[8]. It had, as its main application, the case which ultimately became the commonest type of innominate contract, where a *res* was handed over for some return to be made, and that did not follow[9]. It had other applications, *e.g.* money given as *dos* where the marriage did not follow[10]. The risk in what was handed over was with the claimant[11]. If the counter render became impossible without fault of the intended receiver, the logical view was that the *res* could be recovered, but some texts express the doctrine, associating the action with the notion of contract, rather than with that of unjust enrichment, that the *casus* released the receiver from his duty, so that the *res* could not be recovered[12].

Condictio ob turpem causam, ob iniustam causam[13]. These actions were available where money had been received for an immoral or illegal pur-

1 C. 5. 45. 1. 2 27. 5. 4. 3 27. 5. 1. 8. 4 *Z.S.S.* 19. 163. 5 Peters, *Z.S.S.* 32. 263 sqq.; Partsch, *Negotiorum Gestio*, 62 sqq., who makes it *n. g. utilis*. The name *protutelae* is no doubt a late oriental coinage, but the texts suggest that it was in classical law a special action, designed primarily for the case in which it was doubtful if the *gerens* was *tutor* or not, promised, not in the edict on *negotiorum gestio*, but in the edict on *tutela*, and called *actio negotiorum gestorum pro tutore* (P. 1. 4. 8). There seems no sufficient ground for thinking, with Partsch, that this name is interpolated. Any counterclaim of the *gerens* was enforced by *actio n. g. contraria* (27. 5. 5) as was in all probability any such claim by a *tutor* (Partsch, *op. cit.* 47; *ante*, § LIX). 6 Even this name is not certainly classical, though it probably is. 7 C. 4. 6. In 12. 6. 52 Pomponius distinguishes "*ob causam*" past and "*ob rem*" future, and Paul, in 12. 6. 65. 2, 4, makes the same distinction. See h. t. 65. 3 and 12. 4. 1. 1, 2. 8 12. 4. rubr. See C. 4. 6. 5, 6, where it is not treated as the name of the action. The grammatical construction of the name is much disputed. 9 19. 5. 5. 1. 10 C. 4. 6. 1. *Condictio* for recovery of *donatio mortis causa* is placed by Justinian under this rubric, 12. 4. 12. 11 Arg. 12. 6. 65. 4, etc. 12 12. 4. 3. 3–5. pr., 5. 4, 16; C. 4. 6. 10. Some of these deal with payment in error; others have been altered by Justinian. See, however, Vangerow, *Lehrb.* 3, § 591. 13 In later law "*turpis causa*" seems to be purpose, "*iniusta causa*" dishonest acquisition.

pose or by some illegal or immoral action, the two cases being on the same footing. If the turpitude was on the side of the *dans* or of both, as in the case of a thief who gave money to prevent the giving of information[1], the money was irrecoverable, but it could be recovered where the receiver alone was a wrongdoer, *e.g.* where money was paid under a promise induced by "*vis*[2]," or to prevent a crime[3], or to secure return of what ought to be returned without it[4]. Here it could be recovered whether the event in view of which it was given followed or not[5]. The risk was with the *turpis persona*[6].

Condictio furtiva[7]. This was quasi-contractual, since the *heres* was liable[8] and the action lay *de peculio* on theft by a slave[9]. The risk was on the thief and equally on his *heres*[10]. There was an analogous action, the *actio rerum amotarum*, available where one party to a marriage had taken property of the other, the notion of theft being excluded in such a case[11].

Condictio sine causa. This name is applied by Justinian to a group of cases, not all covered by the foregoing, in which a remedy was given for causeless enrichment[12]. There was no general principle: the cases mentioned in the title in the Digest are those of promise without real *causa*, or *animus donandi*[13], of compensation paid by a *fullo* for lost goods which the owner had subsequently recovered[14], of money given for *dos* where the marriage did not follow[15]. The rules as to risk were no doubt as in *condictio indebiti.*

Condictio ex lege. This action, which has a title in the Digest[16], seems to mean no more than the only text in the title says, that where a *lex* created an obligation and gave no special remedy, this *condictio* lay: it overlaps the previous cases, and is probably Byzantine.

Condictio ex poenitentia. This too seems to be a creation of Byzantine law. In the system of *fiducia*, if one who had made a *fiducia cum amico* for any purpose changed his mind before it was carried out, he could recover the *res* by *actio fiduciae*[17]. When *fiducia* disappeared, this was

1 12. 5. 3; h. t. 4. 1; C. 4. 7. 5. **2** 12. 5. 6; h. t. 7. **3** 12. 5. 2. pr. **4** 12. 5. 2. 1; h. t. 9. pr.; C. 4. 7. 6; h. t. 7. **5** 12. 5. 5; C. 4. 7. 4, without interest. **6** C. 4. 7. 7. **7** See *post*, § CXCVIII, and Monro, *de furtis*, App. II. The line between this exceptional case where ownership has not passed, and *c. ex iniusta causa*, where it has, is somewhat blurred in the Digest. See Pflüger, *Z.S.S.* 32. 167 sqq. **8** 13. 1. 5; h. t. 8. pr. **9** 13. 1. 4; h. t. 19. **10** 13. 1. 7. 2. **11** *Post*, § CXCVIII. **12** D. 12. 7; C. 4. 9. **13** 12. 7. 1. 2. **14** 12. 7. 2. **15** 12. 7. 5. Other cases are mentioned, 7. 5. 5. 1; 19. 1. 11. 6; Inst. 2. 8. 2; C. 4. 9. 2. Koschembar-Lyskowski, *Condictio.* sets out the various applications of the action including those here given and others. In the majority of them the case is one of what has become or been shewn to be an *indebitum* after the event, *e.g.* those in the text above, payment of one alternative without knowledge of right of choice (12. 6. 32. 3), paying without making the Falcidian deduction (35. 3. 1. 9), payment of legacy, the *hereditas* being afterwards evicted (12. 6. 3), etc. There are of course other types, *e.g.* where *condictio* is given in supplement of what had been a mere right of retention. **16** 13. 2. **17** See *ante*, § CLI.

replaced by a *condictio*. But the field of *fiducia cum amico* was very narrow in later law. The only certain case is that of a slave transferred to be freed, and even here there was not always a *fiducia*. The Digest gives the *condictio ex poenitentia* in all such cases and in transactions indirectly aiming at the same thing, *e.g.* gift of money to buy and free a slave, though the texts are not quite consistent[1]. It was given in another, unconnected, case, where a man had undertaken a journey for reward paid beforehand: the text says there was a *locus poenitentiae* and implies that there was one in all such cases, *i.e.* in all innominate contracts[2] (for there is no *fiducia* here). The general proposition is certainly not true: there is no reason to suppose any general theory of *condictio ex poenitentia*[3].

It should be added that in the course of the second century the praetorian obligations enforced by the *actio quod iussu*, *institoria* and *exercitoria* appear to have been adopted into the civil law in the sense that a *condictio* was given as an alternative to these remedies, at least where the actual contracting party was a member of the family[4]. In strictness this is a liability *ex contractu*, but it is not clear that it was so thought of: the point of view may well be an independent one. A man who sets his subordinate in the family in motion must accept the consequences. On this view it may be called quasi-contractual.

There remain a group of cases which can hardly be called analogous to those stated in the Institutes. Among these are:

Actio ad exhibendum. This was a proceeding calling for production preparatory to another action. It was often essential to a right of action that the other party be in possession of the subject of it, notably in *rei vindicatio*, to which this preliminary was primarily applicable[5]. But it was not confined to this[6]. It might be with a view to any real action, including *hypothecaria*[7], interdicts[8], *vindicatio in libertatem*[9], *actio furti*[10], *actio noxalis*[11], accusation of a slave for crime[12], examination of a slave by torture[13], and even in cases in which no litigation was directly in view, *e.g.* to facilitate the exercise of an option in *legatum optionis*[14]. Indeed it seems that any real economic interest, not otherwise protected, and not exceeding legal rights, would entitle to this action[15]. But further action was always contemplated in the long run[16]. It was

1 See Buckland, *Slavery*, 632 sqq. 2 12. 4. 5. pr. 3 See Gradenwitz, *Interpolationen*, 146 sqq. 4 See Mitteis, *Prr.* 1. 227 (citing the principal texts), Von Mayr, *Condictio*, 276. As to the so-called *condictio generalis*, *post*, § CCXXX. 5 10. 4. 1. As to the *formula* in the *actio ad exhibendum*, Lenel, *Z.S.S.* 37. 116 sqq. 6 10. 4. 3. 1, "*multae sunt causae.*" 7 10. 4. 3. 3. 8 10. 4. 3. 5. 9 10. 4. 12. pr. 10 10. 4. 12. 2. 11 10. 4. 3. 7. 12 C. 3. 42. 2. 13 10. 4. 20. 14 10. 4. 3. 6; h. t. 10. 15 10. 4. 19. Cp. h. t. 5. 3–5; h. t. 18. H. t. 3. 9, in which the right is stated very widely, is no doubt due to Justinian. Beseler, *Beiträge*, 1. 1, 2. 128, maintains that in classical law it was a preliminary only to real action. 16 10. 4. 3. 11.

available against any holder who had the power of producing, whether *possessor* or mere *detentor*[1], and anyone who had *dolo malo* ceased to possess, *e.g.* by handing it to another[2], or by changing its character, by melting it down[3]. Where the claimant had an *interesse* both at *litis contestatio* and at judgment[4], holding by the defendant at time of judgment sufficed, though it began after *litis contestatio*, and conversely, if it was *bona fide* lost before judgment, the defendant was entitled to *absolutio*[5]. It was not available to or against a *heres* as such, but he might of course be liable or entitled on his own account[6].

The *obligatio* must be called quasi-contractual, for there need have been no interference with right, and the plaintiff had not to prove that he was really owner. In fact, except in case of dolose abandonment of possession, which is not a primitive part of the scheme of the action, the obligation arose only on *litis contestatio*, much as in interdicts, a point which suggests a praetorian obligation. But as we know it the action is civil[7]. It is supposed to be of great antiquity. It was *in personam*[8] and the *formula* contained an *arbitrium* clause[9].

The obligation was to produce, and this was satisfied by production, with the accessories[10], even in a damaged condition, though, if the damage was wilful or negligent, and the plaintiff proved to be entitled, there might be the ordinary remedies[11]. If, though technically in possession, the defendant was at the moment unable to produce, *e.g.* it was a slave, *in fuga*, it was enough that he gave security for production when it became possible[12]. But the production must be "*in eadem causa.*" If the holder had acquired the thing by *usucapio* since *litis contestatio* in the *actio ad exhibendum*, he would not be entitled to *absolutio* unless he was prepared to accept a *rei vindicatio* in which the *intentio* was dated back to the *litis contestatio* in the *actio ad exhibendum* (*dies repetita*)[13], and similarly, if delay in production had caused loss of a right, *e.g.* it was now too late to exercise an option[14], or for the slave whose production was claimed to enter on a *hereditas*[15], the defendant must make compensation.

Aquae pluviae arcendae[16]. There was an old civil law action for the case in which work done on *A*'s land was likely to cause damage by flow of water over *B*'s, not superseded by the probably more effective remedy

1 10. 4. 3. 15–5. **2** 10. 4. 5. 2; h. t. 9. 1; h. t. 14. **3** 10. 4. 9. 3; h. t. 12. 3, but not where the *dolus* was his slave's without his privity. **4** 10. 4. 7. 7. **5** 10. 4. 7. 4, 5. **6** 10. 4. 8; h. t. 12. 6. **7** 19. 5. 16. 1. **8** 10. 4. 3. 3. **9** Inst. 4. 6. 31. **10** 10. 4. 9. 7, "*causa.*" **11** 10. 4. 17; C. 3. 42. 7. Sabinus seems to have held that damage could come into account in *ad exhibendum*, 10. 4. 9. 3. **12** 10. 4. 5. 6. **13** 10. 4. 9. 6. As to *diei repetitio*, see *post*, § CCXLI. **14** 10. 4. 10. **15** 10. 4. 11. pr. **16** Leist, Gluck's *Erläuterung*, Serie der B. 39, 40. 3.

of *operis novi nuntiatio*[1]. The owner of the land was the person liable[2]. The work must be not reasonably incident to cultivation of the land[3], and must not be so old that no one could say who did it, or whether it was done intentionally or not[4]. It might be neglect, where for instance there was an established water-course, and the owner neglected to repair a dyke destroyed by a storm[5]. If the work was done by a *colonus* or *procurator* without the owner's privity, this action did not lie unless the owner obstructed the aggrieved party in putting it right[6]. The action was barred by even tacit acquiescence[7]. The action was to have the matter put right, and for compensation for damage since *litis contestatio*[8]. It was noxal, but lay against the *heres*[9].

As it seems impossible to find any positive basis for the classification, a large number of other obligations might have found their place here. Such are the obligations between patron and freedman[10], the obligation to give a *dos*[11], and the countless edictal obligations. Many of these were negative, *e.g.* most of those enforced by interdict. But there were many others[12].

CLXXXVIII. We have now to consider a number of incidental rules of obligation, applicable mainly to the cases of contract and quasi-contract.

Interest. The rules as to amount of interest have been discussed[13], and we have only to state the cases in which it was due. It might be due in any transaction by express agreement[14], a separate contract, ordinarily *stipulatio*[15]. But pact sufficed in *nauticum fenus*[16], in loans by cities[17], in later classical law in loans of fungibles other than money[18], and, under Justinian, in loans by bankers[19]. Further, in any *mutuum*, a pact for interest created an *obligatio naturalis*[20]. Where interest was due under these rules in a separate contract, the fact that from any cause the debt had ceased to be recoverable would not necessarily bar the claim for interest already due, except that none was due if the principal

1 39. 2; *post*, § CCXLVI. For past damage the remedy seems to be "*quod vi aut clam*," 39. 3. 1. 1; h. t. 14. 2, 3. 2 39. 3. 3. 3. In later law *actio utilis* against fructuary, h. t. 22. 2; cp. 3. 4. 3 39. 3. 1. 3; h. t. 1. 6, 8. 4 39. 3. 2. 8. 5 39. 3. 1. 22; h. t. 2. 4, 5. 6 "*Quod vi aut clam*" against the actual doer, 39. 3. 4. 2; h. t. 5. 7 39. 3. 19. 8 39. 3. 6. 6. 9 39. 3. 6. 7. No doubt thought of as delictal in early law. See Girard, *Textes*, 17. The remedy overlaps "*damni infecti*" (*post*, § CCXLV) and "*operis novi nuntiatio*" (*post*, § CCXLVI). 10 *Ante*, § XXXII. 11 *Ante*, § XL. 12 The restitutory interdicts require a positive act: some presuppose what is substantially a delict, but not all; see *post*, § CCXLVIII. But the obligations to give guarantees against possible damage of various kinds (*operis novi nuntiatio*, *post*, § CCXLVI, *damni infecti*, *post*, § CCXLV, etc.) might be properly placed under the present head, and the same may be said of the *actio metus* (*post*, § CCIII), and those on fraud on patron's rights (*ib.*) in the cases in which the defendant is no party to the wrong. 13 *Ante*, § CLXII. 14 19. 5. 24. 15 *Ib.*; P. 2. 14. 1. It might be a separate clause in the same *stipulatio*. 16 22. 2. 7. 17 22. 1. 30. 18 C. 4. 32. 11. 19 Nov. 136. 4. 20 C. 4. 32. 3; *post*, § CLXXXIX.

debt was void *ab initio*, and, under Justinian, if a debt was time-barred, a claim for interest was barred too[1]. Apart from agreement interest was due by law in certain transactions, *e.g.* in sale, from the delivery of the goods[2], in debts to minors[3] and to the *Fiscus*[4], in some cases of *dos*[5], and, under Justinian, in some charitable gifts[6]. A *socius* was entitled to interest on his money applied to firm purposes, and was conversely liable if he used money of the firm for his own purposes[7]. A mandatary or *negotiorum gestor* or *tutor* could claim interest for advances, and conversely was liable for interest on money he held and neglected to invest, or used[8], and, as it seems, for money he ought to have got in, though this may be late law[9]. Finally, interest was due from *mora* in all *bonae fidei* transactions, though it ceased to run if the *mora* was purged by tender of what was due[10]. A similar rule applied in claims for *fideicommissa* and some forms of legacy; under Justinian, all forms[11].

Where the liability was not based on agreement, interest was recoverable only in the principal action, so that if payment was accepted without interest, or the debt was time-barred, the right to interest was completely lost[12].

MORA. This was failure to discharge a legal duty on demand made at a proper time and place. This is sometimes called *mora ex persona*, as distinct from *mora ex re*, where "*dies interpellat pro homine*." But this latter expression is unwarranted. There was no *mora ex re*—in some cases, some of the effects of *mora* were produced where there was, in strictness, no *mora*, *e.g.* liability to interest on price from delivery of goods sold. The expression is suggested by a text which says that where there is no one from whom the demand can be made, there is *mora in re*[13]. But this case and that of a defendant who holds a thing by theft or similar delict, who is said to be always in *mora*[14], seem to have been the only cases in which demand was not necessary.

The delay must be wilful and wrongful: there was no *mora* if the debtor was unable, through no fault of his own, to be at the place[15], or if he had reasonable grounds for doubting that the debt was due, provided, in this case, he was ready to litigate at once[16]. *Mora* or no *mora* was a question of fact rather than law: the *iudex* must decide it on all the facts[17]. The principal effects of *mora debitoris* were these:

1. The thing was at his risk. This was modified, at least in later law, to the extent that he was not liable unless the destruction involved a

1 12. 6. 26; 22. 1. 7; C. 4. 32. 26. pr. 2 19. 1. 13. 20. 3 Arg. 40. 5. 26. 1. 4 22. 1. 17. 5. 5 C. 5. 12. 31. 6 C. 1. 3. 45. 4. 7 *Ante*, § CLXXVII. 8 3. 5. 18. 4; h. t. 37; 26. 7. 7. 8. 9 26. 7. 15. 10 22. 1. 1. pr. At local rates, *post*, § CCXXIX. 11 G. 2. 280; D. 30. 39. 1. 12 19. 1. 49. 1. 13 22. 1. 23. 1; 40. 5. 26. 1. 14 13. 1. 8. 1. 15 12. 1. 5; 16. 3. 1. 22; 19. 1. 3. 9. 16 22. 1. 21; h. t. 24; 45. 1. 91. 3. 17 22. 1. 32. pr.

loss to the creditor which would not have occurred if there had been no *mora*[1], not, *e.g.*, for an accident which would have happened equally if the *res* had been handed over, unless indeed the creditor could shew that, if it had been delivered, he would have sold it, so that the loss would not have fallen on him[2]. The debtor in bad faith was liable for the highest value since the *mora*; it does not seem that this applied elsewhere[3]. And there was of course no liability if the loss was caused by the imputable fault of the other party[4].

2. He was responsible, but only in *bonae fidei* transactions[5], for fruits the creditor would have received[6], and for accessories.

3. He must pay interest in the case of money and other fungibles, in the same case, at local rates, not exceeding the legal maximum[7].

The creditor might be *in mora*, where he had not accepted a tender of performance duly made by the debtor, at a proper time and place, not a mere expression of willingness to perform, which might or might not be realisable[8]. The *mora* would result from refusal, or absence at the agreed time and place[9], the fact, in the case of absence, being notified in court by the debtor[10]. *Mora* of the creditor, like that of debtor, required fault. If refusal was due to reasonable doubt of the sufficiency of the tender, and he was prepared to litigate at once, or if his absence was not due to his act or fault he was not *in mora*[11]. The chief effects of his *mora* were these:

1. The debtor was liable only for *dolus*[12], even where liable for *culpa* before.

2. Thus the *res* was at the risk of the creditor, apart from *dolus* of debtor[13].

3. The creditor must pay any cost involved in care of the *res*[14].

4. Interest running ceased to run if the money was officially deposited in custody of the court, but not otherwise, as the debtor still had the use of it[15].

Mora was said to be purged, *i.e.* its consequences no longer operated and the original state of liability was restored, for the future, without prejudice to any rights of interest, etc., already accrued, if the party

1 4. 2. 14. 11; 10. 4. 12. 4; 16. 3. 14. 1. 2 6. 1. 15. 3. 3 13. 1. 8. 1; 13. 3. 4. 4 4. 2. 12. pr.; Inst. 4. 17. 2. Even for such as would have been due to special activity, if the creditor usually shewed this. 5 And in *fideicommissa* and some legacies—all under Justinian. 30. 39. 1. 6 22. 1. 3. 7 *Ante*, § CLXII. 8 46. 3. 39; h. t. 72. pr.; C. 8. 42. 9. 9 C. 4. 32. 6. 10 *Ib.* 11 13. 5. 17; 46. 3. 72. pr.; C. 8. 27. 5. 12 18. 6. 5. 13 17. 1. 37; 18. 6. 1. 3; 33. 6. 8. 14 18. 6. 1. 3. 15 26. 7. 28; 22 1. 7; 22. 1. 1. 3; C. 4. 32. 19. Stated only of money, but no doubt applying *mutatis mutandis* to other fungibles. But there is a rule in sale of specific things that if the creditor refuses them, they are at his risk and the debtor, after notice, may throw them away (18. 6. 1. 3, 4, wine; h. t. 13, furniture). But the text shews that it is thought severe, and it is denied in legacy of wine (33. 6. 8). Probably it must not be in any way generalised.

entitled renounced his right under the *mora*[1], or the debtor made the tender he ought to have made, in reasonable time and place[2], or the defaulting creditor in the same way presented himself to accept it[3], or the debt was novated[4].

CLXXXIX. *OBLIGATIO NATURALIS.* Hitherto we have dealt only with civil and praetorian obligation. But at the beginning of the Empire there was a new development. Any obligation contracted in accord with reason, though not in accord with accepted forms and requirements, might be given a modified validity. Not all such cases were so dealt with but there was a group, not numerous, and chosen, as it seems, rather at hazard, to which the conception of *obligatio naturalis* was applied. No action lay on them, but they could be made effective in other ways, not all to the same extent. Indeed the only rule clearly common to them all was that payment made could not be recovered: a natural obligation always excluded *condictio indebiti*[5].

The whole conception is later than Labeo, but perhaps not much later[6], and it is generally held that its first application was recognition of an *obligatio naturalis* of a slave on his contract[7]. The chief cases were[8]:

(*a*) *Negotia* by a slave with his master or third persons. In general there was no question of a right in the former slave even after freedom[9]: it is only from the point of view of liability that the question arose, except that his natural right against his master survived if he took his *peculium*[10], but only to the extent of barring *condictio indebiti*. With these restrictions it arose, broadly speaking, on any transaction of the slave which would have been a valid contract if he had been free. Besides excluding *condictio indebiti* (*solutum non repeti*) it might be a basis for pledge, *fideiussio* or other surety, and perhaps novation[11], and, if on a verbal contract, it might be discharged by *acceptilatio*[12]. It does not seem that a debtor to him could use it as a set-off, and it is doubtful whether judgment, as apart from actual satisfaction, in an *actio de peculio*, had any effect on the liability[13].

(*b*) Transactions between *pater* and *filiusfamilias* or members of the same family. So long as the *filiusfamilias* was in the family the rules of *peculium* applied, but on release, if he took the *peculium*, he took with it any claim he had against the father, but only to the extent of *solutum*

1 2. 14. 54. **2** 18. 6. 18. Here both have been *in mora*. **3** *Ib.* **4** 13. 1. 17. **5** 46. 1. 16. 4. **6** It is not clear that Javolenus (35. 1. 40. 3) and Seneca (*de ben.* 6. 4. 7) cited by Girard, *Manuel*, 652, contemplate any legal liability at all, but it is clear in Neratius (12. 6. 41). See also Julian in 46. 1. 16. 4, etc. **7** Pernice, *Labeo*, 1. 150 sqq. **8** The cases are sometimes classified (Savigny, *Oblig.* § 9), but such a classification throws no light on the rules. **9** 2. 14. 7. 18; 50. 17. 146. **10** 12. 6. 64; apparently only to exclude *condictio indebiti*. **11** 12. 6. 13. pr.; 44. 5. 1. 4; 46. 1. 35. **12** 46. 4. 8. 4. **13** 15. 1. 50. 2; 44. 2. 21. 4.

non repeti[1]. Where the liability was the other way no doubt the same rule applied as in the case of a slave. Where he contracted with an *extraneus* the *obligatio* was *civilis* and has already been considered[2].

(*c*) *Nudum pactum.* It is now generally held that a nude pact did not create a natural obligation[3], except a pact for interest, where there was no *condictio indebiti*[4], and a hypothec was good[5]. We know of no other results[6].

(*d*) *Sc. Macedonianum.* Action was barred on a loan to a *filiusfamilias*, but there was a natural obligation. Payment could not be recovered[7], and there might be *novatio*, after he was *sui iuris*[8]. *Fideiussio* and hypothec seem not to have been void, but to have themselves created only a natural obligation[9]. It could not be used as set off[10].

(*e*) *Pupilli* without *auctoritas* who had not profited. The texts conflict, but a natural obligation seems to have been admitted in later law; its extent is doubtful. It could not be used as set off[11].

(*f*) Minors and *prodigi interdicti.* A minor who had obtained *restitutio in integrum*, one who in later law contracted without his curator's consent, and *prodigus interdictus*, were all probably bound by a *naturalis obligatio*, but its extent is not known[12].

(*g*) Civil bondsman and *filiafamilias.* These could apparently not bind themselves in classical law, but there was probably a natural obligation[13].

(*h*) Effect of *litis contestatio.* In many cases *litis contestatio* destroyed the old obligation, substituting for it the right under the action[14]. If this proceeded normally no question would arise, but it might not, and the question whether a natural obligation survived is material. If, *e.g.*, judgment was not given within a certain time, it could not be given at all[15]. It is clear that in classical law there was a natural *obligatio* in this case with the usual effects, perhaps even a right of set off[16]. Where the action was lost by *plus petitio* there was a natural obligation[17], as also where it was lost by error of the judge[18].

(*i*) *Capite minuti. Capitis deminutio* destroyed at civil law all contractual and quasi-contractual obligation. In *c. d. maxima* the present

1 12. 6. 38; 4. 5. 2. 2. **2** *Ante*, § CXLVII. **3** Girard, *Manuel*, 654, n. 1, cites 45. 1. 1. 2; 46. 1. 56. pr. **4** 46. 3. 5. 2. **5** 13. 7. 11. 3. **6** A slave's promise creates a natural obligation. Gaius says it has not the force of a verbal contract (G. 3. 176). If so it is a pact and is another exception. It must not be forgotten that a pact was good as a defence. **7** 12. 6. 40. pr.; 14. 6. 10. **8** C. 4. 28. 2. **9** 14. 6. 9. 3 (interp.). **10** The fact that there was no *obligatio naturalis* under the *Sc. Velleianum* shews how partial was the recognition of this kind of obligation. 12. 6. 40. pr. gives reasons. **11** See 12. 6. 41; 45. 1. 59; 36. 2. 25. 1; 46. 3. 95. 4. **12** 46. 3. 95. 3; C. 2. 23. 2; Bas. 26. 1. 25 (Heimbach, 3. 97). **13** G. 3. 104; *ante*, § XLVIII. **14** *Post*, § CCXXXV. **15** *Post*, § CCXXXII; G. 4. 104, 105. **16** 46. 8. 8. 1. Machelard, *Obl. Naturelles*, 370 sqq. **17** 20. 1. 27. Machelard, *op. cit.* 384. **18** See 12. 6. 28; h. t. 60. pr.

point did not arise; if the man was restored to his original position his obligation revived: if he was not he was free of all, even though pardoned. The same seems to be true of *c. d. media* if all the property was forfeited. If only part, he remained liable to action *pro parte*, and not beyond at all[1]. In *c. d. minima* an *obligatio naturalis* survived, but in the most practical case, *adrogatio*, a better remedy was found[2].

More or less doubtful cases are those of a claim barred by lapse of time[3], a creditor deprived of his claim by way of penalty[4], and *confusio* between debtor and creditor[5], but these we need not here consider.

TRANSFER OF *OBLIGATIO*. As we have seen, *obligatio*, being of an intensely personal nature[6], was not thought of as transferable, but, in connexion with mandate[7], we saw how assignability was reached by an indirect method based on the conception of the assignee as a representative of the assignor, *procurator in rem suam*. We have also dealt with the automatic transfer of *obligatio* in various forms of universal succession[8], and in the case of guardianship, on the termination of the wardship[9].

There were cases, too numerous to be set out in detail, in which one in whom a right of action was vested was compellable to transfer it to another, by this indirect method (*cedere*, *mandare*, *transferre actionem*[10]). As familiar instances may be cited the vendor, who must cede, as part of the *commoda rei*, actions acquired in respect of the *res* since the sale[11], the creditor paid by a surety, in certain cases[12], the *mandatarius*, who must cede all actions acquired in executing the mandate[13], the pledge creditor, who must cede actions he has acquired, as part of the *commoda rei*[14], and so forth.

Where this *cessio* could be claimed as of course, the actual claim and transfer might seem an idle form and the person entitled have been allowed to proceed as if he had had a transfer. Some steps were indeed

1 C. 8. 40. 1, *actiones utiles*, *ante*, § XXXVI. 2 *Ante*, § CXLI. The same rule seems to have been applied where a woman passed into *manus*, G. 4. 80, but as to difficulties, see *ante*, *ib.* 3 Machelard, *Obl. Nat.* 464 sq.; Windscheid, *Lehrb.* 2. § 289, n. 2; Girard, *Manuel*, 655. 4 *E.g.* 12. 6. 19. pr. See Machelard, *op. cit.* 512. 5 *Post*, § CXCII. 6 *Ante*, § CXLIII. Even where the contract affected the enjoyment of land the benefit of it did not pass with the land. Where a man let a farm with agreements as to proper cultivation, and died leaving the land away from the *heres*, the legatee could not enforce the covenants, nor could the *heres*, for lack, in this case, of *interesse*. If a legatee of land ousted the tenant, his remedy was only against the *heres*. It was one of the obligations of the deceased (19. 2. 32). 7 *Ante*, § CLXXX. 8 *Ante*, §§ CX, CXLI sq. 9 *Ante*, § LV. The texts record many cases in which *A*, being under a liability to *B*, may release himself by transfer, in this form, of actions he has against third parties (*e.g.* 10. 2. 18. 5; 47. 2. 14. pr.). It is probable that many of these are interpolated, Beseler, *Beiträge*, 3. 172 sqq. 10 Schulz (*Z.S.S.* 27. 82) in a careful study of the principles of forced *cessio* (he does not discuss *cessio legis*, feigned *cessio*) gives a list of over 60 texts dealing with such cases and the list is not exhaustive. 11 47. 2. 14. pr. 12 46. 1. 17; 46. 3. 76. 13 17. 1. 20. pr.; h. t. 27. 5. 14 20. 1. 21. 2; 20. 5. 7. pr.

taken in this direction, the action being however not one in which *cessio* was feigned (*actio ficticia*), but an *actio utilis suo nomine*, usually an *actio in factum*.

To this automatic transfer the name *cessio legis* has been given. The notion no doubt starts from the cases of a transfer which had become inoperative before it was acted on, discussed under mandate[1], but it gradually extended to cases where there had been no transfer. Thus as early as Pius such an action was allowed to a buyer of a *hereditas*[2], to *heres ab intestato* where legacies had been paid under a will afterwards upset[3], to *tutor* sued for negligence, against *contutores*[4]. So too in classical law, if a depositee redeposited, the first depositor had *actio utilis* against the second depositee[5]. Caracalla gave a judgment creditor, where there was nothing to seize, an *actio utilis* against his debtor's debtor[6]. Where a gift was to be restored to a third person, Diocletian gave him an *actio utilis*[7]. Later law allowed such an action in the case of an agreement to sell, or a legacy of, a debt[8]. Justinian gave the principal an *actio utilis ex empto* where a procurator had sold, and to a *fideicommissarius* who had paid off a pledge which should have fallen on the *heres*[9]. But these cases represent no general principle. It is clear on the texts that in general, where *cessio* had not been actually taken, there was no right to sue: the case of surety is a well-known instance[10].

CXC. The Theory of *Culpa*. *Dolus* or intentional damage is not perfectly easy to define, but as it was in itself a delict it will be considered later[11], and can here be left with the remark that in contract and quasi-contract it always created liability.

Culpa was failure to observe the standard of conduct which the law required, a standard varying in the different cases. In the texts we get degree of *culpa* represented in three ways: *culpa* (*culpa levis*), failure to shew *diligentia maxima*, failure to act as, in the given circumstances, a *bonus paterfamilias* would act[12]; *culpa lata*, failure to shew any reasonable *diligentia*, *non intelligere quod omnes intelligunt*[13]; *culpa levis* in another sense, called by moderns *culpa levis in concreto*, not to shew the same degree of *diligentia* as the party ordinarily did in his own affairs[14]. The first two are objectively defined, but the last is taken from a different, a subjective point of view. It was not a distinct degree of *culpa*, for it might conceivably be greater or less than either of the others. A very

1 *Ante*, § CLXXIX. 2 2. 14. 16. pr.; C. 4. 39. 5. 3 5. 2. 8. 16. 4 27. 3. 1. 13. 5 Coll. 10. 7. 8. 6 C. 4. 15. 2. As to a similar but wider right of the *fiscus*, h. t. 3 and 4. 7 Vat. Fr. 286; C. 8. 54. 3. 8 C. 4. 15. 5; C. 4. 39. 7–9; C. 6. 37. 18. 9 19. 1. 13. 25; 30. 57. 10 41. 2. 49. 2; C. 8. 40. 11. See also 45. 1. 126. 2; 14. 3. 1, etc. 11 *Post*, § CCII. 12 18. 6. 3; 13. 6. 18. pr. (*culpa levissima*, 9. 2. 44. pr.). 13 Coll. 10. 7. 6. 14 10. 2. 25. 16, as opposed to *culpa levis in abstracto*.

fastidious and careful person might fall short of this standard in a particular case, while still shewing the care of a *bonus paterfamilias*, and a worthless person might still satisfy this standard while shewing less care than a reasonable man would. But in fact this standard was not thought of as lower than that expressed by *culpa lata*[1].

The general effect of the texts on liability in particular cases may be stated in the following rather confusing propositions, omitting for the present the *stricti iuris* relations.

1. A party benefiting by the transaction was liable for *culpa levis*, *e.g.* both parties to sale, hire, pledge, and innominate contracts, the depositor, the *commodatarius* and the principal in *negotiorum gestio*[2].

2. One who did not benefit was liable only for *dolus*, and, according to some texts, for *culpa lata*, on the ground that *culpa lata dolo aequiparatur*[3].

3. In some cases a party was made liable for *culpa levis in concreto*. In some of these, *tutela*, *heres* under *fideicommissum* and depositee[4], we should expect liability for *dolus* only, and some texts so state the liability[5]. In others, common ownership, husband dealing with *dos*, *societas*[6], we should expect liability for *culpa levis*, and some texts so state the matter[7].

4. In some cases in which on principle the liability was for *dolus*, and is so stated, we get in other texts a liability for *culpa levis*, *e.g.* mandate, *tutela* and *cura*[8].

5. The *negotiorum gestor*, though it was essential that the *gestio* should not be for his benefit, was liable for *culpa levis*[9].

6. The state of the texts makes it extremely probable that the expressions *culpa lata*, *culpa levis*[10], of which there is little trace in prae-Justinian texts, were not used technically to denote degrees of *culpa* till the Byzantine age.

On this story, which is really a record of historical changes, there are several remarks to be made.

(*a*) The line between *dolus* and *culpa* is not so sharp as it looks. In both of them external standards must be applied; the state of mind must be inferred from conduct. If a man's standard of care in business which affects another was plainly below what we expect in ordinary

1 See, *e.g.*, 24. 3. 24. 5 **2** 13. 6. 5. 2; 50. 17. 23. See Coll. 10. 2. 1. **3** 11. 6. 1. 1; 16. 3. 32; 36. 4. 5. 15; 50. 16. 226. **4** 27. 3. 1. pr.; 36. 1. 23. 3; 16. 3. 32. **5** 26. 7. 7. 2; 30. 108. 12; 13. 6. 5. 2; 16. 3. 1. 10, etc. **6** 10. 2. 25. 16; 17. 2. 72; 23. 3. 17. pr. **7** 17. 2. 52. 2; 24. 3. 18. 1; 10. 3. 26. **8** 17. 1. 10. pr.; Coll. 10. 2. 3; D. 50. 17. 23; 26. 7. 7. pr.; 27. 3. 1. pr.; 26. 7. 25. pr. Thus for *tutela* we get the liability stated in all three ways. 27. 3. 1. pr.; 26. 7. 7. pr.; h. t. 41; C. 2. 18. 20. **9** 3. 5. 3. 9; *ante*, § CLXXXV. We are not fully informed as to *fiducia*. **10** Neither expression occurs in any juristic text independent of Justinian. In Coll. 12. 5. 2 we find *lata neglegentia*, in a criminal matter. See p. 553, n. 9.

life, or of what he shewed in his own business, it may be called carelessness, but the suggestion of bad faith is obvious. Slight carelessness is however to be expected occasionally, and does not suggest bad faith. Thus, if damage occurred, *culpa levis* was presumed though of course it might be disproved, but the presumption of *dolus* (or *culpa lata*) was never made[1]; the facts relied on must be proved. We are expressly told by Celsus that it is not good faith to shew in dealings affecting others less care than in one's own affairs, and the same text shews similarly that it is hard to distinguish between *culpa lata* and *culpa levis in concreto*: to shew in such matters less care than you do in your own is not reasonable conduct[2]. It has been suggested that the only difference between *culpa lata* and *culpa levis in concreto* is in the burden of proof. The former must be proved; the latter is *prima facie* presumed[3]. But this would still leave the conflicts in the texts.

(*b*) It has been shewn[4] that *culpa* originally meant active conduct—*culpa in faciendo*; negligent omission (*culpa in non faciendo*) being *neglegentia*, to which *diligentia* is the opposite[5].

(*c*) We are several times told[6] that *culpa lata* is on a level with *dolus* and this was clearly so for Justinian's time. But the whole conception of *culpa lata* is late[7]; the nearest approach to it in any surviving prae-Justinian text is a reference to *lata neglegentia* in connexion with criminal liability[8], and in the same collection Modestinus, dealing with several contracts, evidently knows only one degree of *culpa*[9]. *Culpa lata* has little to do with contract; most of the allusions to it are in connexion with criminal law or quasi-contract (especially *heres* and *tutor*), or in the heterogeneous mass of praetorian obligations[10]. The only direct allusions to it in relation to specific contracts are one or two on deposit[11], all suspicious, one in *precarium*, which also looks interpolated[12], one on mandate more than suspected[13], and one on the sale of a *hereditas* also

1 22. 3. 18. 1. 2 16. 3. 32, interpolated in part. It is difficult to believe with Lenel, *Z.S.S.* 38. 277, that the whole passage represents only Byzantine thought. The classical rule expressed seems to be that what purports to be negligence may be so gross as to raise an irresistible presumption of *dolus*. 3 C. 4. 24. 5. 4 Mitteis, *R. Pr.* 1. 322. 5 See, *e.g.*, 50. 17. 23. The distinction survives in *stipulatio*, *post*, p. 555. 6 44. 7. 1. 5, etc. 7 Mitteis, *op. cit.* 334, who analyses the cases in which it is found. 8 Coll. 12. 5. 2. 9 Coll. 10. 2. 1. Lenel holds, as it seems with great probability (*Z.S.S.* 38. 263 sqq.), that the expressions *culpa levis, lata*, used technically to express degrees of negligence, are post-classical. His article is a reply to Binding, who in *Normen* (2) 2. 711, and again *Z.S.S.* 39. 1, maintains the thesis that these expressions are classical but that they denote originally—and in the Digest—not degrees of negligence, but two kinds of "Schuld" short of *dolus*, *levis* being negligence, *lata*, intentional conduct, without self-seeking fraudulent intent. It is difficult to reconcile the view that the terms do not, for Tribonian, represent degrees, with such texts as 41. 1. 44. 2. 10 Mitteis, *op. cit.* 334. 11 16. 3. 32; 44. 7. 1. 5; C. 4. 34. 1 = Coll. 10. 8, where *culpa lata* is not mentioned. 12 43. 26. 8. 6. It is not contemplated as a contract. 13 17. 1. 29. pr.

doubtful[1]. Probably in classical law a gross failure in care was apt to be regarded as *dolus*, as Celsus suggests and Paul explicitly says[2].

(*d*) The cases in which one who did not benefit was liable for *culpa levis* were all late extensions of liability dating, it may be, from the end of the second century[3]. They were all cases of confidential relations and it is said that this was the cause of the increased liability[4].

(*e*) There was a group of contractual and quasi-contractual actions condemnation in which involved *infamia*. Such were *pro socio*, *fiduciae*, *mandati*, *depositi* and *tutelae*. In nearly all these cases texts give a liability for *culpa*, either *in abstracto* or *in concreto*, and in some cases we find both. It is harsh that mere negligence should have such an effect. The difficulty is met by the view that *infamia* ensued only where the condemnation was for *dolus*[5], but it is repeatedly stated with no such limit. A better view[6] seems to be that in earlier classical law these actions lay only for *dolus* and that the larger liability is either interpolated or a development of late classical law, in which some cases of what texts call lack of *diligentia* were readily construable as breaches of good faith[7]. The transition to the rule of liability for *culpa* was a gradual one not complete till the time of Severus[8]. But the evidence hardly amounts to proof.

(*f*) The cases of *diligentia quam suis rebus*, *culpa levis in concreto*, mentioned in the texts seem to be *fiducia* (?) *societas*, common ownership, *tutela*, husband in relation to *dos*, *fideicommissum* and deposit[9]. The last two are certainly due to Justinian and do not even represent the law of his time as elsewhere stated, except so far as, in the actual case, the failure to act as carefully as in his own affairs was in fact *dolus*[10]. In *tutela* some of the later texts make a *tutor* liable for *culpa* simply, and it may be that the liability for *culpa levis in concreto* was a stage in the transition from liability merely for *dolus* to liability for *culpa*[11]. As to *fiducia* the rule is laid down generally[12]. In *societas* it seems to have been the settled rule from Gaius onwards[13]. In the other cases, *dos* and community, principle requires liability for *culpa*, and it may be[14] that the lessened liability expresses a view, late classic or

1 18. 4. 2. 5. 2 16. 3. 32; 50. 16. 226. No doubt, as Lenel suggests (*op. cit.* 288), in the original they were not stated with such generality, but with reference to the facts of a particular case. 3 Mitteis, *op. cit.* 330. 4 See, however, *ante*, § CLXXIX, as to mandate. 5 *E.g.* Bertolini, *Obblig.* (*Parte Sp.*) 785. 6 Mitteis, 324 sqq. 7 In the case of *tutela* it may possibly be due only to Justinian, but it is more probably late classic. 8 For other views, see Girard, *Manuel*, 667. 9 The texts appear to be 16. 3. 32; 10. 2. 25. 16; 17. 2. 72; 18. 6. 3; 23. 3. 17. pr.; 24. 3. 24. 5; 26. 7. 33; 27. 3. 1. pr.; 36. 1. 23. 3; 44. 7. 1. 4; Inst. 3. 25. 9. 10 16. 3. 32; 36. 1. 23. 3; cp. 30. 108. 12. 11 Lusignani considers the rule in all cases interpolated, *Studi sulla responsibilità per custodia*, 2. 97 sqq. 12 Coll. 10. 2. 1. The reason assigned is that both benefit. This is true of *f. cum creditore*, perhaps the only case existing when the text was written, but not in *f. cum amico*; no doubt whichever benefited was liable for *culpa*. 13 17. 2. 72. 14 Mitteis, *op. cit.* 333.

Byzantine, that in an enduring relation the other standard is unfair. It is observable that in all the cases in which the rule is well evidenced it is in fact the defendant's own affair.

Passing to *stricti iuris* relations, it is to be observed that in *mutuum* and the contract *literis* no question of *culpa* arose. In *stipulatio* to give a certain thing the promisor was liable only for *culpa in faciendo*, a survival of the old conception of *culpa*[1], and only for such *culpa in faciendo* as made delivery impossible, not, *e.g.*, where his act had made the *res* less valuable but still deliverable[2]. Of course the *stipulatio* might be so framed as to express any liability the parties wished, and the texts usually consider not the liability on *stipulatio*, but that on the particular *stipulatio* under discussion; the actual words were material. Apart from this there seems to have been no remedy for negligence or for active *culpa* which merely lessened the value of the thing. If there was *dolus*, the *actio doli* lay[3], and gross negligence would no doubt readily be construed as *dolus*. In the case of *stipulatio faciendi* the rule seems to be that the care of a *bonus paterfamilias* was required, but the textual evidence is scanty[4]. In *condictio sine causa* the rules were as in *stipulatio dandi*[5], while in *condictio furtiva* all risks were on the person liable; *fur semper in mora est*[6]. The case of legacy has already been considered[7].

CXCI. *Custodia*. This is a conception which has given, and still gives, much trouble. In many texts *custodia* (*custodire*) appears in its plain meaning of setting a watch or guard[8]. These cases are unimportant. But there are other texts in which it is used to denote a certain obligation "*custodiam praestare*," meaning something more than to set a guard. This obligation, whatever it may have been, is stated more or less explicitly in a number of cases, *e.g.*, *commodatarius*[9], usufructuary[10], vendor[11], *nauta, caupo, stabularius* (at least in some cases[12]), etc. It appears to mean obligation to prevent theft and perhaps, though this is not quite clear[13], damage by third parties. But the extent and history of this obligation have been and still are the subject of acute controversy. In some texts dealing with specific cases it appears as an absolute obligation to prevent the theft, *i.e.* responsibility to the owner if the thing is stolen, without reference to negligence[14], and this point of view seems to be represented by Gaius, who tells us that *commodatarius* and *fullo* had an *actio furti* on account of their responsibility if the thing was stolen, and the owner had none, as he had no *interesse*[15], without any reference to negligence. In other texts it appears as *diligentia maxima*

1 P. 5. 7. 4; D. 45. 1. 91. pr., sqq. **2** 4. 3. 7. 3. **3** *Ib.* **4** 45. 1. 137. 2, 3. **5** See 12. 6. 65. 8; 39. 6. 39 (Girard, *Manuel*, 669. See also *op. cit.* 668, n. 3). **6** 13. 1. 8; h. t. 16. **7** *Ante*, § CLXXXV. **8** *E.g.* Coll. 10. 7. 4; D. 6. 1. 21. **9** 13. 6. 5. 5. **10** 7. 9. 2. **11** 18. 6. 12. **12** 4. 9. 1. 8. **13** See Lusignani, *Responsibilità per Custodia*, 2. 49. **14** *E.g.* 4. 9. 1. 8. **15** G. 3. 205–207.

applied to the care of the thing against thieves[1], an interpretation quite in keeping with the evolution of *culpa* from an original meaning confined to acts of commission, negligence leading to damage being separately named as *neglegentia*, and avoidance of it as *diligentia*, and the obligation to the same extent to prevent harmful intervention by third persons would be called the obligation "*custodiam praestare*." Again there are texts which, speaking of it as an absolute obligation, base it in certain cases upon express agreement[2]. There is a further difficulty in that some texts which treat it as an absolute liability have evident signs of interpolation[3], and on the other hand some texts which speak of it as only an aspect of *diligentia* are open to the same suspicion[4].

It is obvious that many interpretations are possible, and in fact there are wide differences of opinion. On one view, in all the above cases, and in several others (in which the existence of the obligation itself, apart from its extent, is very imperfectly evidenced), the classical law imposed an absolute liability, and Justinian, by systematic interpolation, cut this down to *diligentia in custodiendo*, not without leaving traces of the older doctrine. Another diametrically opposed opinion is that classical law knew no such obligation apart from *diligentia*, except as created by express undertaking, but Justinian has interpolated a number of texts so as to make the obligation absolute[5]. It is not obvious that the meaning must be the same in all cases, and it is clear that an absolute liability "*custodiam praestare*" might be imposed by special agreement and was so imposed almost as a matter of course in the case of carriers[6]. It may be that the same was the case with *fullo* and *sarcinator*[7], and it is not unreasonable to impose such an obligation as a matter of law on a *commodatarius*[8]. This would account for the language of Gaius who gives *commodatarius* and *fullo* an *actio furti* in any case[9], which seems illogical unless there was a corresponding obligation to compensate the *dominus* in every case.

The whole question must be treated as yet unsolved, but it may be remarked that Lusignani seems to have shewn[10] that no such absolute liability existed in classical law in the case of vendor or *conductor rei* or *operis* in general and that the extreme doctrine applying the absolute liability over a wide range of cases does not seem probable in itself or indicated by the texts[11]. It might have been expected that so important

1 *E.g.* 18. 1. 35. 4. **2** *Ib.*; 4. 9. 1. 8. **3** *E.g.* 13. 6. 5. 15. Lusignani, *op. cit.* 1. 62. **4** *E.g.* 18. 6. 3. See reff. in Berlin stereotype edition (13). **5** See Lusignani, *op. cit.* 1. 1–23, for statement and criticism of various opinions as to the rule and its historical changes. **6** See D. 4. 9. **7** The liability attached by English law to the trades of carrier and innkeeper, for loss of the goods, without proof of privity or negligence, does not however apply to other trades. **8** See 13. 6. 5. 5. **9** G. 3. 205 sqq. **10** It is the thesis of the work cited. **11** See, however, for a far-

a liability would have been prominently stated in the classical texts, but they repeatedly state *dolus* and *culpa* as limits[1] for liability apart from special agreement. *Custodia* as a form of liability occurs rarely, and never with a clear indication that it involves insurance against theft and damage[2].

CXCII. Extinction of Obligation. The modes of extinction of *obligatio* are numerous and may be classified as Involuntary or Voluntary, and as Civil or Praetorian. For clearness of statement, the first classification will be adopted.

The principal involuntary modes are:

(*a*) Supervening impossibility, of which destruction of the subject-matter is the typical case. This did not discharge if, at the time of the destruction, the debtor was already *in mora*[3], or the destruction was by his act or with his privity, *dolo* or *culpa* (where he was liable for *culpa*), with knowledge that the obligation existed[4]. For the rule to apply, it must have been a specific thing which was due[5]. The texts do not deal with other cases of supervening legal or physical impossibility, to which the same principles appear to apply[6].

(*b*) Death. Death of the creditor had in general no effect on the obligation, except where it brought the rules of impossibility into play, but we have seen an exception in the cases of *adstipulatio*[7], and of *societas* and mandate[8]. Here, death ended the contract, and till Justinian the *heres* of a woman with a claim for *dos* could not sue[9]. The death of the debtor was similarly ineffective, with some exceptions and modifications already noted, in *societas*, mandate, *sponsio* and *fidepromissio*[10]. It may be added that a *heres* was not liable in a real action except so far as he had himself possessed, not, for instance, where the deceased had ceased to possess but was still liable[11].

(*c*) *Capitis deminutio minima* of a creditor, as a rule, simply transferred his right to the person[12] into whose *potestas* he passed, but this belongs rather to the subject of succession otherwise than on death[13]. *Capitis deminutio minima* of the debtor extinguished his contractual

reaching liability, Seckel, Heumann-Seckel, *Handlexicon*, s.v. *custodia*. Kuebler (*Berliner Festschrift für Gierke*, 2. 235 sqq.: *Z.S.S.* 38. 73; *ib.* 39. 172) arrives at the following as the classical scheme. One who does not benefit is liable only for *dolus*. Where both benefit each is liable for *culpa*. One who alone benefits is liable for *custodia* also and in some cases for all risks. Haymann (*Z.S.S.* 40. 167 sqq.) considers liability for *custodia* in the technical sense to have applied to *commodatarius*, the worker for hire (*fullo*, *sarcinator*), and to *nautae caupones stabularii*.

1 P. 2. 16. 1; Coll. 10. 2. 2 G. 3. 206, 207; P. 2. 4. 3. 3 *Ante*, § CLXXXVIII. 4 Inst. 3. 19. 2; 45. 1. 83. 5. 5 45. 1. 37. 6 As to alternative obligations, *post*, § CXCIII. 7 *Ante*, § CLV. 8 *Ante*, §§ CLXXVIII sq. 9 Ulp. 6. 7. 10 *Ante*, §§ CLVI, CLXXVIII sq. 11 6. 1. 42; see 10. 4. 12. 5. A rule of late law in *vindicatio*, *ante*, § XCI. 12 Gaius gives the chief exceptions, 3. 82 sqq. 13 *Ante*, §§ CXLI sq.

and other non-penal obligations at civil law, subject to praetorian reliefs already dealt with in the same connexion[1].

(*d*) Prescription. Actions might be barred by lapse of time. The civil law had no such rule except in a few cases, but many praetorian actions were limited to an *annus utilis*. The matter will be considered under the law of procedure[2]; here it is enough to say that leaving out of account the cases of surety, which were under special rules already considered[3], prescription began, in general, to run from the time when the action could have been brought[4], *i.e.* the first *dies utilis*, but it was delayed till puberty of the plaintiff[5], and, in late law, in other than *actiones perpetuae*, till a minor plaintiff was of full age[6]. It was interrupted, and must begin again, if the debtor gave any form of acknowledgment[7], and it ceased to run on *litis contestatio*, in classical law[8], and the institution of legal proceedings under Justinian[9]. It may have been suspended if from any cause the ordinary sittings of the courts were suspended. It is disputed whether its running, having once begun, was suspended if from any cause action became impossible[10], but if a debtor was absent and so could not be sued, interruption could be caused in later law by notice to a court[11].

The lapse of a principal action might destroy subsidiary claims, though they arose at a different time. Thus a surety was released if the debt was time-barred[12], and claims for interest were similarly barred to the extent already stated[13].

(*e*) *Compensatio*. Set off. The question, when set off might be pleaded, and what sets off might be used, will be discussed later[14]; here we are concerned only with the rules applied in cases in which it was in fact available. The starting-point was the rule that, though set off was, so to speak, apparent only when an action was brought, it really existed from the time when the debtor's claim first became enforceable. Thus if interest was due on one of the debts, whether on the other or not, interest ceased to run "*pro rata*" as soon as the compensating debt existed[15]. But a compensating debt must be fully due, *i.e.* not conditional

1 Penal liabilities were not affected, 4. 5. 2. 3; *post*, § CXCVI. *Capitis deminutio maxima* and *media* have been considered in connexion with *obligatio naturalis* (*ante*, § CLXXXIX). Here too, penal liabilities were not affected, 4. 5. 2. 3. 2 *Post*, § CCXXXIII. 3 *Ante*, § CLVI. 4 C. 7. 39. 3. 1. 5 C. 7. 39. 3. 1 a; C. 7. 40. 2. 6 C. 2. 40. 5. 1. 7 C. 7. 39. 7. 5 a. 8 12. 2. 9. 3. 9 C. 7. 40. 2. 1. 10 As it is expressed, whether the time was *utile*, *ratione cursus*, or only *ratione initii*. The latter view seems the better, the other being difficult to reconcile with the existence of *restitutio in integrum* where an action had become time-barred by absence (*post*, § CCXLIV). See Girard, *Manuel*, 741 (citing Ubbelohde, *Berechnung der Tempus utile*); Dernburg, *Pandekten*, 1. § 90, and for a different view, Savigny, *System*, 4. 433 sqq. 11 C. 7. 40. 2. 12 *Ante*, § CLVII. 13 *Ante*, § CLXXXVIII; C. 4. 32. 26. pr. As to *naturalis obligatio* surviving *praescriptio*, *ante*, § CLXXXIX. 14 *Post*, § CCXXXVIII. 15 16. 2. 11; C. 4. 31. 4.

or *ex die*[1], and it must be a real debt, not one open to an *exceptio*[2]. It might be one already before the court in another case[3].

We are told that one who had a set off, and yet paid, could recover by *condictio indebiti*[4]. But this is a hasty extension, by the compilers, to *compensatio*, of a rule laid down originally for *deductio*, *in bonorum emptio*, where it was reasonable, as otherwise the creditor would get only a part of his debt. Applied more generally it would mean that a debt was extinct by the mere existence of a set off, but this was not so[5]. It might be extinct if the debtor chose to plead the set off, but if he did not, his right to sue on it was unaffected[6], and even if it was pleaded the *iudex* had discretion to ignore it, as being uncertain, or not easily liquidated, or on any other ground, and this left it existing. If however he ruled that it had no existence, this had the effect of a judgment, and any later action on it would be met by *exceptio rei iudicatae*[7].

(*f*) *Lex.* There were several cases, into which we need not go, in which the law deprived a man of his right by way of penalty, *e.g.* where a creditor seized the thing by force[8].

(*g*) *Duae lucrativae causae.* There was a rule that two lucrative causes of acquisition could not exist in respect of the same thing and the same person[9]. If then the *res*, being due on, *e.g.*, legacy and gift, had been received under one, there was no claim even to the value under the other. But both must be gratuitous and the *res* must have been received, not its value, and any difference might be claimed. Thus if the legacy was simple and it was received by the gift, under some charge, the difference in value could be claimed[10]. The rule is commonly based on impossibility, though the texts do not say this, and it is not clear why it was more possible because he had paid for the *res*. It is replied that it was equally impossible here, but there was equitable relaxation; he was entitled to be reimbursed what it had cost him[11]. Some writers treat it as an interpretation of the donor's intent[12]. Most of the texts make it clear that he must have the thing. One which does not is corrupt[13].

(*h*) *Confusio.* Where the right and liability vest in the same person[14],

1 Except where though it is due a *iudex* has given time for payment, 16. 2. 7. pr.; h. t. 14; h. t. 16. 1. 2 It may be a *naturalis obligatio*, but not all such could be used as set off, 16. 2. 6; *ante*, § CLXXXIX. 3 16. 2. 8. 4 16. 2. 10. 1. 5 See Girard, *Manuel*, 721. 6 C. 4. 31. 14. 1. 7 16. 2. 7. 1. 8 *Post*, § CXCIX. 9 44. 7. 17; Inst. 2. 20. 6. 10 45. 1. 83. 6. The Digest says, in words due to Justinian, that even if under one will he has the *res*, he can get it under the second if the testator so intended, 32. 21. 1. In the Inst. the contrary is stated, Inst. 2. 20. 6 in f. 11 Dernburg, *Pand.* 2. § 68. 12 This would justify 32. 21. 1 as against Inst. 2. 20. 6. For discussion of various views, Windscheid, *Lehrb.* 2. § 343 a; cp. 50. 17. 139. 1. 13 30. 108. 4. It seems to make the second gift void, though the first has not yet operated. It deals primarily with *legatum debiti* (*alieni*). See Schulz, *Z.S.S.* 38. 176. The article deals with the whole question of concurrent obligations. See also Beseler, *Beiträge*, 4. 326 sqq. 14 46. 3. 107.

the case being regarded, though not quite consistently, as one of automatic payment. A common case was that of one party being *heres* to the other, but it might also occur, *e.g.*, by entry on *societas omnium bonorum*, or where a noxal creditor acquired the guilty slave. That it was not really discharge appears from the facts that if the *hereditas* was sold as such the right revived[1], that if one *correal* debtor was *heres* to the party on the other side, the debt remained as against the others[2], and while *confusio* affecting the principal debtor released a surety, the converse was not true[3]. *Confusio* might occur on the side of debtors or creditors only, *e.g.* where one of joint debtors or creditors inherited from another. He retained the two rights, or two liabilities, though satisfaction of one discharged the other[4]. But if they were not equally advantageous, *e.g.* one of them had a surety or pledge, the less advantageous was extinct[5].

It is to be noted that *compensatio*, *duae causae*, and *confusio* usually resulted from voluntary acts, but they are cases in which it is an indirect and possibly undesired and uncontemplated result of the act.

CXCIII. Voluntary modes of extinction. Besides the obvious cases of occurrence of *dies*, or some other event, which was to release on the terms of the contract, there were three important cases.

Solutio. Performance. This was doing what the liability required. By agreement something else might be substituted—*datio in solutum*—and, on the Sabinian view, which prevailed, this was an *ipso iure* discharge, the Proculian view being that it gave only an *exceptio*[6]. If the substituted thing was not properly done, *e.g.* if ownership in the substituted thing was not given, the classical view appears to have been that the original right revived[7], though some texts, probably interpolated, give an *actio utilis ex empto* for the substituted thing[8]. But of course a performance defective in this way might be set right by *usucapio*[9].

The *solutio* must be of the whole of that debt, with accessories, etc., and must be at the agreed place[10]. If none was agreed, there were elaborate rules as to place of payment[11]. If there were several debts a *solutio* was imputed to that named by the debtor[12]. If he named none the creditor might then and there impute it to debt already due, but must consult the interest of the debtor, choosing the most onerous.

1 18. 4. 2. 18; h. t. 20. 1. See G. 4. 78. 2 46. 1. 71. pr. If there was a right of regress between the *correi*, *e.g. socii*, the debt was extinct to the extent to which reimbursement might be claimed under this right. 3 46. 1. 21. 3. 4 45. 2. 13; 46. 1. 5. 5 Arg. same texts. 6 G. 3. 168; Inst. 3. 29. pr.; C. 8. 42. 17. 7 46. 3. 34. pr. See Francisci, *Bull.* 27. 311, citing Rabel. 8 13. 7. 24. pr.; 42. 4. 15; C. 8. 44. 4, etc. 9 In case of money debt, if the debtor had nothing but land, and could not sell that, the creditor might be compelled, in late law, to take it at a valuation (Nov. 4. 3), and the court might in late law compel the creditor to accept payment by instalments, 12. 1. 21. The so-called *beneficium competentiae* (*post*, § CCXXXIV) gives a similar result. 10 13. 4. 9. 11 See Van Wetter, *Pandectes*, 3. § 289. 12 46. 3. 1.

Failing any distinction he might impute it to the oldest[1]. If he did not impute, the court would, on the same principle[2], and if no distinction could be drawn it was proportional payment of all the debts[3]. Payment might be made by a third person, unauthorised[4], but it must be to the creditor, his authorised representative, or a *solutionis causa adiectus*[5]. Thus payment to a *negotiorum gestor* could be reclaimed by *condictio* before ratification[6]. Payment to a creditor of a creditor might discharge if it was a reasonable *negotii gestio*, but it operated only as *compensatio*, not as *solutio*[7]. Of course both parties must be *capaces*[8].

Payment extinguished the debt and released pledges and sureties[9], subject to what has been said as to cases in which payment was treated as purchase of the debt, where a surety paid (*beneficium cedendarum actionum*)[10].

Attempted payment put the creditor in *mora*[11]. If, after tender, the thing was deposited in a public place, *e.g.* a temple, with, under Justinian, the leave of a *iudex*, the debtor was released as by payment, though, till the creditor took the thing, he could revive the debt by taking it back[12]. If it could not be so deposited, *e.g.* live-stock, he might sell it for the benefit of the creditor, and, apparently he was in no way responsible if he let the thing go to waste, at any rate in sale[13].

From the point of view of *solutio* there was an important distinction between divisible and indivisible obligations. They might be indivisible by agreement or by nature. Thus an obligation to do a piece of work, to build a house or transfer an indivisible right, *e.g.* a praedial servitude, was indivisible: there could be no partial *solutio*[14]. So long as performance was incomplete the whole remained due and could be sued for[15]. An alternative obligation was indivisible. If one who owed 100 or a house paid 50, he could still be sued for 50 or a house. If the action was limited to 50 or a half share in a house, the result might be the render of a half share in a house which would not be what was contracted for[16].

1 *Ib.* in f.; h. t. 2. **2** 46. 3. 3. 1–5. pr. **3** 46. 3. 8. **4** 3. 5. 38; 46. 3. 72. 2. As to Labeo in 46. 3. 91, and the rule: "*invito beneficium non datur*" (50. 17. 69), see *Z.S.S.* 38. 317 sqq. **5** 3. 5. 38; 46. 3. 12. 1; 50. 17. 180. Texts appear to disagree on the question whether payment can still be made to *sol. causa adiectus* who has suffered *capitis deminutio* or in any way materially altered his position (45. 1. 56. 2; 46. 3. 38. pr.; h. t. 95. 6). See Desserteaux, *Mél. Girard*, 1. 353; *Capitis deminutio*, 2. 145 sqq. His conclusion is that it was a question of intent with a general presumption that the *facultas* was destroyed by any fundamental economic change in the *status* of the *adiectus*, whether it amounted to *c. d.* or not. He handles it throughout, however, as a *facultas recipiendi* rather than a *facultas solvendi*. **6** 46. 3. 12. 4. **7** 44. 4. 6. **8** Inst. 2. 8. 2. As to pupils and minors, *ante*, §§ LVI, LXII. **9** Inst. 3. 29. pr. **10** *Ante*, § CLVII. See also assignment, *ante*, § CLXXXIX, and *successio in locum*, *ante*, § CLXVIII. **11** *Ante*, § CLXXXVIII. **12** 22. 1. 7; h. t. 41. 1; 46. 3. 39; C. 4. 32. 2; h. t. 6, 9, 12 and 19. **13** 18. 6. 1. 3, 4; *ante*, § CLXXXVIII. **14** 45. 1. 2. 1; h. t. 72. pr. **15** 8. 1. 17. **16** 45. 1. 85. 4.

Apart from this case indivisibility was important chiefly where there were several parties; it had the effect that, quite apart from solidarity, each might be sued for the whole[1]. Where they were common owners or *socii* or *coheredes*, and they would practically always be one or another, adjustment would be made by *pro socio* or a divisory action. The same point might arise in *confusio*. If *A* and *B* were under an obligation to do a piece of work for *C*, and *A* became *C*'s *heres*, he could, in that capacity, claim performance from *B*, though in their mutual relations he would have to bear half the cost. But indivisibility presented many difficulties[2].

Alternative obligations, to give *A* or *B*, also raised questions. The transaction might make it clear which party was to choose[3], but if it did not, the choice was with the person liable, the promisor[4], vendor[5], *heres*[6], or the husband restoring *dos*[7]. But in legacy *per vindicationem* it seems to have been with legatee[8]. The payment of a part of one alternative was not even a partial discharge: the case was pendent. If that payment was completed the obligation was discharged: if the other payment was made, the part first paid could be recovered as *indebitum*[9]. *Acceptilatio* in respect of one alternative discharged the *obligatio*, and *acceptilatio* of part of one alternative discharged it *pro parte* if it was divisible, and the rest could be satisfied by giving the proper proportion of either, the point being that here there was no possibility of being put off with part of each[10]. A pact not to sue for one alternative discharged the obligation, *iure exceptionis*, unless it was really a pact to limit the right of choice[11]. A choice by *promissor* could be varied till actual completion[12], and probably the same was true in the other case[13]. The rule was different in legacy: a declaration by the person entitled to choose fixed his choice[14]. Consistently with this distinction, a *promissor* who paid one alternative object, not knowing he had a choice, could condict, but a *heres* could not, nor could a legatee who had, in the same way, vindicated one[15]. If a *promissor* paid both, in mistake, he could in later law vindicate whichever he liked, at least where he had the original choice[16].

If one of the alternatives was *ab initio* impossible, the other was alone *in obligatione*, so that if the other afterwards became possible, it

1 8. 1. 17; 10. 2. 25. 9. **2** Van Wetter, *Pandectes*, 3. § 337; Windscheid, *Lehrb.* 2. § 253 and literature there cited. **3** 30. 8. 2; h. t. 84. 9, 11; 23. 3. 10. 6; 45. 1. 75. 8, etc. See on the whole subject, van Wetter, *op. cit.* § 326. **4** Inst. 4. 6. 33 d; D. 13. 4. 2. 3; 45. 1. 75. 8. **5** 18. 1. 25. pr.; h. t. 34. 6. **6** 30. 109. 1; 31. 15. **7** 23. 3. 10. 6. A contract in which one alternative is contained in the other is not alternative; it is for the lesser. 31. 43. 3; 45. 1. 12. **8** 31. 19; h. t. 23. **9** 12. 6. 26. 13, 14; 45. 1. 2. 1; h. t. 85. 4; 46. 3. 34. 10; 30. 8. 2; h. t. 34. 14; D. 31. 15. **10** 46. 4. 17. But *acceptilatio* is a nullity if what is dealt with was conditional, h. t. 13. 6. **11** 2. 14. 27. 6 (?interp.). **12** 45. 1. 138. 1. **13** 45. 1. 112. pr. **14** 30. 84. 9; 31. 11. 1. **15** 12. 6. 32. 3; 31. 19. **16** There had been disputes, 12. 6. 32. pr.; C. 4. 5. 10.

was still a nullity[1]. If one became impossible after the *obligatio* was created, without fault or *mora*, the other was simply due[2], but if, *e.g.* by declaration of the *heres*, the obligation had been fixed on one, impossibility affecting that one ended the obligation[3]. There is a suggestion in one of the texts for legacy[4] and an uncertain inference from another for contract[5], that where one had become impossible, *e.g.* by death of the slave due, there was still the choice of giving the value of this, but most of the texts are explicit that the other must be given[6]. If both so died the obligation was at an end, but, as we saw, a buyer would still have to pay the price[7]. If one was tendered and was destroyed while the creditor was *in mora*, the obligation was completely discharged[8]. If one died by fault of, or during *mora* of, the debtor he must give the other where he had the choice[9]. If both died, the first by accident, the second by his fault, he must give the value of the second[10]. If in the other order the obligation was discharged, subject, at least in later law, to an *actio doli*[11].

This case of alternative obligation, in which both were *in obligatione* but only one, it was uncertain which, was *in solutione*, must be distinguished from *facultas solutionis* where the *facultas* was not *in obligatione* at all. The *solutionis causa adiectus* is the most familiar instance[12], but there are others, *e.g.* in *laesio enormis*, the right of the buyer to avoid restoration by paying the difference[13], or the right of a third person, holder, to pay off a pledge instead of restoring the thing to the creditor[14]. Such a discretion might be attached to any contract; it might be a question of interpretation whether it was *facultas* or alternative. The distinction was important in that if the *res in obligatione* was destroyed or otherwise ceased to be due, there was no liability to render what was *in facultate*.

CXCIV. *Novatio.* This was the extinction of an obligation by the substitution of another for it. To bring the rules of *novatio* into play the new obligation must have been by way of *stipulatio*, in the law as we know it, but it is probable that while it existed the contract *literis* served the same purpose[15]. The notion of *novatio* is said to originate in the doctrine that there cannot be two distinct obligations for the same thing between the same parties any more than there can be two actions for *eadem res*. This principle however is not well evidenced; the text mainly relied on

1 45. 1. 128; 46. 3. 72. 4. 2 18. 1. 34. 6; 23. 3. 10. 6; 30. 47. 3; 31. 11. 1; 46. 3. 95. pr. 3 30. 84. 9; 31. 11. 1. 4 30. 47. 3. 5 46. 3. 95. 1. 6 See 13. 4. 2. 3. 7 18. 1. 34. 6. 8 45. 1. 105. 9 46. 3. 95. pr. 10 Arg. 46. 3. 95. 1. 11 *Ib.* For the case of killing of one of promised slaves, by *stipulator*, 9. 2. 55. For the case of one or both being *in fuga* or *apud hostes*, 30. 47. 3. As to the many disputes on the foregoing questions, see, *e.g.*, Van Wetter, *Pandectes*, 3. § 326. 12 *Ante*, §§ CLIV, CXCIII. 13 *Ante*, § CLXX. 14 20. 6. 12. 1. 15 See G. 3. 128–30; Cicero, *de Off.* 3. 14.

merely says that of two stipulations for the same between the same, one is void[1], a much narrower proposition[2]. There are texts which admit the existence of two obligations for the same thing between the same parties, but these are treated as late equitable relaxations, though Ulpian regards it as an old settled rule[3]. However this may be, the rule of classical law was that, to effect a *novatio*, the new contract must involve some change[4], which might be either in form, or parties or terms. The main rules were the following:

There must be an existing obligation, though it might be merely natural[5], but some natural obligations were not susceptible of novation[6]. If the old bargain was void and the parties did not know this, there was an *exceptio* under the new, or a *condictio* if it had been satisfied. If the *promissor* did know, the new contract was valid, but it was in effect a *donatio*, not a *novatio*[7].

There must be a new obligation set up by formal contract. This need not, however, be perfectly valid; it might novate and destroy the original obligation though itself "*inutilis*." A text in the Digest suggests that it must set up an *obligatio*, which may be either *civilis honoraria* or *naturalis*[8], but this was neither necessary nor sufficient. A promise by *sponsio* by a peregrine and a promise by a slave (Servius held otherwise) did not novate, though these set up a *naturalis obligatio*[9]. These were not regarded as verbal obligations at all. But a *stipulatio post mortem*,

1 45. 1. 18. This must be the second, for otherwise it would be a novation. 2 It is not a general overriding principle. It is a narrow proposition. It is merely that if there is a contract it is not superseded by another identical in all respects. There is nothing "*inelegans*" in itself in the existence between two persons of two obligations tending to the same thing (see n. 3). A civil and a praetorian obligation cannot be the same, but both may exist. Thus a man often has the choice of *actio ex empto* and *actio quanto minoris* (*ante*, § CLXXII). It is true that if owing a thing by sale I afterwards make a *promissio* of the same thing, the old *obligatio* is destroyed by *novatio*. But what if *animus novandi* was expressly excluded? What if, owing a thing by a promise for which there was a counter promise, I afterwards agree to sell it for a price? It seems that the old *obligatio* still exists at civil law, though there would be an *exceptio*. If a legacy to the creditor is advantageous, it is valid not only to the extent of the advantage, but absolutely, and the same is true of *legatum dotis* (*ante*, § CXXIII), yet these are assuredly "*eadem res*." 3 19. 1. 10; 44. 2. 14. 2; 50. 17. 159. See, however, Girard, *Manuel*, 706, n. 2. 4 G. 3. 177; Inst. 3. 29. 3. 5 46. 2. 1. 6 *Ante*, § CLXXXIX. 7 12. 6. 62; 14. 6. 20. 8 46. 2. 1. 1. 9 G. 3. 176, 179; Inst. 3. 29. 3. The remark by Gaius that where it was a slave it is as if stipulated "*a nullo*" is not the real reason, for the statement is incorrect: it creates a *naturalis obligatio*, apart from the edictal rules. In fact the meaning of the statement, though it has been used for far-reaching conclusions, is obscure. There was no difficulty about taking a novatory promise, but as this releases the old, there must be authority, or, *in re peculii*, what is the same thing, *administratio peculii*. P. 5. 8. 1; D. 46. 2. 20; h. t. 34. These texts say that a *procurator* could novate for us: this means only that his general authority is as good as an express mandate to a third party, implying our assent. The rights under the contract made with him will not be directly acquired by us.

though void, destroyed the old obligation, and there are other cases[1]. Apparently any *stipulatio* sufficed if the parties were *capaces* of the form whether in the individual case it was valid or not.

The new promise must refer to the old debt, notwithstanding the change. A *stipulatio* for another thing in substitution was not a *novatio*, though it no doubt had the effect of a *pactum de non petendo* on the old promise. This rule was not abolished by Justinian, but was relaxed. The sum of money might be altered, the right, *e.g.* servitude, might be increased, but it does not appear that the debt could be wholly different[2].

There must be *animus novandi*. The texts have been so altered that the history of this matter is difficult if not impossible to trace. Working backward we may say that under Justinian it must be clear on the face of the transaction that *novatio* was meant[3], that in later classical law the intent must exist, *i.e.* be proveable[4], and that Gaius does not mention intent[5]. The better view seems to be that where a new stipulation was made for the same object, but with a change in some factor, *animus novandi* was presumed. It is obvious that it would be necessary in stipulating, *e.g.* with a new debtor, to make it clear that it was not intended merely to add a surety to the old *stipulatio*[6]. If there was no change the second *stipulatio* was ignored.

There must be change in form, parties or terms. As to form, the only possible one was substitution of *stipulatio* for debt in some other form, and it is clear that here *novatio* was treated as a matter of course[7]. Till the relaxation by Justinian the only changes of terms we hear of are addition or removal of *dies*, *condicio* or surety[8]. As to surety Justinian speaks of *fideiussor* where Gaius says *sponsor*, and it may be that in the time of Gaius only change as to *sponsor* sufficed. And he notes that the Proculians did not admit that change as to surety was enough. As to conditions, it must be noted that a conditional *stipulatio* neither novated nor could be novated[9]. A conditional *stipulatio* novated a simple one only when the condition was realised, so that it became identical with the old one. If there was no other change one might have expected this to nullify the second[10]. But we have seen that a conditional *stipulatio* had an existence and was not a nullity in practice even before the condition was satisfied, since it acted as a *pactum de non petendo* on the old[11]. If the first was conditional and the second simple, there was *novatio* when the condition arrived so that there was a debt to novate[12]: here there is the same difficulty[13].

1 G. 3. 176. 2 45. 1. 58; h. t. 56. 7; h. t. 91. 6; 46. 2. 1; C. 8. 41. 8. 3 C. 8. 41. 8. 4 46. 2. 2; Inst. 3. 29. 3 a. 5 G. 3. 176 sqq. 6 See 46. 2. 6. pr. (interp.). 7 13. 5. 24; G. 3. 177. 8 G. 3. 177; Inst. 3. 29. 3. 9 46. 2. 14. 10 *Ante*, p. 564. 11 12. 1. 36; G. 3. 179; dispute, *ante*, § CXLVIII. 12 46. 2. 14. 1. 13 The texts do not suggest any change other than that affecting the condition.

It might be a change of parties. Change of creditors occurred where, with the assent of the creditor, the debtor promised the debt to a new creditor. It was in effect the assignment of a debt. Change of debtor occurred where a new debtor promised the same debt to the creditor: the assent of the original debtor was not needed; that of the creditor was evident. It might, of course, be by way of gift, but more often the new debtor was a debtor of the old one[1]. In transactions of this kind there was a special terminology. If *A* owed *B* money and the debt was novated by *stipulatio* of *B* in which *C* promised to pay, it was usually the case that *C* was indebted to *A*. It was substitution of the debtor's debtor. There was not merely *novatio*; there was *delegatio debitoris*[2]. *C* was *delegatus*. But the affair had another side. There was another *novatio*, for *C*'s debt to *A* was now novated and replaced by a debt to *B*. This was the strict meaning of *delegatio*, substitution of *A*'s debtor for himself in a debt of *A*'s. But the word was used loosely wherever *C* promised to pay *B* on behalf of *A*, whether *C* was a debtor to *A* or not[3]. In like manner, the word *expromissio* meant, strictly, a promise by a debtor to his creditor's creditor, by way of *novatio*[4], but it was also used whether the novating *promissor*, *expromissor*, was a debtor or not[5]. The above case is within the strict senses of both expressions, but it would be *expromissio* in the wider sense even if *C* had not been indebted to *A*. A man could even be called *expromissor* for his own debt[6].

Novatio destroyed the old debt with all securities and liabilities; in particular it purged *mora*, so that, *e.g.*, interest which had begun to run on account of this, ceased to run[7]. Of course the new contract could expressly preserve as much as the parties wished. It also normally created a new *obligatio*, subject to what has been said, but the accessory elements of the old one did not apply to this, except so far as they were expressly preserved[8].

The effect of *litis contestatio* was akin to that of *novatio*[9], and it is here and there in the sources so called[10]. But it was produced in effect without the consent of both parties, for though, in classical law, litigation still rested in form on consent, this was unreal, since it could be compelled, and the *novatio* was usually distinguished as *novatio necessaria*. Its effects, considered later[11], were not quite the same. Thus it did not, of course, purge *mora* or destroy pledges[12], and, in general, the

1 There may be more than one change. If *A* owes *B* 10 on sale, and with *B*'s consent *C* promises to pay this 10 in 10 days all three kinds of change have occurred. 2 46. 2. 11–12. 3 *Ib.*; 23. 3. 5. 8. 4 *E.g.* 23. 3. 36. She is a debtor of the *dos*. 5 12. 3, 4. 6 14. 6. 20; 46. 2. 31. 1. 7 *Ante*, § CLXXXVIII. 8 13. 7. 11. 1. As to validity of defences to the old claim, see 46. 2. 12, and Girard, *Manuel*, 714. 9 G. 3. 180, 181. 10 Vat. Fr. 263; C. 7. 54. 3. 2. 11 *Post*, § CCXXXV. 12 22. 1. 35.

obligation could not differ from that which the action was brought to enforce[1].

CXCV. Release of the debt. The primary rule was that an obligation was to be discharged in the form in which it was made. It seems that performance was not of itself necessarily a discharge in early law. Payment of money borrowed by way of *nexum* did not completely discharge the obligation without release *per aes et libram*, but this may possibly have been due to the effect on the debtor's personal position, and not strictly to the obligation, so that we cannot say that a promise to pay was not discharged, at one time, by payment but only by *acceptilatio* as well[2]. It has however been pointed out that the extreme antiquity of the formal modes of discharge is against the notion that they can have been invented as modes of gratuitous discharge. But performance was a complete discharge, *ipso iure*, in classical law, and the rule requiring form applied only to voluntary release without satisfaction.

Release *per aes et libram*. This was a solemn weighing with copper and scales, *libripens* and five witnesses. Gaius gives the form for release from judgment[3]. The debtor recited the fact of judgment and declared himself released by copper and scales, the act emanating here, as elsewhere, from the person benefiting under the transaction. The form in Gaius is somewhat corrupt, and no doubt was suitably varied in different applications. Besides judgment it applied to *nexum*, to legacy *per damnationem* of *certa fungibilia*, with a doubt as to measurable things[4], and possibly to any form of *damnatio*[5]. The effect was to destroy the obligation completely.

Accepti relatio. Release of contract *literis* by some form of entry[6]. It probably consisted in an entry in the debtor's *codex* with the creditor's consent. Gaius does not however seem to know of it[7]. But a special form of it is *a priori* probable and the form *acceptum referre* is well evidenced[8].

Acceptilatio. This was the most important formal mode, as it released from the most important formal contract of classical and later law, *stipulatio*, as well as from *iusiurandum liberti*[9]. Of the form given by Gaius the essential words were "*habesne acceptum?*" "*habeo acceptum*[10]."

1 See, however, as to noxal actions, *post*, § CCV. 2 Eisele, *Beiträge*, 16, finds evidence in G. 4. 21. See G. 3. 174, "*me a te solvo.*" 3 G. 3. 173 sqq. 4 G. 3. 175. 5 It is suggested that *sponsor* to have the *actio depensi* must have paid *per aes et libram*, the name of his action, and the repeated use by Gaius of the word "*dependere*" in speaking of him supports this. Eisele, *Studien*, 28 sqq. 6 Vat. Fr. 329. 7 G. 3. 170. 8 Lewis and Short, *Latin Dictionary*, s.v. Accipio, E. See, however, for a special view of its nature, Heck, *Archiv f. c. Pr.* 116. 129 sqq. 9 46. 4. 13. pr. It is not shewn that it applied to *dotis dictio*, but it probably did. 10 G. 3. 169.

Ulpian says that "*acceptum facis*," "*facio*" would do as well, and that as it was, like *stipulatio, iuris gentium*, it might be in Greek[1]. It could not be under express *dies* or *condicio*[2], though the obligation released might, and the *acceptilatio* would operate when the *dies* or *condicio* arrived[3]. It might cover more than one *stipulatio*, and, conversely, though this was doubted in the time of Gaius, it might, in later classical law, be a release of part of a promise, unless the promise was indivisible, in which case the *acceptilatio* of part was void[4]. It could not be by *procurator* in classical law[5], and while a slave could take an *acceptilatio* he could not give one[6].

Here too the act proceeded from the party to be released. It effected complete extinction, like payment[7], releasing sureties and *correi*, and where it was given to a surety it released the principal, even though his contract was not *stipulatio*[8].

Though it applied only to verbal contract it might be made effective in a wider field by first novating the contract. The *stipulatio Aquiliana* was an important illustration of this. It was a means of discharging any debts existing between two parties by novating them into a *stipulatio* and releasing this by *acceptilatio*. We have the form in two places[9], not quite identically, and thus shewing that it might vary both in expression and inclusiveness. Both are very inclusive. The *stipulatio* covered *iura in rem*, these being contemplated as actionable liabilities[10]. It might cover only one group of debts or all. Neither form seems to cover delicts and possibly it was not usual to include these. It must be remembered that its use was not an act of charity; men do not usually abandon their claims for nothing. If there were cross claims between parties enquiry would shew that a balance was due one way. Matters were simplified by *stipulationes Aquilianae* and *acceptilationes* on the old debts and a new *stipulatio* for the balance[11]. No doubt it was often a compromise.

Consensual contracts could be discharged as from formation by *contrarius consensus*, provided nothing had yet been done. This was a full civil law discharge[12]. If something had been done, or some event had released one party, it would only be a *pactum de non petendo* available by way of *exceptio*[13]. It was disputed whether giving a surety was

1 46. 4. 7; h. t. 8. 4. **2** 46. 4. 4; h. t. 5. But like other *actus legitimi*, it might be dependent on some tacit condition, h. t. 11. 3; 23. 3. 43. pr.; 50. 17. 77. **3** 46. 4. 12. **4** G. 3. 172; D. 46. 4. 9; h. t. 13. 1. **5** 46. 4. 13. 10. H. t. 3 is probably interpolated; see also C. 8. 41. 4. **6** 43. 4. 8. 1, 2; h. t. 11; h. t. 22. **7** 46. 4. 5. **8** 45. 2. 2; 46. 4. 13. 7, 12. An *acceptilatio* which failed as such might be good as a *pactum de non petendo*, 46. 4. 8. pr. **9** 46. 4. 18; Inst. 3. 29. 2. **10** Effect on *dominium* not stated: apparently, *traditio brevi manu*, giving only bonitary ownership of *res mancipi* in classical law. **11** 2. 15. 2; P. 1. 1. 3. **12** 46. 4. 8. pr.; h. t. 23; Inst. 3. 29. 4. See 18. 5. 5. pr.; 46. 4. 23; release by one is, in such a case, mutual release. **13** 2. 14. 58; C. 4. 45. 1; h. t. 2. But as they are all *bonae fidei*, this is much the same thing. The thing done must, apart from special agreement, be undone.

such part performance as barred civil discharge by *contrarius consensus*[1].

As contracts *re* essentially involved something done there was no discharge by *contrarius consensus*. Acceptance of return of the *res* would in effect destroy it for the future, *ex fide bona*, but not for the past, unless there was special agreement, amounting to *pactum de non petendo*[2].

Pactum de non petendo. This was, apart from delict, a praetorian defence. It was an informal agreement not to sue, express or tacit, *i.e.* inferred from conduct. It might apply to any debt or part of a debt and be subject to any limitations[3]. It might be consented to by messenger, and even by a slave[4]. The defence was an *exceptio pacti*, which need not be expressed in *bonae fidei iudicia*, and might be met by *replicatio doli* and so forth. The most important point is the distinction between *pacta in personam* and *pacta in rem*.

Pacta in rem were pacts that an action should not be brought, with no limitation as to the person who was not to sue or be sued. *Pacta in personam* were pacts that action should not be brought by or against particular persons. This was commonly shewn by naming the person: "*ne T* (*a T*) *peteret* (*peteretur*)," but this was not conclusive. It was to be decided, *ex mente*, the name being sometimes inserted only to shew who made it, with no intention of limitation[5], and there was a general presumption that the pact was *in rem*. It might be made to exclude particular persons who would otherwise be entitled to use it[6]. A pact *in personam* affected only him who made it, not even his *heres*[7]. One *in rem* affected any one suing or sued for the same debt, if there was a right of regress, as otherwise the pact would be illusory[8]. Where there were several creditors a pact by one could not be used against the others, even if it was *in rem*, unless there was regress[9]. A surety, as he could claim reimbursement, could use a pact made with his principal[10], but not *vice versa*, or one made with a co-surety, as the right of regress did not exist[11]. *Socii* had such a right, and thus the pact of one could be used by the others[12]. The rule, being due to the right of regress, did not

1 Papinian allows it. Paul on Julian's authority holds that the release is only by *exceptio*. 18. 5. 3; 46. 3. 95. 12. **2** Texts are wanting, see 13. 6. 17. 5. **3** 2. 14. 7. 6; h. t. 17. 3; h. t. 27. 7; h. t. 41. **4** 2. 14. 2; h. t. 17. 7–19; h. t. 28. 2. **5** 2. 14. 7. 8. **6** 2. 14. 17. 3; h. t. 22. **7** 2. 14. 21. pr.; h. t. 25. 1; 24. 3. 31. 1; 23. 4. 20. 2. **8** 2. 14. 21. 5; h. t. 32. **9** 2. 14. 27. pr.; see h. t. 28. 1. **10** 2. 14. 21. 5; h. t. 32. **11** 2. 14. 21. 5; h. t. 25. 2; h. t. 26. **12** 2. 14. 14; h. t. 25. pr. Julian in 34. 3. 3. 3 seems to deny *socii* the pact. It has been maintained on 46. 3. 34. 11, that correal debtors never had the right in classical law, and similarly, on 2. 14. 19. 1–21. pr.; 24. 3. 31. 1; 23. 4. 20. 2, that a *heres* had not the right in classical law unless expressly mentioned. See Cuq, *Manuel*, 625. But in all these texts the pact is expressly *in personam*. The suggestion is that the distinction between *p. in r.* and *p. in personam* is largely the work of the compilers.

apply where on the facts this was excluded. Thus a *fideiussor* who acted *donandi animo*, renouncing his right of regress, could not use his principal's pact[1], and conversely, if, though nominally a *fideiussor*, it was really his own affair, he could use a pact made with his nominal principal, for the formal positions were in fact reversed[2]. A pact made with a vendor was available to his buyer[3], since the buyer had or might have a claim *ex empto*. A pact by or to the *possessor* of a *hereditas* did not in any way affect the true *heres*[4]. Correal debtors as such had no right of regress, and a pact not to sue one did not therefore affect the others[5].

A pact that a third party should not be sued was in principle void, and was not confirmed though the third party afterwards became *heres* to the pactor[6]. Thus it was generally held that a pact by *reus* that a surety should not be sued was of no value, but Paul held that as in such a case it was the principal who really benefited, the purpose of the general rule required that the surety should be allowed to use the pact[7]. Pacts by a *tutor* or *curator* that the pupil or *furiosus* or *prodigus* should not be sued were available to the ward, an equitable relaxation, carrying out the principle that actions lying against the guardian could be brought against the ward at the end of the wardship[8].

Within the family the rules were different owing to the fact that the subordinate acquired for the *paterfamilias*. A pact by son or slave[9] "*ne peteretur*" or "*ne a patre peteretur*" was good for the *paterfamilias*[10]. A son's pact "*ne a se peteretur*" was valid for him or the *pater* or his *heres* if sued in any way on the son's obligation[11], but if the son was dead, as it was framed personally, it was useless[12], a rule more logical than reasonable as *de peculio* still lay for a year. A slave's pact "*ne ipse peteret*" was a nullity[13]; he could never sue. But a slave's or son's pact not to sue, if *in rem*, was valid against the *pater*, *in re peculiari*, if he had *administratio peculii* and it was not *donandi animo*[13]. A son's personal pact not to sue might be good, as there were cases in which he could sue[14]. A pact by a *paterfamilias* that the son should not be sued was not valid for the son, but Proculus held that the father could use it if sued on the son's account, to which Paul (or Tribonian) adds the limitation, "*si in paciscendo id actum sit*" which destroys the rule[15].

1 2. 14. 32. **2** 2. 14. 24. **3** 2. 14. 17. 5. Sabinus held that this applied even if it was *in personam*; no doubt the pact is contemplated as part of the *commoda rei*. He also allowed it in case of donee, but this, it would seem, must depend on the terms of the gift. **4** 2. 14. 17. 6. **5** 46. 3. 34. 11. *Ante*, § CLVIII. The rule in 2. 14. 25. pr. applies only to *socii*. **6** 2. 14. 17. 4. **7** 2. 14. 27. 1. **8** 2. 14. 15; h. t. 28. 1; C. 2. 3. 22. But not *vice versa*. See *ante*, § LV. **9** Or one *bona fide serviens*, and no doubt fructuary, within the field of acquisition through such persons. **10** 2. 14. 17. 7–21. 1. **11** 2. 14. 19. 1; h. t. 20. **12** 2. 14. 21. pr. **13** 2. 14. 23. 2. But it will never bar the father's right to sue on an *iniuria* to the son, the father's right being independent of the son's, h. t. 30. pr. **14** 2. 14. 28. 2; h. t. 30. pr. **15** 2. 14. 21. 2.

In some cases where the pact was not available the *exceptio doli* might be used as a "*subsidium*" thereto[1], but the principle is obscure. A debtor had *exceptio doli* on a pact to his procurator or surety[2], provided, says Ulpian, at least as quoted in the Digest, that this was meant, and he applies the same rule as between co-sureties[3]. A father's pact that his son should not be sued gave the son *exceptio doli*, at any rate under Justinian[4]. A slave's pact "*ne a se peteretur*" gave the master an *exceptio doli*[5]. So, too, if a *filius* made such a pact with creditors of a *hereditas* on which he would enter after *emancipatio*, or a slave *heres* acted similarly, though the slave's pact was a nullity, and the son's was lost to him by the *emancipatio*, they had *exceptio doli*, though this was doubtful in classical law, for the case of the slave[6].

In delict, by virtue of words in the XII Tables, pact was a complete defence at civil law, and, as the Tables[7] use the same language as to coming to terms after *litis contestatio* on any claim, it is possible that the same rule applied there, but there is no sign of this in later law.

CXCVI. *Obligatio ex Delicto.* This, the second of Gaius' two classes of obligation, was essentially a wrong done, consisting in breach of a *ius in rem*, giving rise to an action for a penalty, distinct from that which also existed in many cases, for restoration. This type of obligation has some special characteristics which must be noted. As we have just seen a mere pact was a complete defence at civil law, a rule which rests on strict interpretation of the XII Tables. It had other remarkable characteristics which originate in the fact that action on such an obligation was in origin a legal substitute for self-help, which in this case meant revenge. Thus the action did not lie against the *heres* of the wrongdoer[8], revenge being a personal matter. On the other hand, for the same reason it was not affected by *capitis deminutio* of the wrongdoer[9], since, though his legal personality was changed, he was still in fact the same man. Where a delict had been committed by two or more in concert each was liable to the whole penalty; there was no question of satisfaction by one releasing the others[10]. This may be referable to the same notion: revenge would not be so subdivided.

Justinian's symmetrical arrangement, which gives four delicts, is artificial. It treats rapine and theft as distinct delicts, whereas rapine

1 2. 14. 10. 2. 2 *Ib.*; h. t. 25. 2. 3 2. 14. 26. 4 2. 14. 21. 2. 5 2. 14. 21. 1. 6 2. 14. 7. 18, 19. It will be seen that many of the texts have probably been altered, and how far the above rules represent classical law may be doubted. Analogous principles to those stated in the text were applied in case of *confusio*, *transactio* and set off, 4. 8. 34. pr.; 16. 2. 5; h. t. 9. 1; 45. 2. 10. 7 1. 7; 8. 2. Girard, *Textes*, 12, 17; Bruns, 1. 19, 29; Cons. 9. 1. 8 *Post*, § CCXXXIV. 9 *Ante*, § L. 10 47. 2. 21. 9; 9. 2. 11. 2; 47. 10. 34. As to an apparent exception in the cases of *dolus* and *metus*, *post*, § CCIII.

is aggravated theft, and it omits a number of wrongs, some of which will call for discussion, which must on any reasonable definition of the word come under the head of delict. He considers them all to be of one class in that they all originate "*re, id est ex ipso maleficio*," where *res* is used in the sense of *factum*, the explanation being due to Gaius[1]. The four which he discusses, certainly the most important, are *Furtum*, *Rapina*, *Damnum iniuria datum* and *Iniuria*[2].

FURTUM. This is defined by Justinian as "*contrectatio fraudulosa vel ipsius rei vel etiam usus eius possessionisve*[3]." This omits certain elements essential to the definition. In the law as we know it, the subject-matter must have been a *res mobilis* or one which became *mobilis* by the theft, *e.g.* crops[4], though Sabinus is said to have held that there could be theft of land[5]. It must have been with a view to profit, *lucrifaciendi gratia*[6], which is however, as illustrated in the texts, a somewhat unworkable requirement[7]. The *res* must be a *res in commercio* to which some one has a right. Thus there could be no *furtum* of ordinary *res nullius*, or of *res sacrae*, though here there were other remedies[8]. For the same reason there could be no *furtum* of *res hereditariae*, since they belonged to no one at the moment[9]. As a by-product of the old law of *usucapio lucrativa pro herede* the rule actually was that there could be no theft of such things till they had actually been possessed by the *heres*[10]. But if, though the *hereditas* was vacant, there was some other right existing in the *res*, *e.g.* usufruct or pledge, which gave the holder a right of action for theft, this right was not affected, and in such a case the *heres* also had a right of action when he had entered[11].

Contrectatio means handling, and thus theft involved actual meddling with the thing. But it did not necessarily involve taking the thing without consent from the owner's possession into the thief's. That is the obvious case, but there were others, *e.g.* inducing a debtor to pay to him by pretending that he was the creditor, or was the person authorised by him to collect the money[12], or even, according to most of the jurists,

1 44. 7. 4; Inst. 4. 1. pr. **2** The others of importance are mostly praetorian, which would account for their omission by Gaius. **3** Inst. 4. 1. 1. **4** 47. 2. 25. pr. **5** Aul. Gell. 11. 18. 13. As to the *actio de tigno iuncto, ante*, § LXXVIII. **6** 47. 2. 1. 3. It is not so stated in the Institutes or in Gaius or in *Pauli Sententiae*, but it is at any rate for some purposes old law; see Sabinus in Aul. Gell. 11. 18. 21. **7** It seems to mean little more than that mere wanton destruction is not theft whatever else it is. (See Monro, *de furtis*, 77, where it is shewn that the various texts on the matter indicate a very uncertain notion.) See 47. 2. 55. 1. It is contended by Huvelin (*N.R.H.* 42. 73 sqq.) that as a general requirement it is due to Justinian. See also Huvelin, *Études sur le furtum*, 1. 537, 783. **8** See *ante*, § LXVII. **9** G. 3. 201; D. 47. 2. 69. For the remedy by *crimen expilatae hereditatis*, see 47. 19. 1. **10** G. 2. 52; 3. 201; P. 2. 31. 11; D. 47. 19. 2; C. 9. 32. 6. **11** 41. 3. 35; 47. 2. 69–71. The idea seems to be that where the *res* was in the hands of a fructuary all the possession exists which is *de facto* possible. **12** 47. 2. 43. pr., 1; h. t. 81. 6. The essential point is that there is an intention to pass the

knowingly to receive payment of what was not due[1]. Still more striking are the cases of what were called in Justinian's law, *furtum usus* and *furtum possessionis*. That a *commodatarius* should be liable for theft for selling the thing is rational, but the law went further. There was *furtum usus* if a depositee used the thing, or a *commodatarius*, not thinking the owner would assent, used it for unauthorised purposes[2]. It was *furtum possessionis* for an owner to take the thing from one who had a *ius in rem* against him, usufructuary, pledgee or the like, or even from a *conductor* with a right of retention for expenses[3]. These were thefts, and though some classical texts assume that what was stolen must be a *res aliena*[4], the rules were classical, though it is not so clear that the expressions *furtum usus*, *possessionis* were[5]. The notion of theft as involving intent to deprive the owner of his whole interest is not really the Roman conception.

The *contrectatio* must be *fraudulosa*; it must be against the interested person's will[6]. One who supposed that the owner consented was not a thief, nor was one who thought the owner did not consent, when in fact he did[7]. It was not theft to take a thing believing one was entitled, even though the error was one of law, and it was immaterial how causeless the error was[8].

Persons other than the actual thief might be liable to the *actio furti*, *i.e.* those who have helped *ope et consilio*[9]. It is not easy to draw a clear line between these, but, roughly, *ope* means by physical help, and *consilio* by advice, that is, not advice to steal, urging and encouragement, but suggestions as to method and so forth[10]. If several were concerned in a theft, each was liable to the whole penalty; there was no question of release by payment by one of them[11].

There might be *furtum* with no *actio furti*. Thus if a *filiusfamilias* stole from the *pater* there was no *actio furti* as there could be no action at all in such a case, but there was *furtum*, for accomplices were liable

ownership to some one other than the actual receiver. If, however misled, the owner intended to pass the property to the actual receiver it is not *furtum* whatever else it may be.

1 13. 1. 18. The language of this text goes further than the principles expressed in those cited in the last note. **2** 47. 2. 77. pr.; G. 3. 196, 7; Inst. 4. 1. 6, 7. **3** 47. 2. 15. 1; h. t. 19. 5; h. t. 60; G. 3. 200; Inst. 4. 1. 10. **4** G. 3. 195; P. 2. 31. 1. **5** They were probably thought of as *furtum* by wrongly taking the use or the possession. See the discussion and references in Monro, *de furtis*, App. 1. **6** Inst. 4. 1. 1; D. 47. 2. 76. **7** 47. 2. 46. 7, 8. **8** 47. 2. 46. 7; h. t. 83. These rules gave rise to dispute in connexion with the delict of *servi corruptio*, *post*, § CCIII. **9** Inst. 4. 1. 11. It is maintained by Huvelin (*Études sur le furtum*, 1. 392 sqq.) with predecessors, that in early law the expression "*ope consilio*" had no relation to assistance to the thief but referred to the act of the principal, "*ope*" being his act, "*consilio*" his intent. See G. 4. 37. **10** 47. 2. 50. 3; Inst. 4. 1. 11. If it did benefit the thief but was not so intended Gaius doubts whether there is not an *actio in factum* for the *culpa*. See *post*, p. 574, n. 6. **11** C. 4. 8. 1. As to theft by several slaves of the same master, *post*, § CCV.

and the *res* was *furtiva*[1]. So too, no *actio furti* lay where one party to a marriage stole from the other, because no infaming action lay in such a relation[2], but accomplices were liable, the *res* was *furtiva*[3], and there was a special action for the recovery of the property—*actio rerum amotarum*[4]. We are also told that there was no *actio furti* for "*domestica furta*," *i.e.* theft by *liberti* and free employees living with the patron[5]. Apparently the domestic authority sufficed for that[6].

CXCVII. Presumably, in the majority of cases, it would be the owner[7] who proceeded for theft, but other persons might have a sufficient *interesse* to entitle them to sue. Conversely the owner had not the action unless he had an *interesse*, and thus not where someone was responsible to him, so that he did not stand to lose by the theft. The types of *interesse* other than that of the owner were substantially two.

(*a*) The positive *interesse* of one who had a *ius in rem* in the thing, including a *bona fide possessor*[8]. Usufructuary, *emphyteuta* and usuary are the other obvious cases[9]. These had the action by reason of what they lost[10], as also had the owner[11].

(*b*) A negative *interesse* in those who were responsible to the *dominus* if the thing was lost, which *interesse* barred any in the *dominus*[12]. The damages recovered were kept; the owner had no claim to them, though there was in classical law some doubt in the case of *commodatarius*[13]. To bring these rules into operation there must be a real liability. If the person liable under the contract was insolvent, so that he had nothing to lose, the owner had the action and he had not, and if he became insolvent before the action it passed to the owner[14], though here, too, there were doubts in *commodatum*[15]. So, too, if the *dominus* released his claim under the contract, he had the action and the other party had not[16].

1 5. 1. 4; 47. 2. 16; h. t. 17; Inst. 4. 1. 12. **2** 25. 2. 1; h. t. 7; C. 6. 2. 22. 4; *post*, § CXCVIII. **3** 25. 2. 29. **4** 25. 2; C. 5. 21. **5** 47. 2. 90; 48. 19. 11. 1. **6** The earlier conception of *furtum* was much wider. Sabinus laid little stress on the element of guilt. He makes a man liable for acts amounting to "*ope et consilio*" after the theft. He and Q. Mucius, older still, lay it down that any use by a *detentor* in excess of his right is *furtum*. He and others also hold that there may be *furtum* of land. Aul. Gell. 6. 15; 11. 18. **7** Several texts tell us that there might be *furtum* of free persons. Gaius (3. 199) speaks of those in *potestas* or *manus* and *iudicati* and *auctorati*. He does not mention those *in mancipio*. In Justinian's law texts still speak of *actio furti* in case of those in *potestas* (Inst. 4. 1. 9; D. 47. 2. 14. 13; h. t. 38) but it may be doubted whether it was a living part of the law. **8** 47. 2. 12. 1; h. t. 20. 1; h. t. 56. 1. **9** 47. 2. 15; h. t. 46. 1–4. As to pledge creditor and holder with a *ius retentionis*, *post*, p. 575. **10** It is maintained by Schulz, *Z.S.S.* 32. 23 sqq., that no one but the owner had this positive *interesse* in classical law (except where the owner was the thief) all others mentioned being responsible to him for the thing, and having the action on that account and excluding him. But this seems in conflict with the sources. See Buckland, *N.R.H.* 1917, 5 sqq. **11** 47. 2. 46. 1. **12** G. 3. 203; Inst. 4. 1. 13. **13** 19. 2. 6; C. 6. 2. 22. 3 a. **14** 47. 2. 12. pr.; h. t. 14. 17; G. 3. 205; Inst. 4. 1. 15. **15** C. 6. 2. 22. 1 b. **16** 47. 2. 54. 1; h. t. 91. pr.

Among those said to have this right are *commodatarius*, *conductor operis*, especially *fullo* and *sarcinator*, *conductor rei*, *mandatarius*, *nauta*, *caupo* and *stabularius*[1], and no doubt others. But while in some cases it is said that they had the action if the theft was by their *culpa*[2], in others it is assumed that, subject to the limits already stated, they always had it, and, in some, this is based on the obligation *custodiam praestare*[3]. This opens up the question already considered[4] as to the meaning and possible changes of meaning of this word. Here it need only be noted that as *culpa levis* was always presumed, these holders would always be *prima facie* liable for the loss without the need of appealing to the principle of absolute liability.

For *commodatum* the law was altered by Justinian. He provided that where a thing lent was stolen, the owner had the choice whether he would sue the thief, in which case all liability of the *commodatarius* was ended, or rely on his contract, leaving the *commodatarius* to sue the thief. But if he took this course not knowing of the theft, he could change his mind on discovering the facts[5].

Two exceptional cases must be noted. We hear of an *interesse* based on the right of retention for expenses, the action being allowed to every one who had such a right, except depositee[6], but there is no evidence that this right was enough, except where the thief was the owner. Also, a pledge creditor had the action, but its basis is obscure. Some texts base it on a liability for the thing and apply the rules which follow from this[7]. Others make the creditor impute the damages to the debt[8], which is inconsistent with this basis[9]. Others give both him and the owner the action[10], which is also inconsistent with the *custodia* basis. Some allow pledgee to recover on a unit of the whole value, while others limit the unit to the amount of the debt[11]. He could not sue twice on two thefts if the amount due to him had been recovered on the first[12]. Yet he could hardly be less liable because the debt had been paid. No doubt there are differences of opinion, and changes of doctrine here, but the matter is controversial.

There was an overriding rule that the *interesse* must be *honestum*. This is of small importance in the case of positive *interesse*, but, while a *bona fide possessor* had the action, a *mala fide possessor* had not, because his *interesse* was not *honestum*, though the thing was at his risk[13]. For the same reason a depositee who has acted dolosely with the thing, *e.g.*

1 G. 3. 205 sqq.; Inst. 4. 1. 15, 16; D. 47. 2. 12. pr.; h. t. 14. 2, 9, 12, 14, 17. **2** *E.g.* 47. 2. 14. 12. **3** *E.g.* 47. 2. 12. pr.; h. t. 14. 2; 14. 17, etc. **4** *Ante*, § CXCI. **5** Inst. 4. 1. 16; C. 6. 2. 22. **6** 47. 2. 15. 2; h. t. 60; 47. 8. 2. 23; C. 4. 34. 11. **7** 47. 2. 14. 16, both suspicious. **8** 13. 7. 22. pr.; 47. 2. 15. pr. **9** 19. 2. 6. **10** Unless the thing is worth less than the debt, 47. 2. 12. 2; h. t. 14. 6; h. t. 19. 6; h. t. 46. 4. **11** 47. 2. 14. 5–7; h. t. 15. pr.; h. t. 88. **12** 47. 2. 14. 6. **13** 47. 2. 12. 1.

by lending it, though he had the liability had no *actio furti*[1]. But one who had an honest *interesse* did not lose it because he had also been dishonest. If a thing is stolen from the owner, who himself had stolen it from a pledgee, he had the *actio furti* as owner[2]. A *fullo* was liable for *custodia*. If he lent the thing, which he had no right to do, and it was stolen, we are told that he had the *actio furti*[3], though himself liable for theft for his loan. If *A* stole a man and he stole from *A*, *A* had *furti noxalis* against his owner[4]—a grotesque case, but correct in principle; *A*'s *interesse* in the thing was *honestum*; it did not matter that he had no *honestum interesse* in the thief[5].

CXCVIII. The actions resulting from theft may be classed under two heads:

(i) *Ad poenam persequendam*, the *actio furti* for a penalty. *Furtum manifestum* was more severely dealt with than *furtum nec manifestum*. Manifest theft occurred where the thief was caught in the act, an expression as to the meaning of which there were different views. On one view it was during commission, on another, while still at the place, on another, generally however rejected, while still in possession of the thing[6]. The classical law as expressed by Gaius seems to have accepted presence at the spot[7]. But Justinian goes further and accepts a view, suggested by Sabinus and stated by Paul, that it was still manifest if the thief, on the same day, had not yet deposited the thing in a safe place[8]. According to the Institutes "caught" meant "*visus vel deprehensus*," which seems to mean seen and identified[9], but the rule as stated in the Digest requires capture or at least pursuit and capture of the goods thrown down by the thief[10]. A man was still committing *furtum* so long as he had the thing, but if it had ceased to be manifest it did not become so if he was afterwards caught with the goods[11]. To this there was one ancient exception. If a man's premises were solemnly searched "*lance licioque*," *i.e.* by a man wearing a loin cloth and bearing a dish, and the goods were found, this was manifest theft[12]. This rule, of the XII Tables and perhaps Greek[13], which is explained in many ways[14], seems to have

1 G. 3. 207; Inst. 4. 1. 17; D. 47. 2. 14. 3. It is true that Servius had held that in some cases a thief might have *actio furti*, but this was not accepted. h. t. 14. 4; h. t. 77. 1. 2 P. 2. 31. 19. 3 47. 2. 48. 4. 4 47. 2. 68. 4. 5 There are however some texts which conflict and hold that one who acts dolosely with the *res* loses any *actio furti*. 4. 9. 4. pr.; 47. 2. 14. 8, 9. 6 G. 3. 184, 185; Inst. 4. 1. 3; D. 47. 2. 3 sqq. 7 G. 3. 184. 8 47. 2. 4, 5; Inst. 4. 1. 3; P. 2. 31. 2. The limitation to the same day did not exist in the time of Gaius, who speaks of uncertainty in the matter. It is attributed to Paul in the Digest, where, however, it may be interpolated. 9 Inst. 4. 1. 3. 10 47. 2. 7. 11 47. 2. 6. 12 9. 3. 192 sqq. 13 Aristophanes, *Nub.* 495, cited Gneist, *Syntagma*, ad h. l. 14 Gaius, *loc. cit.*, observes that the provision is ridiculous, as such search would be resisted by a thief and there was no penalty for this. He states and rejects explanations of the rule. For other ancient and modern suggestions, see Danz, *Gesch. d. R. R.* § 155, n. 2; Gneist, *Syntagma, cit.*; Costa, *Storia*, 314; Karlowa, *R.Rg.* 2. 777 sqq.

been obsolete in classical law. Manifest theft was capitally punished under the XII Tables, while non-manifest involved only a twofold penalty[1], it may be on account of the element of doubt which surrounds non-manifest theft, but other explanations of the difference are offered[2]. The praetor introduced a fourfold penalty for manifest theft, which gives the odd result that as the civil penalty for non-manifest theft was unaltered, that gave an *actio in ius*, and manifest an *actio in factum*[3].

The unit of which a multiple was taken was the interest of the plaintiff. For the *dominus* in possession, and in the case of the negative *interesse*, that was the value of the thing, in that of usufructuary it was that of the usufruct. If the thing had increased in value, the increased value was the unit; if it had diminished the thief did not benefit[4]. The *interesse* also covered extrinsic resulting losses, *e.g.* if a slave were stolen, the value of an inheritance to which he was instituted, and on which he could not be authorised to enter[5], and, where evidences of a debt were stolen, the amount of the debt, if the theft prevented recovery[6]. The action was *perpetua* and available to the *heredes* of the victim, but, like all penal actions, it did not lie against the *heres* of the wrongdoer[7]. *Condemnatio* involved *infamia*[8]. Bringing it in no way barred the proprietary actions which might lie[9].

(ii) *Ad rem persequendam*, to recover the property. The owner was still owner and had the proprietary remedies against the thief or other holder of the goods. He had *vindicatio*, *actio ad exhibendum* and the possessory interdicts, and a thief, as a *mala fide possessor*, was liable whether he had transferred or not, in classical law by the *actio ad exhibendum*, in later law by the *vindicatio* itself[10]. A usufructuary would have the *actio confessoria*[11].

But there was also a special remedy peculiar to cases of theft called *condictio furtiva* which, as we know it, was illogical, since it expressed a claim on the part of the owner to have the ownership transferred to him: "*dare oportere*[12]." It was a quasi-contractual action, available against the thief or his *heres*, and, unlike the delictal obligation, extinguished, to the extent already mentioned, by *capitis deminutio*[13]. Since a thief was not owner he could not "*dare*"; and Gaius has no better explanation to give of the illogicality than that it was allowed "*odio furum.*" It is possible that it lay at first only where the thing had ceased to exist. It

1 G. 3. 189. 2 See, *e.g.*, Maine, *Anc. Law*, 379. 3 G. 3. 189, 190; Lenel, *E.P.* 321. 4 47. 2. 50. pr. 5 47. 2. 27; h. t. 52. 28. 6 47. 2. 27. 2. For the puzzles set up by this rule, see Monro, *de furtis*, 37. 7 47. 1. 1. pr.; Inst. 4. 12. pr., 1; G. 4. 112. 8 3. 2. 1. 9 13. 1. 7. 1. 10 6. 1. 27. 3; *ante*, §§ XCI, CLXXXVII. 11 7. 6. 5. 1. 12 G. 4. 4. The view of Sabinus that land could be stolen, and the anomalous nature of this *condictio*, are reflected in texts suggesting it where land is "*ei possessum.*" 13. 3. 2; 47. 2. 25. 1. 13 *Ante*, § L.

has been suggested that it was a generalisation of the *actio rerum amotarum* which lay on theft between husband and wife[1]. The actions were much alike. Both were *perpetuae* and lay to and against the *heres*[2]. In both, as the defendant was always in *mora*, it lay though the thing had ceased to exist[3]. In both increase must be paid and lessening in value was ignored[4], and in both the *fructus* and extrinsic profits came into account[5]. But while *condictio furtiva* was available only to owner and pledge creditor[6], the other was available to a *bona fide possessor*[7].

It seems that in practice the owner relied usually on the *condictio* rather than on *vindicatio*, even though the defendant was the *heres*[8], since it dispensed with evidence as to the position or existence of the thing.

There were some subsidiary actions connected with *furtum* which must be mentioned. A person on whose premises a search made resulted in the discovery of the goods was liable to a threefold penalty, *furtum conceptum*, a simplification, or secularisation, of the still older *furtum lance licioque conceptum* already mentioned[9]. Similarly one who placed stolen goods in another's house was liable to the same penalty[10] (*furtum oblatum*). Gaius says there was no penalty under the XII Tables for resisting search, but the praetor gave an *actio in factum* for a fourfold penalty[11] (*furtum prohibitum*), and, further, an action for failure to produce stolen goods afterwards found on the premises (probably on formal search, *furtum non exhibitum*). The penalty is not stated[12]. These various actions are classed by some of the jurists as varieties of *furtum*[13]. Justinian, observing that they had fallen into disuse (some of them lasted into the fifth century[14]), says that in all these cases there is a liability for *furtum nec manifestum*[15].

1 *Ante*, § CLXXXVII. **2** 25. 2. 6. 2, 3; h. t. 21. 5; 13. 1. 7. 2. **3** 25. 2. 3. 3; h. t. 17. 1; 13. 1. 8. pr. **4** 25. 2. 29; 13. 1. 8. 1. **5** 25. 2. 21. 3, 4; 13. 1 3. **6** 13. 1. 1; h. t. 12. 2. **7** 25. 2. 17. 3; h. t. 20. The hypothesis of this origin is propounded by Mommsen (*Strafr.* 757). But the later development of *actio rerum amotarum*, after marriage without *manus* became usual, seems at least equally probable, especially in view of the fact that while the *condictio* is a civil action, the other is an *actio in factum*. Lenel, *E.P.* 299. It is probable that in its origin this was a penal action, with a *condemnatio in duplum* and a right of noxal surrender where the wife who removed the goods was a *filiafamilias*. The action has been specially studied by Pampaloni, *Sopra alcuni azioni attinenti al delitto di furto*, and Zanzucchi, *Il divieto delle azioni famose*, both cited by Huvelin, *Études sur le furtum*, 1. 621 sqq. These two writers hold that it was only under Justinian that the action became the quasi-contractual institution which we know. It seems clear that it lay only against the wife in early law, but under Justinian, and probably in later classical law, it lay against the husband. **8** 13. 1. 7. 2. **9** G. 3. 186, 191; P. 2. 31. 3. **10** G 3. 186, 187, 191; P. 2. 31. 3, "*ne apud se inveniretur.*" G. attributes these provisions to the XII Tables but they are probably praetorian; see Huvelin, *Études sur le furtum*, 1. 53. **11** G. 3. 188, 192. It is probable that Gaius is wrong in saying that the XII Tables gave no action for resisting search. **12** Inst. 4. 1. 4. It is commonly supposed to have been fourfold. This action is not mentioned in any classical text. **13** G. 3. 183. **14** Gaius, *Ep.* 2. 11. 2. **15** Inst. 4. 1. 4.

In modern systems theft is commonly dealt with as a crime, not a wrong to be dealt with simply by an action for damages, and this was essentially the attitude of early Roman Law. It is clear that this alternative was also possible in the law of the Empire; in fact, as thieves have, commonly, no money, the civil remedy would often give no redress at all. Ulpian tells us that criminal proceedings were the more usual course[1], and Julian says that judgment in such proceedings barred any *actio furti*[2]. The converse is probably true.

CXCIX. *Rapina. Vi Bonorum Raptorum.* Theft with violence.

This was erected into a special delict in the troubled times of the Republic, and the rules became a permanent part of the law. The action was *in factum* and condemnation involved infamy[3]. The penalty was fourfold, or rather, as this included the value of the thing, for threefold and compensation. As it was penal and praetorian, it was *annua*, but, as it covered compensation as well, *perpetua* as to the single value[4]. Hence it was said to be *mixta* by some jurists and Justinian so decides[5], but it had the main characteristic of penal actions that it was not available against the *heres*[6]. As the act was *furtum* there would always be the *condictio furtiva*[7]. The principles were in general those of *actio furti*[8]. Thus it applied only to *res mobiles in commercio* and owned. The *contrectatio* must be *fraudulosa*[9].

On some points, however, there are slight signs of divergence. Thus we are told that what could be recovered was a multiple of the *verum pretium*, not of the *interesse*, but as one text tells us this of *furtum* also[10], the import is doubtful. Though in general those who could bring it were the same, one text, probably due to Justinian, says that any sort of *interesse* sufficed in this case[11]; in classical law the rule of *interesse* was the same as *in furtum*[12]. One text suggests that mere encouragement was enough to make a man liable for *ope consilio*[13], which is consistent with the genesis of the action. The action was a bar to *actio furti* and any action *ad rem persequendam*[14]. Probably in classical law it was barred by *actio furti*, but under Justinian it was still available for any excess recoverable by it[15]. It is plain that, in manifest theft, *furti* would be the better remedy, but not in other cases. It does not appear that the action could have been barred by *vindicatio*, at least as to threefold.

This delict involved bad faith, but violent enforcement of claims,

1 47. 2. 93. 2 47. 2. 57. 1. 3 See Lenel, *E.P.* 381; D. 32. 1. 4 G. 3. 209; Inst. 4. 2. pr. 5 G. 4. 8; Inst. 4. 6. 19. See, however, 47. 8. 2. 27. 6 47. 8 2. 27, even to enrichment—*sufficere condictionem.* 7 47. 8. 1. 8 47. 8. 2. 23 9 47. 8. 1; h. t. 2. 18, 20; C. 9. 33. 1. 10 47. 2. 50. pr.; 47. 8. 2. 13. 11 47. 8. 2. 24, which gives it even to a depositee. 12 Gaius treats it as always being *furtum*, which seems to involve this. G. 3. 209. 13 47. 2. 81. 4. But the meaning of *dolus* here may be limited by 47. 8. 2. 2. 14 47. 8. 1. 15 *Ib.*

even in good faith, needed repression. Such conduct had been criminal from the Republic[1], and Marcus Aurelius provided that one who seized property to satisfy a claim, without judicial process, should forfeit his claim[2]. In A.D. 389 it was provided that one who seized property under a *bona fide* claim of right should, if the claim was well founded, forfeit his right, and if it was unfounded should give back the property and its value as well[3]. This penalty applied to land as well as moveables[4]. The actions by which these rules were enforced were no doubt ordinary proprietary actions, at any rate so far as the forfeiture of property was concerned. Whether, where the claim was well founded, the *heres* of the wrongdoer was equally liable does not appear; presumably he was not, and he could hardly have been liable to penalty in the other case.

CC. *DAMNUM INIURIA DATUM.* Wrongful damage to property.

The law of the Empire on this topic is mainly based on the *l. Aquilia*, of which the date is uncertain, but earlier than the introduction of the contract of mandate[5]. It does not seem that, as the Institutes rather suggest, and the Digest actually says[6], it superseded earlier provisions as matter of law[7], but it was of overwhelming practical importance and seems to have swamped them. On the other hand there was praetorian legislation on the matter[8], apart from extensions of this statute. But it is plain that this law, with its extensions, was much the most important part of the scheme of remedies. The words *damnum iniuria datum* mean damage unlawfully caused, but we get the expression *actio damni iniuriae*[9].

The *l. Aquilia* contained, besides a penalty for *adstipulatores* who fraudulently released the debtor[10] (which does not here concern us) and, perhaps, a vaguely indicated procedure for *multa* as an alternative, in the case which does concern us[11], two important provisions for a civil remedy for damage to property. Its first chapter provided that anyone who unlawfully killed another's slave or beast within the class of *pecus*, *i.e.* such as feed in herds, was liable to pay the owner the highest value the thing had had within the previous year[12]. Its third chapter provided that anyone who unlawfully damaged another's property in respects not

1 Mommsen, *Strafr.* 657 sqq.; 4. 2. 12. 2, partly interpolated. In classical law violent seizure of pledges by the creditor came under the *l. Iulia de vi*, though it was not theft. P. 5. 26. 4; D. 47. 2. 56. 2 D. 4. 2. 13; 48. 7. 7. 3 C. 8. 4. 7; Inst. 4. 2. 1. 4 *Ib.* 5 It contains provisions for an unfaithful *adstipulator*, not needed if *actio mandati* existed, G. 3. 215. 6 Inst. 4. 3. pr.; G. 3. 210; D. 9. 2. 1. pr. 7 Girard, *Textes*, 17. 8 D. 4. 9; 39. 4. 1; 47. 9. 1, etc. 9 Inst. 4. 3. pr.; G. 3. 210; G. 4. 9; D. 9. 2. 32. pr., etc. We have also *damnum iniuria*, Cic. *pro Rosc. com.* 11. 32, 18. 54. See on these irregular forms, Mommsen, *Strafr.* 826. In Inst. 4. 4. pr. it may be *damnum iniuria* in apposition, though some editors insert "*datum*." It is pointed out by Monro (ad 9. 2. 27. 21) that though the expression *damni iniuriae* is consistent with a form *damnum iniuriae* this does not in fact occur. He interprets the usage as apposition, the fact that *iniuria* was properly ablative being forgotten. 10 *Ante*, § CLV. 11 Cic. *Brut.* 131. 12 G. 3. 210, 214; Inst. 4. 3. pr.; D. 9. 2. 2. Inst., h. t. 1, give

coming under the first chapter, by burning, breaking or destroying, was liable to pay him the value the thing had had within 30 days before[1].

The period of time was reckoned back, not from the death, but from the injury[2]. The third chapter did not, like the first, say the highest (*plurimi*) value within the 30 days, but the lawyers read this in, in order to give the provision a meaning[3]. So far as the main text goes a man who merely damaged the property had to pay the whole value, but, apart from the bad economics of such a rule[4], there is a text which implies that what he had to pay was the difference between the highest value and the value after the damage[5].

The *actio legis Aquiliae* was a penal action with the ordinary consequence that it did not lie against the *heres*, except to the extent of his enrichment[6], that it was not extinguished by *capitis deminutio*[7], and that each of joint wrongdoers was liable in full. It was penal as to the whole of the damages and not merely as to the excess over the harm done[8], and as there often would be no such excess, it might, like the *actio doli*, be penal where what was paid was merely compensation. It was penal also in the sense that it was for double damages in case of denial[9], but this alone did not cause an action to be regarded as penal[10]. The rule that it was *duplex contra infitiantem*, a result of the original *manus iniectio*[11], raises the question whether denial was of the facts or of liability. We are told that one who confesses the fact of killing could not afterwards deny liability, but might prove that the man was not dead, or died from natural causes[12]. The text describes the action in which he has confessed the fact as *confessoria*[13].

The damage must be unlawful, but need not be wilful; negligence was enough[14]. But the negligence must be active; mere omission did not suffice[15]. Cases which look like exceptions, as of one who, having lit a fire, neglected to look after it, so that it spread to the next property[16],

a list of the animals, all ordinary domestic beasts, treated as *pecus*. D. 9. 2. 2. 2 adds elephants and camels if tamed.

1 G. 3. 217; Inst. 4. 3. 13; D. 9. 2. 27. 5. **2** 9. 2. 21. 1. Julian. **3** G. 3. 218. **4** It would give no inducement to stop if some damage had been done, unless the deft. might take the *res*, of which there is no evidence. **5** 9. 2. 24. **6** G. 4. 112; D. 9. 2. 23. 8. **7** 4. 5. 2. 3. **8** Arg. 9. 2. 11. 2. Pernice, *Sachbeschädigung*, 125. **9** 9. 2. 23. 10. **10** *E.g.* the action on *legatum per damnationem*. As to the essentials of a penal action, *post*, § CCXXXIII. **11** *Post*, § CCXII. **12** 9. 2. 23. 11; h. t. 25. pr.; 42. 2. 4. The distinction drawn seems to rest on a confused notion of possibility. See Monro, *l. Aquilia*, App. 3. **13** 9. 2. 23. 11. This seems to imply that confession of the fact alone makes the action *confessoria*, but only, it seems, because it dispenses with proof of the *iniuria*. But in Coll. 12. 7. 1 the words are "*si fatebitur iniuria occisum esse*," and in D. 9. 2. 25. 2 (which may be interpolated Beseler, *Beiträge*, 1. 54) the principle is the same. It must be remembered that *culpa* sufficed and was presumed. **14** G. 3. 211; Inst. 4. 3. 3; D. 9. 2. 5. 1. **15** Arg. "*occidere*," etc. **16** 9. 2. 27. 9=Coll. 12. 7. 7. See also h. t. 8. pr. and Pernice, *cit.*, 164 sqq.; Grueber, *l. Aquilia*, 208 sqq.

were cases in which an act was done with insufficient attention to consequences. The strongest case is that in which *A* lit a fire and *B* watched it negligently. *B* was liable[1]. But he was not a casual passer without privity; he was one who had done something to make himself responsible. In most of the cases of this type the remedy was not the action itself, but a praetorian extension.

The negligence need not be extreme; slight negligence created the liability[2]. This rule raises the question, where there was a contract between the parties in which *culpa* did not create liability, *e.g.* deposit, whether damage caused by negligence created the Aquilian liability. There is no decisive text and both views are held[3]. The dominant opinion is that the liability existed[4].

Contributory negligence of the aggrieved person might be a defence. This is sometimes misleadingly called "*culpa*-compensation," which suggests both some sort of quantitative relation between them, and the notion of damage to the defendant by the plaintiff, neither of which notions has anything to do with the matter. The true principle is one of causal connexion. The causal *nexus* was broken if there intervened, between the *culpa* of the defendant and the damage, some other cause without which the damage would not have occurred[5]. Where a man wounded another not mortally, who died in consequence of being neglected, he was liable for the wounding but not for the death[6]. But if the original act was wilful it is generally held, though there is no explicit text, that intervening negligence of the injured person was no defence, though there was the same breach of causal *nexus*. The texts dealing with the case where the intervening event was a wrongful act of a third person present some difficulty, but their doctrine seems to be as follows[7]: Where a slave, wounded by *A* and then by *B*, died, if each act would certainly have killed, *A* had wounded, *B* had killed. If several wounded and it was clear which killed, he alone was liable for the killing. If it was not made out that one killed, more than another, all were liable for killing. If it was clear that *A*'s wound would have killed, but not clear whether *B*'s would or not, apart from *A*'s previous act, both were liable. But there is much controversy on this. It is generally held that the texts cannot be reconciled[8].

CCI. The statute was at first very narrowly construed. At one time it seems that it was inferred from the etymology of the word "*occido*"

1 9. 2. 27. 9. 2 9. 2. 44. pr. 3 Pernice, *cit.* 78 sqq.; Windscheid, *Lehrb.* § 455, n. 12 in f. 4 The doctrine reduces the rule *in depositum* to an absurdity in a wide range of cases: the further liability might seem reasonably to be excluded by the contract. 5 9. 2. 11. pr.; 50. 17. 203. 6 9. 2. 30. 4; h. t. 52. pr. 7 The principal texts are 9. 2. 11. 2, 3; h. t. 15. 1; h. t. 51. 1. 8 Pernice, *op. cit.* 60; Windscheid, *Lehrb.* 2. § 258, n. 15; Beseler, *Beiträge*, 3. 9, 3. 20, 4. 194.

that the act must have been done directly by the person of the wrongdoer or a weapon held by him. But the early lawyers extended this to killing by, *e.g.*, actually administering poison[1]. The rule so understood was expressed in the words that it must be "*corpori corpore*," by the wrongdoer's body to that of the injured thing[2]. Another extension made at civil law by *interpretatio*, was to understand "*rumpere*" in the third chapter to mean "*corrumpere*," so that it covered any form of material damage and the other words became unimportant[3]. Further, in construing the words "highest value" the jurists included what is called "*damnum emergens*," loss due to extrinsic circumstances[4], and "*lucrum cessans*," profit which the fact prevented the owner from making[5]. The killing of one horse of a pair, of one of a troupe of actors[6], are instances of the first, as the loss was greater than the value of the thing as a single thing. The second is illustrated by loss of a *hereditas* on which the slave would have entered[7]. But it must be a material loss: value of affection was not taken into account[8]. Though the statute applied only to *res mobiles*, its application was extended to land[9].

Even so extended, the statute was extremely narrow; it was left to the praetor to make further extensions, not of the action itself, but by providing analogous remedies for analogous cases. Such are the following:

(*a*) The *lex* applied only where the aggrieved person was the *dominus*. The praetor provided an *actio utilis*, or one *in factum*, to persons with lesser *iura in rem*, *e.g.* usufruct, the unit here being the value of the interest, the owner having also an action for the value of his interest[10]. A *bona fide possessor* had the action for the full value, but if ultimately sued by the owner, must give up what he had recovered[11]. Under Justinian, but probably not before, a pledgee had it if the debtor was insolvent, or if he had from any cause lost his personal claim against the debtor[12]. In all these cases it lay against the owner himself, as an *actio in factum*[13]. In general one with a mere *ius in personam* had not the extended action, but one text gives it to a *colonus* where weeds are sown in a cornfield[14].

1 9. 2. 7. 6; h. t. 9. pr. 2 Inst. 4. 3. 16. 3 G. 3. 217. 4 Inst. 4. 3. 10. 5 G. 3. 212; Inst. 4. 3. 10. In the case of a slave killed there are alternative criminal proceedings. 6 9. 2. 22. 1. 7 9. 2. 23. pr.; Inst. 4. 3. 10. 8 9. 2. 33. pr. 9 9. 2. 27. 7–9; Coll. 12. 2. 7. 10 9. 2. 11. 10. 11 5. 3. 55; 9. 2. 11. 8; h. t. 17. 12 9. 2. 30. 1, interp. 13 9. 2. 12; h. t. 17. The genuineness of 17 may be doubted, as to *b. f. p.* in view of 5. 3. 55, as to pledgee, before Justinian, see n. 12. 14 9. 2. 27. 14 (cp. h. l. 20, which gives direct action to owner of grain with which sand has been mixed). In the present case the injury is to the crop, which will ultimately belong to *colonus*, indeed he hardly suffers injury till this has grown. No text authorises the view that a mere *ius in personam* gave the action (9. 2. 11. 9). It is disputed whether 27. 14 is interpolated or not, Debray, *N.R.H.* 33. 643.

(*b*) *Leges* did not apply to persons not *cives*, unless expressly, but an *actio ficticia* was given in this case as if they were *cives*[1].

(*c*) The *lex* covered only cases of property. Injury of a freeman was thus not within it, for a man did not own his body. The praetor gave an *actio utilis* to a freeman who, or whose *filiusfamilias*, had been injured[2], but not where a freeman was killed[3].

(*d*) The *lex* applied only where the damage was done by the body to the body, *corpore corpori*. The praetor gave an action, *utilis* or *in factum*, in cases not within this conception, where it was by but not to the body, as by throwing *frumentum* into a river[4]. It might not be harmed, but in effect it was destroyed. So too where it was to, but not by, the body, as by putting poison where a slave was likely to take it, but not actually administering it[5]. So too where it was neither, as by opening a stable door so that animals escaped and were lost. It is easy to see that these lines might be difficult to draw. There is no great difference between mixing the seed in the sower's bag, which gives the direct action, and sowing false seed after him which does not[6]. The line between actually administering poison and merely facilitating the taking might be rather fine.

In some of these cases an *actio utilis* was given; in others an *actio in factum*. Gaius tells us that it was *utilis* wherever it was not *corpore*[7], but the Institutes say that if it was not *corpore* or *corpori* the action was *in factum*, which would make it *utilis* if it was *corpore* but not *corpori*[8]. When we turn to the texts in the Digest it is difficult to make them conform to any rule. Even the direct action is given in cases which seem to be more appropriate to one of the others[9], and as between these, any logical scheme is unattainable. This may be due to the fact that the question was one of procedure[10], never very important, and practically obsolete in the time of Justinian. In view of the words "*reddendo actiones in factum accommodatas legi Aquiliae, idque utilitas huius legis exigit*[11]," it is to be doubted whether any distinction is intended.

CCII. *INIURIA*. Insult, contumely. Justinian, following Paul, tells us of the many senses in which this word is used, with the Greek equivalent in each case[12]. It might mean unlawful action, as in the case just considered; it might mean any unlawful interference with right; it might mean an unjust judgment, but, as a special delict, it meant *contumelia*, insult or outrage, represented in Greek by ὕβρις.

1 G. 4. 37. 2 9. 2. 7. pr.; h. t. 13. pr. 3 Arg. 9. 1. 3; 9. 2. 7. pr.; 9. 3. 1. 5. 4 9. 2. 27. 19. 5 9. 2. 7. 6. 6 9. 2. 27. 14, 20. 7 G. 3. 219. 8 Inst. 4. 3. 16. 9 9. 2. 27. 19–21. 10 This has been disputed: it has been said that the *actio in factum* was not *in duplum contra infitiantem* and did not go to the highest value, but see Pernice, *op. cit.* 157 sqq.; Grueber, *op. cit.* 199 sqq. 11 19. 5. 11. 12 Inst. 4. 4. pr.; Coll. 2. 5. 1.

The XII Tables contained provisions against a certain number of forms of insult, probably only assaults, usually subjecting them to a fixed money penalty[1]. This crude system, limited in scope and inflicting penalties which with changes in the value of money had become derisory in the later Republic[2], was then superseded in practice by a series of praetorian edicts[3]. The first, which came to be known later as "*generale edictum*" and probably was designed to deal only with the acts contemplated by the XII Tables, provided in terms which, as we know them, cover any form of *iniuria*, that an *actio in factum* would lie, in which the plaintiff must specify the nature of the *iniuria* complained of and the damages he claimed, the case to be tried by *recuperatores* who would fix the amount of the *condemnatio*[4]. The next dealt with *convicium*, public insult, and there followed other edicts extending the scope of the action[5]. These edicts expressed a profound change in the conception of the wrong, an evolution assisted by the very general form of the *edictum generale*, which lent itself to juristic interpretation, so that, in the law as we know it, the wrong consisted in outrage or insult or wanton interference with rights[6], any act, in short, which shewed contempt of the personality of the victim or was of a nature to lower him in the estimation of others, and was so intended[7]. All that was needed was that the act be insulting in kind and intention, and unjustified[8]. Not only the actual insulter was liable but any accomplice, even one who did no more than encourage the offender[9].

The evolution was somewhat interrupted by a *lex Cornelia de iniuriis* of the time of Sulla, which provided a criminal or quasi-criminal remedy for "*pulsare, verberare, vi domum introire*" (covering the whole field of the *iniuriae* dealt with in the XII Tables)[10], and apparently some other proceedings[11]. It is held, on one view, that this legislation excluded these wrongs from the ordinary *actio aestimatoria iniuriarum*, till late in the classical age, when a rescript of Severus and Caracalla restored

1 Girard, *Textes*, 17, 18; Bruns, 1. 29, 30. 2 Aul. Gell. 20. 1. 13. 3 See the history of them set out by Girard, *Mél. Gérardin*, 255 sqq. 4 Aul. Gell. *ib.*; Coll. 2. 6. 1; Lenel, *E.P.* 384. 5 47. 10. 15. 2; *adtemptata pudicitia*, Inst. 4. 4. 1; *infamandi causa facta*, 47. 10. 15. 25, etc. See Lenel, *E.P.* 384 sqq. 6 So early as Labeo it was recognised that the *generale edictum* was wide enough to cover the special cases. 47. 10. 15. 3; h. t. 15. 26. See, *e.g.*, 47. 10. 13. 7; h. t. 15. 31; h. t. 23; h. t. 27, etc. 7 The principles differ from those of our law, resting on defamation. Intent was the gist: it is immaterial to liability in our law, apart from privilege. It was wider (47. 10. 1. 2). In most cases publication to third persons was not needed, apart from *convicium*. The wrong was doing intentionally what was likely to injure a man's reputation or outrage his feelings. 8 G. 3. 220; Inst. 4. 4. 1; 47. 10. 3. 1; h. t. 4; h. t. 12; h. t. 13. 1, etc. Many *iniuriae* had other remedies. There was an *actio contraria iniuriarum* for wrongfully bringing the action, G. 4. 177, and there were other remedies for this. 47. 10. 43; P. 5. 4. 11. 9 47. 10. 11. pr., 6. 10 3. 3. 42. 1; P. 5. 4. 8; 47. 10. 5. All the reff. to the *lex* are cited Mommsen, *Strafr.* 785, n. 2. 11 See P. 5. 4. 8.

the right to bring a civil action in such cases[1]. But the view that the two remedies existed side by side is also held[2].

The action was in a special sense "*vindictam spirans.*" It rested not on economic loss but on outraged feelings; hence some characteristic rules. Like other delictal actions it did not lie against the *heres* of the wrongdoer, but, contrary to the general rule, it could not be brought by the *heres* of the injured person[3]. It lay only within a year of the event[4], and, as it rested on outraged feelings, it did not lie unless there was evidence of anger at the outset—*dissimulatione aboletur*[5]. As it had nothing to do with property the damages were measured according to the position of the parties, and the grossness of the outrage[6]. It was no defence that the defendant did not know the plaintiff, or mistook him for someone else[7], except that if the defendant had supposed him to be a *paterfamilias* or a widow no action lay for the insult to the actual *paterfamilias* or *vir*[8]. But in the case of allegations, the truth of the statement was a complete defence[9].

The *iniuria* need not be directly to the person aggrieved; it is plain that *A* might be insulted by something done to *B*. But the important cases of this are of outrage to members of the family. An *iniuria* to a wife gave an action not only to her but to her husband[10]. An insult to a *filiusfamilias* was an insult to the *paterfamilias* as well, who might sue for himself and for his son, though, as in certain circumstances the son might himself sue, there was a provision against two actions *nomine filii*[11]. Thus where a married *filiafamilias* was insulted there might be three actions, or more, her own, her husband's, her father's, and even her husband's father's[12]. A *sponsus* might have an action on an insult to his *sponsa*[13], and there were other cases. It must be noted that the damages would not necessarily be the same in these cases: in each the personality of the plaintiff was considered[14]. And though an insult to wife or child was an insult to *paterfamilias*, the converse was not true[15]. The most remarkable case of indirect insult is that of *heredes*. An insult to the body or funeral was an insult to the *heres* if it was after entry. If not, it was an insult

1 Mommsen, *op. cit.* 804, n. 3; Girard, *Mél. Gérardin*, 258, 279 sqq. The principal texts relied on are 47. 10. 7. 6; h. t. 37. 1. **2** Lenel, *E.P.* xiv. The other view is difficult to reconcile with some texts, especially Gaius, 3. 220, who wrote long before Caracalla and treats assault as typical *iniuria* for the praetorian action. See also Strahan-Davidson, *Roman Crim. Law*, 1. 219 sqq. **3** 47. 10. 13. pr. "*lite non contestata.*" **4** C. 9. 35. 5. **5** 47. 10. 11. 1; Inst. 4. 4. 12. **6** Inst. 4. 4. 7. **7** 47. 10. 18. 3. **8** 47. 10. 18. 3. But the mere fact that the offender did not know what the family relations of the person insulted were is no reply to an action by the *pater*, h. t. 1. 8. **9** 47. 10. 18. pr. **10** 47. 10. 1. 3. **11** *Ib.*; h. t. 17. 10–22. **12** 47. 10. 1. 9; G. 3. 221; Inst. 4. 4. 2. **13** 47. 10. 15. 24. **14** 47. 10. 30. 1. **15** Inst. 4. 4. 2: exception, 47. 10. 11. 8.

to the *hereditas* and the *heres* after entry acquired it like other claims of the *hereditas*[1].

Iniuria to a slave was the subject of elaborate rules. For *verberatio* or submitting to torture, without justification, an action lay without proof of intent to insult the master[2]. This was *servi nomine*: "*hanc enim et servum sentire palam est*[3]." But the master brought the action; on what principle the damages were assessed we do not know, or whether they were *in peculio*. In general no action lay unless the *iniuria* was *atrox*; if it was, and was intended to insult the master, there was an *actio domini nomine*[4]. If no such intent was proved an action lay *servi nomine*, but it was still really on account of the master; such a thing did insult him, though the edict governing it said nothing of intent to insult the master[5]. It did not pass on alienation of the slave[6].

If there were several masters all of them might have an action, and the damages would vary, not with their share, but with their position[7]. But in no case of *iniuria* to a slave, apart from *verberatio*, etc., was the action a matter of course: it was given *causa cognita*[8]. If there were less rights in the slave, *e.g.* usufruct, the fructuary might have an action, but the *iniuria* was *prima facie* presumed to be to the owner[9]. So too a *bona fide possessor* might have it, and, if the man was really free, both might have it[10].

A distinction between *atrox* and ordinary *iniuria* frequently recurs. As the question, which it was, was probably left to the praetor, it is likely that the distinction was not very exactly drawn. We are told in varying terms that it might be *atrox ex re* (or *facto*) from its extreme nature, or *ex persona*, the person insulted being one to whom special respect was due (*e.g.* the patron, or a magistrate), or *ex loco*, where it was very public[11]. The chief results of *atrocitas* were that an action would lie on insult to a slave[12], and that the damages were differently estimated. In general the plaintiff fixed his maximum claim by a *taxatio*, which the *iudex* could cut down. In *atrox iniuria* the praetor fixed the maximum, usually at a higher rate, and the *iudex* did not interfere with it[13].

1 47. 10. 1. 4, 6. **2** 6. 1. 15. pr.; 47. 10. 15. 34. **3** 47. 10. 15. 35. **4** *Ib.* But this distinction between actions *domini* and *servi nomine* appears to be later than Gaius, or at any rate unknown to him, G. 3. 223. **5** 47. 10. 15. 35; h. t. 44. **6** 47. 10. 29. **7** Inst. 4. 4. 4. Here the action is *domini nomine*. In 47. 10. 16, Paul, quoting Pedius, gives the action in proportion to their shares. This may be *servi nomine*. **8** 47. 10. 15. 34. **9** 47. 10. 15. 45–48. But fructuary had no action on *iniuria* by *dominus*, or *vice versa*. Nor had common owners of the slave against each other, 47. 10. 36–38. **10** 47. 10. 15. 48. **11** G. 3. 225; P. 5. 4. 10; Inst. 4. 4. 9; D. 47. 10. 7. 6–9 sqq. **12** 47. 10. 15. 44. **13** G. 3. 224; Coll. 2. 2. 1. A man condemned for *atrox iniuria* could not afterwards be a *decurio*, 47. 10. 40.

In many cases there were criminal remedies for *iniuria*, in increasing number. In later law an *extraordinarium iudicium* for punishment was always available as an alternative[1], which would be used where the defendant was without means, and was evidently sometimes used in other cases of extreme insult. Whichever way the matter was tried condemnation involved *infamia*[2].

CCIII. This concludes the list of Delicts which the Institutes, following Gaius, expressly consider, but there were many others. A number of wrongs were dealt with by machinery other than that of an ordinary action, *e.g. vis*, by the interdict, *unde vi*. But there are others which gave rise to what must be called *actiones ex delicto*.

Metus. There was a complex praetorian machinery for relieving one who had been forced by threats to go through some legal transaction, or in later law, other damaging act[3], and to penalise the wrongdoer. There existed an *actio ~~quod~~ metus ~~causa~~* for fourfold damages in default of restoration[4], an *exceptio metus* if a claim was made under the transaction[5], and *restitutio in integrum*[6], the nature of which varied with the nature of the right purporting to have been created[7]. The threats must be of death or bodily hurt, or wrongful enslavement, or a capital charge, or an attack on chastity, either to plaintiff or to a member of his family[8]. Mere money threats were not enough[9], and the fear must have been actual, and the imminence of the threat such that a normal man might reasonably have feared[10]. The action is not stated as infaming. It lay against not only the wrongdoer, but any third persons, even innocent, who had profited, either immediately or indirectly[11]. The penalty was fourfold, of the damage, including *damnum emergens*, etc., in the case of the wrongdoer, of their profit, in the case of others[12]. But there was an important limitation. The action was *arbitraria* in the sense that the *condemnatio* was incurred only if, where the *iudex* ordered restitution, the defendant failed to restore[13]. Here there was a great difference between the positions of the wrongdoer and others. The former was necessarily *in mora*, and thus took the risk of *casus*[14], so that he might be unable to restore, and he might have parted with the proceeds[15], while a third party was liable only for his actual profit, which he could

1 47. 10. 45; Inst. 4. 4. 10. **2** 3. 2. 1. As to concurrence with actions *ex contractu*, and with other delictal remedies, *post*, § CCXLII. **3** Accarias, *Précis*, 2. 931; arg. 4. 2. 9. 2. **4** 4. 2. 14. 1. **5** 4. 2. 9. 3. **6** 4. 2. 1. All these are known in the republic. See Cicero, *de Off.* 1. 10. 32; *pro Flacco*, 21. 49; *In Verr.* 2. 3. 65. 152. The texts dealing with the different remedies are not clearly to be distinguished in the Digest. **7** *Post*, § CCXLIII. **8** 4. 2. 8. 3. **9** 4. 2. 3. 1; h. t. 7. 1; h. t. 8. 1, 2; C. 2. 19. 4, 8. **10** 4. 2. 5; h. t. 6. **11** 4. 2. 14. 3. **12** 4. 2. 14. 1, 7; h. t. 17; h. t. 18. **13** 4. 2. 14. 3, 4. It is however sometimes held that restitution barred the fourfold action only if it was before *litis contestatio*. See, *e.g.*, Biondi, *Studi sulle actiones arbitrariae*, 1. 42. **14** 4. 2. 14. 1, interp. **15** 4. 2. 14. 5, in f.

always restore and thus avoid the heavy *condemnatio*[1]. The action was available to *heredes*, but not against them, except to the extent of enrichment[2]. As in other delicts, where more than one person was engaged in the wrong, each was liable in full, but there was the exceptional rule that when one had made the wrong good, the others were released[3], a result of the principle that the action lay only "*si non res restituatur*[4]."

The action being praetorian and penal was *annua*, but lay, *in simplum*, after the year, *causa cognita*, if there was no other remedy[5]. It seems that in early law the action did not lie till the loss was completed, not, *e.g.*, on an extorted promise where there was only the *exceptio* or *restitutio*, but in classical law this limitation was extinct[6]. In other respects the remedies seem to have been so far as possible co-extensive. None of the remedies was subordinate; the party could choose whichever suited the case, but there are difficulties on the question whether he could use more than one. If the defendant had accepted the *arbitrium*, and restored, there was no room for the other remedies, but if he had been condemned, there is some doubt on the texts[7]. On the older view, the action was purely penal, so that if the injured party was sued, on, *e.g.*, an extorted promise, he still had the *exceptio*. The harshness of this was avoided by including in the fourfold a release of the debt, *i.e.* condemning him for threefold and a discharge: in later law the rule is clear that the fourfold barred any other remedy, and the transaction stood. Whether this is due to Justinian or was recognised in Ulpian's time is disputed[8].

Dolus. The definition by Labeo, adopted by Ulpian, is "any craft or deceit employed for the circumvention or entrapping of another person[9]." It is sometimes added, for the purpose of this action, that it must have induced some act of the aggrieved party, as in *metus*, but the cases shew that this restriction did not exist[10], though it was no doubt only in that case that there could be *restitutio in integrum*. Where this was applicable there would be no *actio doli*. Very little is known of this *restitutio*; it seems to have been in Julian's edict[11], but it has been pointed out[12] that its only known applications were in matter of procedure; in any case it would be useless if the actual beneficiary was a person not concerned in the fraud. The *actio doli* was conceived of as penal, and was thus available to[13] but not against *heredes*, except to the extent of enrich-

1 4. 2. 14. 5. 2 4. 2. 14. 15. 3 4. 2. 14. 3. There seems no sufficient reason to suppose, with Albertario, *Bull.* 26, 106, that this rule of release in such circumstances is an interpolation. It is held by Beseler (*Beiträge*, 3. 7) that in classical law this release did not follow where one had paid the fourfold under judgment. 4 4. 2. 19. 5 4. 2. 14. 1, 2. 6 See Karlowa, *R.Rg.* 2. 1065. 7 See Girard, *Manuel*, 429. 8 The text may be interpolated. 9 4. 3. 1. 2. 10 4. 3. 7. 6; h. t. 18. 5, etc. 11 4. 1. 7. 1. 12 The Digest, in its confused treatment of the matter, seems to aim at suppression of the *rest. in int.* 13 G. 4. 112; Inst. 4. 12. 1.

ment[1], and was barred by an *annus utilis*[2]. It was *arbitraria*[3], and lay only if the damage had not been made good[4]. As elsewhere if more than one person was engaged in the wrong, each was liable for the whole, but if one had made the wrong good, the others were released[5], a result of the principle that the action lay only "*si non aliter res servari potest*[6]." In these respects it resembled the *actio metus*, but it differed in that it lay only against the wrongdoer, not against third parties[7], was infaming[8] and was subsidiary, *i.e.* was not allowed if there was any other remedy, either against the wrongdoer or another[9] (even a *popularis actio*[10]), or where the *exceptio* sufficed[11]. Even where there had been another remedy but it was time-barred or released, there was no *actio doli*[12]. But if the other remedy was illusory, on account of insolvency of the potential defendant, the *actio doli* was allowed[13], as also in case of reasonable doubt as to the existence of another remedy[14]. The only certain exception is that it was alternative to *actio metus*[15], but there are inconclusive texts suggesting that in later classical law it was sometimes alternative to other actions[16].

The action being purely praetorian, these delicate points would be determined by the praetor, and we are told that the action was given only *causa cognita*[17]. The *cognitio* would also deal with other grounds of exclusion. As it was infaming it was not allowed except in cases of some importance[18], and never to *liberi* or *liberti* against *pater* or *patronus*[19], or to any *humilis* against one of high rank[20]. In such cases an *actio in factum* was given which said nothing of *dolus* and was not infaming[21]. The same action was given in ordinary cases, after the *actio doli* was time-barred, to the extent of enrichment[22], and perhaps where it was barred by another remedy, itself time-barred.

SERVI CORRUPTIO. This was a praetorian delict with liability *in duplum*, for making a slave less valuable, by physical, mental or moral deterioration caused dolosely[23]. For careless damage this action did not

1 4. 3. 17; h. t. 26, in which case it is *perpetua*, h. t. 28, 29. **2** 44. 7. 35. Constantine further requires it to be begun within an *annus continuus* (with some reliefs) and finished within two *annos continuos* (C. Th. 2. 15. 1). Justinian modifies this enactment and provides that it is enough that it be finished within two *annos continuos*, whenever begun (C. 2. 20. 8). It is possible indeed that C. Th. 2. 15. 1 enacted the same thing, *tempus anni* being a corruption for *tempus biennii*. But see Gradenwitz, *Z.S.S.* 34. 293. The *exceptio* is not similarly limited. 15. 1. 30. 6 is probably interpolated; see Beseler, *Beiträge*, 3. 86. **3** 4. 3. 18. pr. **4** As to satisfaction after *litis contestatio*, *ante*, p. 588, n. 13. **5** 4. 3. 17. pr. **6** 4. 3. 1. 8; h. t. 5. As to suggested interpolation, see *ante*, p. 589, n. 3. **7** 4. 3. 15. 3. **8** G. 4. 81; D. 3. 2. 1. **9** 4. 3. 1. 1; h. t. 3; h. t. 4. **10** 4. 3. 7. 2. **11** 4. 3. 1. 4; h. t. 40. **12** 4. 3. 1. 6; h. t. 7. **13** 4. 3. 5, 6. **14** 4. 3. 7. 3. **15** 4. 2. 14. 13. **16** *E.g.* C. 2. 20. 1; D. 7. 4. 5. 3. Accarias, *Précis*, 2. 920. **17** 4. 3. 1. 1. **18** 4. 3. 9. 5; h. t. 10. **19** 4. 3. 11. **20** 4. 3. 11. **21** *Ib.*; h. t. 12. **22** 4. 3. 28. **23** 11. 3. 1. pr., 4, 5. 2. Concealing him in flight, persuading to misconduct, idleness, crime, fraud or insolence, or wilfully causing injury to his body.

lie, though for physical harm thus caused there was an *actio utilis e lege Aquilia*[1]. The fact that he was already of evil ways was no defence; it did not excuse making him worse[2]. The action was not available to or against a *bona fide possessor*[3], but since it was available as an *actio utilis* to anyone with a *ius in rem*, owner and fructuary might have it against each other[4]. It was *perpetua*[5] and noxal[6], but as it was delictal, was available to but not against the *heres*[7]. It was not extinguished by death, alienation or manumission of the slave[8]. The unit of which double was due included, besides the lessening in value, the amount of things stolen or damage done by the slave[9], and of any liability he might have imposed on the owner, *e.g.* where he was induced to steal from, or damage the property of, a third person[10]. It was not barred by *actio furti*, *e.g.* where he stole "*ope consilio*" of a third party against whom *furti* had been accordingly brought, or by return of any thing he had stolen[11]. In later law the master might choose between this action and surrendering the slave, taking in return his original value[12].

Gaius discusses the case in which a third person tried to induce *A*'s slave to rob him, but the slave informed *A*, who, in order to trap the corrupter, told the slave to fall in with the plan. Gaius held, logically, that there was no liability for *servi corruptio*, as the slave was not corrupted, or for theft, as *A* consented. But Justinian, by a sort of rough justice, allowed both actions[13].

Fraud on creditors[14]. This was dealt with by the *actio Pauliana*, of which the rules are obscure, as the compilers appear to have fused different remedies. The main principles however seem to have been the following. The action lay where the debtor had impoverished himself to the detriment of his creditors, with knowledge that he was so doing[15], *e.g.* by alienation, by incurring liabilities, or by allowing rights to lapse, but it did not lie for failing to acquire[16], or for paying just debts[17]. As it required proof of insolvency, it seems to have lain only where the creditors had taken possession, and it was brought on their behalf by a *curator bonorum*[18]. It lay against the debtor, who might have since acquired property, but its important field was against acquirers from him, who were parties to the fraud[19]. It was *fictitia*, the *fictio* being that the wrongful act had not taken place[20]. It was *arbitraria*[21], so that *condemnatio* was avoided by giving up what was due. It was *in simplum*,

1 11. 3. 4. **2** 11. 3. 1. 4. **3** 11. 3. 1. 1. **4** 11. 3. 9. 1. **5** 11. 3. 13. **6** 11. 3. 5. 3. **7** 11. 3. 13. **8** 11. 3. 5. 4. **9** *E.g.*, destruction of evidences of debt. 11. 3. 11. 1. **10** 11. 3. 10; h. t. 14. 5–8. **11** 11. 3. 11. 2; h. t. 12. **12** 11. 3. 14. 9, interpolated. **13** G. 3. 198; Inst. 4. 1. 8. **14** See for full account of this remedy, Girard, *Manuel*, 432 sqq. **15** 42. 8. 10. 2; h. t. 17. 1. **16** 42. 8. 6. 2. **17** 42. 8. 6. 7. **18** 42. 8. 1. pr.; h. t. 6. 7; h. t. 10. 1. **19** 42. 8. 6. 8. **20** See Lenel, *E.P.* 425 sq. **21** 42. 8. 10. 20.

annua, and available to but not against *heredes*[1], but it was not noxal[2], so that it was penal rather in respect of purpose than of effect. There was an *exceptio* in appropriate cases[3], and there was an *interdictum fraudatorium*, the history[4] and scope of which are doubtful. In later law there was also *restitutio in integrum*[5].

FRAUD ON PATRON[6]. This was provided against by two actions; *Fabiana*, where the *libertus* had left a will, *Calvisiana*, where he was intestate[7], but having similar principles. The action was *in personam*, *perpetua*, *in factum*, and *arbitraria*[8]. It was available to and against the *heres*[9], and was quasi-contractual in other respects. Thus, if the act complained of was through a slave, the action was *de peculio*, etc.[10] As we shall see, there need have been no fraud on the part of the person liable. It lay only after death of the *libertus*[11]. If the act was *inter vivos* the patron must shew not only that it lessened his gain, but that this was intended; if it was *mortis causa*, *e.g. donatio mortis causa* or legacy, the fact of injury sufficed[12]. It was brought against the receiver, but it need not be shewn that he was in bad faith; *dolus* of the *libertus* sufficed[13]. The action covered *fructus* before and since *litis contestatio*[14]. As in fraud on creditors, it lay only for diminution, not for neglect to acquire[15]. It was specially aimed at gifts, and thus, where it was a sale or analogous transaction, the third party was allowed either to have the transaction set aside, receiving what he has given and restoring what he has received, or to have the bargain amended to fairness[16]. On a fair transaction the action did not lie at all, and the edict provided that the praetor would enquire into this[17]. It does not seem to have lain against later holders, or where the thing had ceased to exist[18], subject no doubt to the rule as to *mora*[19].

1 42. 8. 1. pr.; h. t. 11. It lay after the year, and against *heredes*, to the extent of enrichment (42. 8. 6. 14; h. t. 11), and was extended by the jurists against innocent donees to the same extent (42. 8. 6. 11). 2 42. 8. 6. 12. In this case it was treated as quasi-contractual, giving *de peculio*, etc. There is the same intermediate character in the next case to be considered. 3 42. 8. 3. 4 See Lenel, *E.P.* 475 sqq. Other literature cited, Girard, *Manuel*, 433 sqq. See also Huvelin, *Études sur le furtum*, 1. 467 sqq. 5 Inst. 4. 6. 6. There is much controversy about the *actio Pauliana*. For Lenel (*E.P.* 479) it was, in classical law, only the *formula arbitraria* given under the *interdictum fraudatorium*. But see Solazzi, *Bull.* 15. 127 sqq. Collinet, *N.R.H.* 43. 187 sqq., is led (by an examination of the texts and glosses referring to the action) to the conclusion that whatever the nature and origin of the action, the name *Pauliana* is a late figment which did not appear even in the Digest as originally issued. 6 D. 38. 5; *Frag. de formula Fabiana*; Girard, *Textes*, 454. 7 38. 5. 1. 6; h. t. 2; h. t. 3. pr.–3. 8 38. 5. 1. 26; h. t. 3. 2; h. t. 5. 1; *Fr. de f. F.* 1. 9 38. 5. 1. 26. 10 38. 5. 1. 22. Biondi, *Studi sulle actiones arbitrariae*, 1. 164, holds that it was not considered as a penal action in classical law. 11 38. 5. 1. pr. 12 38. 5. 1. 1, 12, 27. 13 38. 5. 1. 4. 14 38. 5. 1. 28; h. t. 2. 15 38. 5. 1. 6, 7. 16 38. 5. 1. 12, 13. 17 38. 5. 1. pr. 18 38. 5. 10. 19 *Ante*, § CLXXXVIII. There are many other delictal actions and proceedings. Such are the *actio de rationibus distrahendis*, *ante*, § LIX; the

CCIV. *Obligatio quasi ex delicto.* This classification, which purports in the Digest to come from a work of Gaius[1], may possibly be an interpolation, these obligations having been treated in classical law among the "*variae causarum figurae*[2]." In the Institutes we get four cases.

Iudex qui litem suam facit. The main source is a text from Gaius, which recurs three times with small variations. An *actio in factum* lay against a *iudex* who, from carelessness or unfairness, gave a wrong decision, or, perhaps, neglected his duty in any way to the detriment of a party[3]. It was available also if he gave a judgment not authorised by the *formula*[4]. It was not available against the *heres*[5].

Res deiectae vel effusae. Where something was thrown from a dwelling on a way commonly used[6], to the damage of a passer or property, the householder was liable. The action was *in factum* for double the damage done[7], but if there were several persons liable, satisfaction by one freed the others[8]. It was *perpetua* and available to but not against the *heres*[9]. If a freeman was killed there was an *actio popularis annua*, for a penalty of fifty *solidi*[10]. It was provided that if several wished to bring it, persons interested in the deceased were preferred[11]. If a freeman was injured there was an *actio in factum*, for damages assessed by the *iudex*, *perpetua* so long as the injured man was alive, but not available to his *heres*[12].

Res suspensae. Where things were suspended from a building over a way in common use, to the danger of passers, there was an *actio popularis* for ten *solidi* against the occupier, not available against the *heres* (unless of course on his own account), and, in general, under the same principles as those applied to *res deiectae*[13].

Nautae caupones stabularii. The principals of a ship or inn or public stable were responsible for any theft or damage done by those employed by them in the ship, etc. The action was *perpetua* and *in factum* for double

iudicium de moribus, *ante*, § XL; the *actio de arboribus succisis*, XII Tables, 8. 11; Girard, *Textes*, 19, and its praetorian descendant, *arborum furtim caesarum*, D. 47. 7 (see Huvelin, *Furtum*, 1. 67), and a number of others in the XII Tables, practically superseded by the later law of *damnum* and *iniuria*. Moreover some interdicts have a delictal character, *e.g.*, "*quod vi aut clam*," *post*, § CCXLVIII, as have also the proceedings for *damnum infectum*, *post*, § CCXLV, and "*operis novi nuntiatio*," *post*, § CCXLVI.

1 It is actually "*quasi ex maleficio*," 44. 7. 5. 4, 5. **2** 44. 7. 1. pr. **3** 44. 7. 5. 4; 50. 13. 6; Inst. 4. 5. pr. **4** G. 4. 52. See D. 50. 13. 6. **5** 5. 1. 16 (Julian, *contra*). It does not lie against the *pater* where the son is a *iudex*, and the son is liable to the extent of what was in his *peculium*, when he gave the judgment, 5. 1. 15; Inst. 4. 5. 2. **6** 9. 3. 1. pr., 2; Inst. 4. 5. 1. **7** 9. 3. 1. pr., 4. Not noxally available in case of acts done by son or slave householder, 9. 3. 1. 8; Inst. 4. 5. 2, but noxal where done by slave of householder, 9. 3. 1. pr., and no doubt in earlier law where it was a son. **8** 9. 3. 1. 10–4. **9** 9. 3. 5. 5. **10** *Ib.*; Inst. 4. 5. 1. **11** 9. 3. 5. 5. **12** *Ib.* The text gives this action to others for an *annus utilis*. **13** Inst. 4. 5. 1, 2; D. 9. 3. 5. 6–13; 44. 7. 5. 5.

damages and was available to, but not against, the *heres*[1]. In the case of an inn, this extended to acts of permanent residents, but not of mere passing travellers[2]. If the offender was the defendant's own slave the liability was noxal, and presumably ended by his death, but would not so end in other cases[3]. As it involved proof that the act was done by such a person, there might be an alternative action against him[4]. So far as theft was concerned this rested on a special edict[5], but there seems to have been no edict for the case of *damnum*[6]; it was probably an extension of the *actio in factum* under the *lex Aquilia*[7]. An alternative procedure of somewhat different character and scope under the edict, *de receptis*, has already been considered[8].

The common quality of these cases of quasi-delict is uncertain[9]. In the case of the *caupo*, etc., Justinian suggests that it is his fault for employing such people, and Ulpian points out that he could not pick and choose among *viatores* and so was not liable for them[10]. But this would make it delict, and moreover no amount of care would avoid the liability. It was in fact insurance. They were all cases of vicarious liability, for even in the case of the *iudex* the name, an old one[11], shews that he was contemplated as taking over the liability for act of another.

CCV. We have now to consider generally the circumstances in which one might be responsible for another's delict. Apart from personal privity[12], there was what is called noxal liability for delicts committed by members of the *familia*, *i.e.* liability either to pay the damages or to hand over the offender. The XII Tables created it for *furtum*[13], the *l. Aquilia* for *damnum*[14], the Edict for *rapina*, *iniuria*[15] and other praetorian wrongs. The system did not apply to crime, to contract[16] or quasi-contract, or even to quasi-delict except in the case of *deiectio*[17]. In *iniuria* the master could avoid the noxal liability by handing over the slave *in iudicio*, to be thrashed, the *iudex* determining the amount of chas-

1 47. 5; 44. 7. 5. 6; Inst. 4. 5. 3. **2** 47. 5. 1. 6. **3** 47. 5. 1. 5. **4** 47. 5. 1. 3. **5** 47. 5. **6** 4. 9. 6, 7; 9. 4. 19. 2. See Lenel, *E.P.* 199. **7** Lenel, *loc. cit.* **8** *Ante*, § CLXXXIII. **9** See Moyle, *Instt. Iust.* 540; Girard, *Manuel*, 650 (who considers any theoretical basis of the classification unattainable, and rejects that of Pothier, who bases it on absence of wrongful intent, which does not fit the case of the *iudex*). **10** 47. 5. 1. 6. **11** Girard, *Manuel*, 649, n. 3. **12** Connivance or failure to prevent, having the means, made the master fully liable (P. 2. 31. 28; D. 9. 4. 2, etc.). It was decided after discussion that this connivance did not affect the other liability of the slave himself if freed, or of a later owner. Even command did not, if the matter was serious (*facinus*) (9. 4. 2. 1; 47. 10. 17. 7, etc.). **13** G. 4. 76; D. 9. 4. 2. 1. **14** G. 4. 76. Visscher, *Les actions noxales*, 27, holds that this was not expressly provided but inferred from the XII Tables. **15** G. 4. 76; Inst. 4. 8. 4. **16** As to a quasi-noxal surrender, where the contract was by the master, the damage by the slave, *ante*, § CXLIII. **17** 9. 3. 1. pr. As it is always *in duplum* it is better than the *actio e lege Aquilia*, also available where the slave is identified.

tisement[1], otherwise the noxal action went on. In *metus* we are told that if the *dominus* had surrendered the slave noxally, he could still be sued for any enrichment[2]. In *dolus* we are told that the action was noxal only if the matter in which the *dolus* occurred was itself delictal[3]. But other texts make this point obscure[4].

The master's liability depended on his having *potestas*[5], which here meant the actual power to produce the slave. If, when sued, he was not disposed to defend, his proper course was to produce the man, and the magistrate would authorise the plaintiff to seize him (*duci vel ferri iubere*) which released the master, though there might be minor rights in the man[6]. The transferee would in any case usucapt, and, under Justinian, would be owner if the transferor was. If the master neither surrendered nor took the proper steps in defence, he was liable *in solidum* with no right of surrender[7]. If he was absent and the slave present, the slave might be "*ductus*," and the defendant was released[8]. But anyone interested, *e.g.* usufructuary, might defend on behalf of the master[9]. Till the *condemnatio*, the payment or surrender may be regarded as alternatives (though it must be noted that the power of surrender has nothing to do with *arbitrium iudicis*[10]), but after *condemnatio*, which was always primarily for money, the surrender became merely facultative[11]. It did not then release if there were minor rights outstanding[12], and the *actio iudicati* was for the damages only[13]. One who would have had *potestas* but for his fraud was liable, under praetorian rules, as if he still had it[14].

Noxa caput sequitur. Liability followed the delinquent: the person liable was the owner at the time of the action[15]. Thus, apart from fraud, death, alienation, manumission or abandonment of the slave before *litis contestatio* released the owner[16], though it might make someone else liable. There could be no noxal action between master and slave, and none

1 47. 10. 17. 4–7. In later law it seems to have been more usual to deal with it *extra ordinem*, *i.e.* castigation under authority of the magistrate, h. t. 9. 3; h. t. 45. See, however, as to the earlier history, Naber, *Mél. Gérardin*, 467. **2** 4. 2. 16. 1. **3** 4. 3. 9. 4; 44. 7. 49. **4** See 4. 4. 24. 3; 10. 4. 16. The reason why noxal actions are allowed in delict and not in contract, is that it is not exactly a liability of the master, but a right to ransom the slave from vengeance. In time, payment and surrender come to be regarded as alternative, some texts treating payment as primary (9. 4. 1; 42. 1. 6. 1; cp. 2. 10. 2; 9. 4. 2. pr.). This is a complete reversal of the original conception. See Girard, *N.R.H.* 12. 31 sqq. **5** 9. 4. 21. 2, 3. **6** 9. 4. 15; h. t. 21. pr. The texts imposing a duty of conveyance are supposed to be interpolated. Pissard, *Études Girard*, 1. 244 sqq. **7** 9. 4. 21. 4; h. t. 22. 3. **8** 2. 9. 2. 1; 6. 2. 6; 9. 4. 39. 3. **9** 9. 4. 26. 6. **10** For the *formulae*, see Lenel, *E.P.* 190, 319. **11** 42. 1. 6. 1. It is only between *litis contestatio* and *condemnatio* that it is truly alternative, for till then death of slave releases: it would not be a true alternative. 9. 4. 7. pr.; *ante*, § CXCIII. **12** 42. 1. 4. 8. **13** 5. 3. 20. 5. **14** 9. 4. 12; h. t. 22; 47. 2. 42. 1. **15** 9. 4. 7. pr. **16** 9. 4. 5. 1–7. pr.; h. t. 14. pr.

would arise after transfer[1]. And if the guilty slave passed into the hands of the injured person the action was extinct and would not revive on alienation[2]. If, *dolus* apart, the slave was freed or transferred during the action, this was transferred[3], against himself or his new master as the case might be.

It is generally held that in classical law death of the man after *litis contestatio* did not release, but that it sufficed to surrender his dead body[4]. This last power did not exist under Justinian, so that in such a case the death left the owner liable *in solidum*.

Holders of lesser *iura in rem* could not be sued noxally, but a similar result was produced by the rule that if the owner surrendered, they could not enforce their right without paying the damages; hence the rule that they might defend on behalf of an absent owner[5].

Where a wrong was committed by several of a man's slaves, he ought, on principle, to be fully liable in respect of each. But the praetor limited the damages to what would be due if one freeman had done the act[6], a rule originating in theft and extended to many delicts, but not to all, since, in some cases, it was not to be thought of as one, but "*plura facta*." This was so in *iniuria*, and, as some thought, in *damnum*[7]. The alternative to single damages was surrender of all the slaves concerned. But proceedings in respect of one of the slaves who had been freed or alienated did not release the *dominus* who still held the others[8].

There were special rules for *publicani*. They were liable to an action *in duplum* where goods were violently seized or damaged by their employees, slaves or free, but payment of what would be due from a single free man was enough[9]. The slaves concerned must be produced, and if the actual offender was identified there was an ordinary noxal action[10]. If they were not produced it was *in solidum*[11]. The twofold included the *res*, so that the injured person could, if the slave was identified, proceed if he preferred by an ordinary noxal action on *rapina* or *damnum*[12].

1 47. 2. 17; G. 4. 78; Inst. 4. 8. 6. 2 47. 2. 18. School dispute, G. 4. 78. This, however, would work unfairly where, *e.g.*, *A* bought under a mandate for *B* or held the slave in *fiducia*. Hence the rule that he can get an indemnity, not delictal damages, under the contract, unless the slave is surrendered to him, which also is short of fairness, 17. 1. 26. 7, for he may have bought the slave under special instructions, so that his faults are not in any way imputable to him, and the damage done may exceed the man's value. It is an application of the rough rule that an owner ought not to be liable beyond the slave's value, to a case in which it is quite unfair. The rule has however little importance under Justinian. It is not often that a buyer under mandate would be interim owner. See Buckland, *Slavery*, 125. 3 9. 4. 15. Much controversy as to this *translatio* and the nature of the transferred action. See *post*, § CCXLI. 4 G. 4. 81; Aut. G. 82, 87. 5 7. 1. 17. 2; 9. 4. 18. Difficulties in this case, Buckland, *Slavery*, 117. 6 9. 4. 31; 47. 6. 1. 7 2. 1. 9; 47. 6. 1. 2. 8 47. 6. 3. pr. 9 39. 4. 1. pr.; h. t. 3. 3. *In simplum* after a year. 10 39. 4. 2; h. t. 3. pr., 2. 11 39. 4. 1. 6. 12 39. 4. 1. 3, 4.

Another edict, with apparently similar rules, dealt with simple theft in such cases[1].

Where a slave committed several delicts against different people, the owner was liable in respect of all, but the rule, *noxa caput sequitur*, made the first surrender free him from liability, so that the last of several plaintiffs kept the slave, since all the rest would in turn have been liable. But a surrender to *B* after *litis contestatio* with *A* would not free the owner from *A*[2].

Delict in connexion with contract gives rise to difficulties. If a slave committed a delict in respect of property held by his master under contract the view which prevailed was that if the master was in no way to blame, even in the choice of the man, he could be sued *ex contractu*, but might free himself by handing over the man[3]. Where the wrongdoing slave was himself the subject of the contract, the rule seems to have been that the slave's act was no breach of the contract, which he did not make, and thus if a hired slave stole from the hirer there was no *actio ex conducto*, but an ordinary noxal action[4]. But this is obscured by the fact that, in transactions descended from *fiducia*, many texts refuse a noxal action, but give one on the contract, with a right of release by handing over the slave—*pro noxae deditione*. This may be due to the fact that in *fiducia* the receiver, being owner, could have no noxal action, the texts having been written of *fiducia*, and representing a transfer to the new system of a rule developed in the old, to which alone it was appropriate[5]. In the case of *commodatum*, Justinian, in an interpolated text, reasonably gives a noxal action[6].

Special rules appear to have existed under the *l. Aquilia*. No text applies the notion of *potestas* to it. In general an owner was not liable noxally for a slave *in fuga*, as he had not *potestas*, and a *bona fide possessor* was liable because he had[7]. But in *damnum* an owner was liable for a *fugitivus*, and a *bona fide possessor* was not liable[8]. It has been acutely suggested that something in the *lex* made it impossible to apply the idea of *potestas*, probably an energetic reference to *herus* or *dominus* as the person liable[9].

Under Justinian noxal liability applied only to the case of slaves, but in classical law a son, though, no doubt, not a daughter, could be

1 They are confused in the Digest, see Lenel, *E.P.* 324. 2 2. 9. 1. 1; h. t. 2: it is *dolus*. 3 Chief texts: Coll. 12. 7. 9; D. 9. 2. 27. 11; 19. 2. 11. 1; 47. 2. 62. 5. See also, *ante*, § CXLIII. If the act was theft and the holder was absolutely liable for *custodia* (*ante*, § CXCI), *e.g.*, the slave of a *fullo* stole a thing sent to him to be cleaned, this release would not apply: the *fullo* was absolutely liable for the thing. 4 19. 2. 45. pr.; 47. 2. 62. 6. 5 See, *e.g.*, 13. 7. 31; 17. 1. 26. 7; 47. 2. 62. 1, 5–7. 6 13. 6. 22. 7 9. 4. 12; 47. 2. 17. 3; P. 2. 31. 37. 8 9. 2. 27. 3. 9 Girard, *N.R.H.* 11. 430 sqq.; *Manuel*, 693. Cp. 9. 2. 11. 6: it is only the *dominus* who has the action.

surrendered in the same way. The softening of manners and acquisition of proprietary rights by *filiifamilias* put an end to this. The holding was in no way fiduciary, but in later classical law the holder was compelled to free the man when he had worked out the damages[1]. The Institutes apply this also to slaves[2], but it is not so stated in the Digest or Code.

Pauperies. The XII Tables gave an analogous procedure, an *actio in simplum* with a right of surrender, where damage was done by an animal in such circumstances that no man was to blame[3]. We know the law only as it was in classical and later law[4]. We are told that the rule applied only where the violence was not natural to such beasts, and thus not where a wild beast was concerned[5]. But the texts also say that if the wild beast had escaped, the old owner, being no longer owner, was no longer liable, which implies that the action would have lain had the beast still been in captivity[6]. The action was subject to the general principles of noxal actions. It could be brought by the *heres*, but not against him, *qua heres*, but only *qua* owner[7]. Anyone might bring it who had an *interesse* in the safety of the *res*[8]. If a free person was injured, the damages were in respect of cost of treatment, value of time, and profits lost[9]. The XII Tables dealt only with quadrupeds[10], but, later, an *actio utilis* was given in the case of other animals[11].

In addition to these proceedings there was a provision in the Edict of the Ediles, which seems to have been designed to provide a remedy in the case of wild animals, because there was none in *pauperies*. If a wild animal was kept by the wayside, and escaped, and damaged property, there was an action for double damages, and if a freeman was injured, at the discretion of the *iudex*. If a freeman was killed the penalty was 200 *solidi*[12]. Justinian declares this to be alternative to the *actio de pauperie*[13].

1 G. 4. 79. The man is *in mancipio*, but in this case, on the view which prevailed, one manumission sufficed to destroy the *potestas*. Coll. 2. 3. 1; Inst. 4. 8. 7 (which says that at one time it was allowed for daughters). 2 Inst. 4. 8. 3. 3 9. 1. 1. pr., 3. 4 By which time it has undergone changes. 9. 1; Inst. 4. 9; P. 1. 15. 5 Inst. 4. 9. pr.; D. 9. 1. 1. 7, 10. The carrying of disease was enough. P. 1. 15. 1 b = Lex Rom. Burg. 13. 3. 6 Inst. 4. 9. pr.; D. 9. 1. 1. 10, probably interpolated. 7 9. 1. 1. 17. Death of the animal before *l. c.* destroyed the claim (h. l. 13) but not death after *l. c.* (h. l. 14). 8 9. 1. 2. 9 9. 1. 3. 10 9. 1. 1. pr. 11 9. 1. 4. 12 Inst. 4. 9. 1; D. 21. 1. 42. 13 Inst. 4. 9. 1.

CHAPTER XIII

THE LAW OF PROCEDURE. *LEGIS ACTIO. FORMULA. COGNITIO*

CCVI. Nature of the Law of Actions, p. 599; CCVII. Comparison of the successive systems of procedure, 602; *Actio* and *Iudicium*, 604; CCVIII. *Legis Actio*, 605; *Sacramentum*, *ib.*; CCIX. Default of a party, 608; *Vadimonium*, 609; Procedure *in iudicio*, *ib.*; CCX. *Iudicis arbitrive postulatio*, 612; *Condictio*, *ib.*; CCXI. *Manus Iniectio iudicati*, 614; CCXII. *M. I. pro iudicato*, 617; *M. I. pura*, *ib.*; CCXIII. *Pignoris Capio*, 618; CCXIV. Decay of *Legis Actio*, 621; Introduction of *Formula*, 623; CCXV. Course of action by *Formula*, 626; *Actiones interrogatoriae*, 627; *Iusiurandum*, 628; CCXVI. *Confessio*, 629; CCXVII. *Iudex* and *Iudicium*, 631; Details of the hearing, 632; Default, 633; CCXVIII. *Officium Iudicis*, Judgment, 634; *Calumnia*, 635; CCXIX. Execution of Judgment, 637; *actio iudicati*, *ib.*; Personal Seizure, 638; *Bonorum Venditio*, *ib.*; Applications apart from judgment, 640; *Distractio Bonorum*, *ib.*; CCXX. Remedies against the debtor's sureties, 641; Appeal, *ib.*; Local limits of jurisdiction, *ib.*; CCXXI. Structure of the *Formula*, *Nominatio Iudicis*, 643; *Praescriptio*, *ib.*; *Demonstratio*, 645; CCXXII. *Intentio*, 646; CCXXIII. *Exceptio*, 648; Classifications, 651; CCXXIV. *Condemnatio*, 653; *Clausula Arbitraria*, 654; *Taxatio*, 656; *Adiudicatio*, 657; CCXXV. *Cognitio extraordinaria*, *ib.*; History, 658; CCXXVI. Course of Proceedings, 660; CCXXVII. Jurisdiction, 663; Judgment, 664; Appeal, 665; *Relatio*, *ib.*; *Supplicatio*, 666; Execution of judgment, *ib.*

CCVI. The Law of Actions[1], from a modern point of view, is the Law of Procedure, of Litigation, of Remedies. Before stating the elements of the system, as it was in Roman Law, some preliminary observations must be made.

The subject covers two distinct sets of rules, which may be called the law of actions, strictly so called, and the law of procedure. The former is concerned with the distinctions between different types of remedy, such as *Actio* and *Interdictum*, the classifications of each of these, according to their varieties, such as *actio in rem*, *actio in personam*, *interdictum prohibitorium*, *restitutorium*, *exhibitorium*, and so forth, and with the rules determining the remedy for each wrong. The latter branch is concerned with the steps to be taken in the course of the action or other proceeding by the plaintiff who desires to bring the matter before the Court, and the steps to be taken by the defendant if he disputes the claim made. It is not practicable to separate these altogether in discussion, except at the cost of repetition, but nearly all the long sixth title in the fourth book of the Institutes deals with the former topic.

The law of actions may thus be called the law of litigation, the law governing the submission of claims to a tribunal for settlement. But it

1 Bethmann-Hollweg, *C.P.*; Keller-Wach, *C.P.*; Bertolini, *Il processo civile*; Costa, *Profilo Storico del processo civile Romano*.

must not be forgotten that legal remedies in Rome originated in self-help, and that early Roman Law did not regard litigation as essential to the conception of an "*actio*." Traces of this wider sense in which the word means any proceeding regulated by law for the enforcement of rights are to be found in Gaius, as we shall see in dealing with *Legis Actio*.

Though both Gaius and Justinian start evidently from the conception of the Law of Actions as the Law of Remedies, Adjective Law, they depart from this notion in the actual treatment. The whole of the Praetorian law (there was no civil law on the matter) concerning liability of the *paterfamilias* on transactions by members of the *familia*, or business agents[1] (*institor*, *magister navis*), and the law, civil and praetorian, as to his liability for wrongs committed by members of the *familia*[2] (noxal liability), both more logically belonging to the law of obligations, are treated under the law of actions, and practically all that we hear of purely possessory rights is said in connexion with interdicts[3]. This last fact is justified by the consideration that the right of *possessio, per se*, consists of nothing but the right to these remedies; *possessio* has a purely procedural content[4]. The other cases constitute a real difficulty in regarding the *ius rerum* as the law dealing with rights with a money value, but in view of the close affinity between *obligatio* and *actio*, and of the fact that both these sets of rights are marked by a strongly specialised form of procedure, it is not surprising that they are attracted to this topic. The Romans did not possess such a developed theory of representation as makes such a treatment unlikely in modern systems. And Gaius, whom Justinian follows, introduces the rules of these types of obligation, not as independent objects of discussion, but as illustrations of certain types of action which he is explaining from the point of view of procedure, so that, as his language shews[5], it is only for convenience, and to avoid repetition, that he treats them in detail here, instead of treating their substantive characteristics under the law of obligations, where the matter properly belongs. The method adopted is no doubt partly the result of the habit, observable in ordinary speech, of using the same word, action, to denote both the right of action and the procedural steps, a practice which is at the bottom of the observed affinity between action and obligation[6].

The co-ordination of the law of actions with the law of things and the law of persons as a third element in the classification, is the feature of the institutional arrangement which has met with the most hostile criticism. Some of the criticism rests indeed on misapprehension: it is

1 G. 4. 69 sqq.; Inst. 4. 7. 2 G. 4. 75 sqq.; Inst. 4. 8. 3 G. 4. 143 sqq.; Inst. 4. 15. 2 sqq. 4 *Ante*, § LXXII; *post*, § CCXLIX. 5 G. 4. 69. 6 See D. 44. 7, rubric.

impossible for instance to lay much stress on Austin's severe language, as he appears to misunderstand the Roman arrangement[1]. But the point that these rules of adjective law should be subordinated to, not co-ordinated with, the substantive rules is clearly sound. If, however, the view be accepted that the law of persons was a descriptive chapter and the law of things the statement of the modes of acquisition of substantive rights, the actual position of the law of actions as an appendix to it is justified, and the treatment of it as a new *genus* is a logical error, but without effect on the actual treatment. It has been shewn that in the effort to construct a triad the Romans were constantly led into errors of this kind[2]. In any case few will dispute Maine's proposition that the author of this arrangement, whoever he was, achieved a great feat of abstraction[3].

It is of course said with justice that the whole institutional scheme is defective, that it would have been far better to base the arrangement absolutely on rights or on duties. But the Romans were only gradually reaching the clean-cut conception of a right which we possess, and in the conditions which existed, the arrangement under the heads of those persons who can be affected, the rights which the law will protect, and the means by which this is done, seems to merit Gibbon's remark that it is "no contemptible method[4]." A more logical method would no doubt have been a division simply into Substantive Law, the *ius rerum*, and Adjective Law, the *ius actionum*. The Law of Persons would have found its place as an introduction to the *ius rerum*, as in the French Code Civil[5], and in the German Bürgerliches Gesetzbuch[6], so that it is the law of persons, rather than the law of actions which is undeserving of a separate place. The effect of such a change would have been very small: the opening phrases of the first, second and fourth books of Gaius would have needed modification, but all the rest of the matter might have stood exactly as it is.

CCVII. The law of procedure was in a sense the most important part of the law. A state of things can be conceived, and has indeed existed in undeveloped communities, in which the only permanent law was that regulating the submission of disputes to a central authority: Cadi justice. In all early communities the law of procedure is the most prominent part of the law. At first it may be regarded as State regulation of self-help, but in civilised communities this mode of redress tends to be

1 It is difficult to extract a consistent doctrine from Lect. XLIII and its notes (pp. 749–763, ed. 1873), or to see what part of the Law of Actions would be suitably placed as a subhead of the Law of Persons as conceived by Gaius or his authority. 2 Goudy, *Trichotomy in Roman Law, passim.* 3 *Early Law and Custom*, 367. 4 *Decline and Fall of the Roman Empire*, ch. XLIV (Bury, 4. 470). 5 Code Civil, Livre I. 6 Bürgerl. Gesetzbuch, §§ XXII–LXX.

superseded by a system in which the question in dispute is first decided by a Court of Law, and the remedy then put in force by it, or under its authority.

If both parties to a dispute were always agreed on the facts and the law, and ready to carry out their legal duties, there would be no need of a law of procedure. But this is not the case, and rules of law do not enforce themselves. In any dispute, therefore, in which the parties have not been able to come to terms, the enforcement of the law depends, ordinarily, on the willingness of the party who has, or conceives himself to have, a right which has been infringed, to take the necessary steps to procure a decision by a court of law. It is for him to initiate proceedings. In Rome he would have to take certain formal steps, which varied historically, in order to bring the other party before the court, and he would have to decide, not always an easy matter, just which of the various possible remedies would meet his case. If what he complained of was that a right *in rem* which he claimed to have was disputed, to his injury, he would ordinarily bring an *actio in rem*, a *vindicatio*, the generic name of all actions to enforce such rights. If what he complained of was breach of a contractual or quasi-contractual obligation, or a delict, he would bring, normally, an *actio in personam*, of which there were, in the Roman Law, many kinds. In both cases the tribunal decided the question, and in the ordinary course judgment was given for damages (or in some cases an order of restitution), or the defendant was absolved. But in many cases there were proceedings open to him which, while they would usually in the long run take the form of an ordinary action, began in another way. Thus for interference with purely possessory rights (or where all that was for the moment complained of was interference with possession) or with some family rights, or with many of what may be called public rights, *e.g.* the right to use a highway, the remedy in classical law took the form of an interdict, a complex procedure in which the first step was a formal order of the magistrate, disregard of which led to an action or actions of the ordinary type. There was another type of action, *praeiudicium*, which aimed merely at a declaration by the court, *e.g.* that so and so was a *libertus*, such a proceeding being usually the preliminary to another. And there were of course many other complications.

In the long evolution of the Roman Law the forms of litigation naturally underwent great changes. But these were more fundamental than this way of stating the matter would suggest. They were so great and so well marked that each new mode, as it was introduced, can hardly be regarded as derived from the other: in each case it may almost be said that there is supersession rather than evolution. If we neglect

primitive institutions we have three systems succeeding one the other in time, the *legis actio*, the *formula* and the *cognitio extraordinaria*. These will be considered in detail, but the most marked differences may be usefully stated here. In the *legis actio* the matter was brought before the magistrate by a fixed ritual, each party and the magistrate himself going through a series of acts and declarations, prescribed partly by statute, and partly by priestly lawyers, interpreting the statute. These ceremonials completed, the matter was referred for trial and decision to another person or persons (*iudex*, *arbiter*) who was not an official but a private person, chosen from a list (*album iudicum*) the constitution of which was changed from time to time, but may be said to have been made up of the better class of *cives*. If the decision was against the defendant, it was enforced by seizure of the defendant by the plaintiff, and, in the last resort, sale into slavery.

In the formulary system, which was that dominant in classical law, there was still a preliminary hearing before the magistrate and reference to a *iudex*, but there were three very great changes. The magistrate was no longer an automaton, reciting words prescribed for him[1]; he controlled the proceedings. His right of *iurisdictio* enabled him to prescribe the form in which the issue should be submitted to the *iudex*, the *formula* (chosen indeed by the parties from models set forth by the magistrate, but subject to his approval), to refuse to issue it at all if he thought fit, and to allow the insertion in it of defences which he thought reasonable, though they were not contemplated in the law or admissible under the old regime. In such matters he now had a very great power. Further, the instruction to the *iudex*, the *formula*, was now written, a step almost inevitable, so soon as it became possible to submit the more complex issues and to give the wide discretionary powers which mark the new system. Again, though the system of personal seizure survived through the formulary period, it was partly superseded by a more reasonable system, invented by the powerful magistrate, the praetor, under which execution of judgment proceeded directly against the goods of the debtor—*bonorum venditio*, the whole estate being seized and sold, a process resembling the modern bankruptcy, but leaving the debtor still liable to pay out of later acquisitions any part of his debt which the sale of his property had left unsatisfied.

In the third system, *cognitio extraordinaria*, there was a very funda-

1 The automatic character of his action must not however be exaggerated. He had the right to refuse concurrence if the formal requirements were not complied with, and an individual magistrate might construe this rather widely. Apart from this, the automatic character of his action under the *legis actio* is not universally admitted; see *post*, § CCXIV and for the view stated in the text and full discussion, Girard, *Mélanges de Droit Romain*, 1. 71–99, 126 sqq.

mental change. There was no longer any reference to a second person for hearing. The magistrate, or, it might be, a deputy appointed by him, before whom the matter came from the beginning, himself heard and decided the case. There was thus no issue of a *formula*, though the claim and defence were still usually stated in writing. A still more rational system of enforcement had been devised. Instead of making bankruptcy the inevitable result of an unsatisfied judgment, the law authorised the seizure and sale of so much of the property of the debtor as would satisfy the judgment.

The words *actio* and *iudicium* bore many meanings and shades of meaning. Of the various meanings of the word *actio*, those which most concern us are three. It might mean a right of action[1]. It might mean the remedy regarded as a whole, as in nearly all the cases in the sixth title of Book 4 of Justinian's Institutes[2]. It was sometimes used to express the proceeding by *legis actio* as opposed to *formula*, the latter being called *iudicium*[3], and this usage left a trace in later law, in a tendency to confine the word to civil law actions[4]. In this old narrow sense the word had from another point of view a wider significance; as will appear in the discussion of *pignoris capio* and *manus iniectio*, *actio* did not necessarily imply litigation; it was a process for the enforcement of a right.

Of the meanings of the word *iudicium* some appear above. Thus it might mean procedure by *formula* or *cognitio* as opposed to *legis actio*, and, occasionally, in later law, a praetorian proceeding as opposed to civil. It has indeed been maintained[5] that in the late Republic it meant the actual written *formula* itself, a signification which accentuates the distinction between the old oral and the new written process. *Iudicium* was also used to denote an action tried by a *iudex* as opposed to an *arbiter* or *arbitri*[6]. A very important meaning of *iudicium* was the second stage of the hearing, the actual trial, procedure *in iudicio*, as opposed to the procedure before the magistrate, procedure *in iure*. This distinction disappeared in the system of *cognitio*, so that the name *iudicium* then came to signify the whole hearing.

A distinction is drawn in some texts between *lis* and *iurgium*[7]. Cicero speaks of *iurgium* as a friendly dispute: *non lis inimicorum iurgium dicitur*[8]. Varro seems to say that they are the same thing[9]. Some legal texts suggest that as applied to legal process the name *iurgium* was

1 "*Nihil aliud est actio quam ius quod sibi debeatur iudicio persequendi*," 44. 7. 51. See also 50. 17. 204. 2 But the initial phrase is from the text printed in n. 1. 3 Wlassak, *Processgesetze*, 1. § 8. 4 See, *e.g.*, the opening clauses in G. 4. 5 Wlassak, *loc. cit.* 6 *Post*, §§ CCX. CCXVII. 7 See, *e.g.*, Cicero, *de Legg.* 2. 12. 29; Livy, 5. 13. 8 *De Rep.* 4 (Nonius, 431). 9 Varro, *L.L.* 7. 93.

specially applied to the divisory actions[1], which would accord with Cicero's language. But it is not important for the law of the Empire[2].

CCVIII. The *Legis Actio*. This expression is not free from difficulty. Gaius tells us that these proceedings were so called either as having been introduced by *lex*, or as being framed strictly according to the words of a *lex*[3], so that, as we have said, they constituted a fixed ritual, a fact which he illustrates by the case of one who sued for injury to his vines and lost his action because he called them vines, the word in the *lex* being *arbores*. There appears to have been an appropriate *legis actio* for each form of wrong, the exact form for use in each case having been elaborated by the Pontiffs, building on the words of the *lex*. But though there were many *legis actiones*, of the words of which we know little, we are told by Gaius[4] that there were but five "*modi lege agendi*," five moulds, so to speak, into one or other of which every *legis actio* was cast, whatever the formal words: *sacramentum*, *iudicis arbitrive postulatio*, *condictio*, *manus iniectio* and *pignoris capio*.

Sacramentum. This is described by Gaius[5] as *generalis*, which seems to mean that it was applicable where no other was prescribed[6]. Thus it might be used as an *actio in rem*, to enforce a *ius in rem*, *e.g.* ownership, or as an *actio in personam* to enforce *iura in personam*, *obligationes*, and, in the former case at least, it had an elaborate ritual.

The process in a real action began by a summons by the plaintiff to the defendant, the form of which (if it had a specific form) we do not know, to appear in court—*in ius vocatio*[7]. As it was essential to the *legis actio* process, as a mode of litigation, that both parties be present and play their part, obedience to the summons could be compelled. If the defendant simply disobeyed, the creditor proclaimed the fact (*antestamino*), seized him, and brought him before the court[8]. It is probable that some circumstances might excuse from obedience to the summons, in particular, *morbus sonticus* and *status dies cum hoste*, which would certainly cause postponement of the hearing before the *iudex*[9]. If the defendant evaded *in ius vocatio* by trickery or flight, the creditor might

1 *E.g.* Vat. Fr. 294; C. Th. 2. 26. 4; D. 10. 2. 57. 2 See for discussion and suggested explanations, Karlowa, *C.P.* 5 sqq. 3 G. 4. 11. Added words not in the prescribed ritual vitiated the process, Vat. Fr. 318. 4 G. 4. 12. 5 G. 4. 13. 6 Karlowa, *op. cit.* 13, holds that the meaning is that *sacramentum* is available if no other is provided, which is not the same thing and would exclude the possibility of alternative processes. See however von Mayr, *Mél. Girard*, 2. 171 sqq. 7 XII Tab. 1. 1. The principal authorities for the procedure are the XII Tables, as restored (Girard, *Textes*, 12; Bruns, 1. 18); G. 4. 16 sqq.; Cicero, *pro Murena*, 12. 26 sqq.; Valerius Probus, *Notae iuris*, "*in legis actionibus*"; Aul. Gell. 20. 10. 8 "*Igitur em capito*," XII Tab. 1. 1. If he was ill the creditor must provide carriage, XII Tab. 1. 3. 9 See the refs. Bruns, 1. 20.

seize him—*manum inicere*[1], which probably means no more than the right to bring him by force before the magistrate's court[2].

The parties being before the court, the plaintiff formally asserted his claim. In an ordinary claim of ownership, *e.g.* of a slave, he placed a hand on the object and said: "*Hunc ego hominem meum esse aio ex iure Quiritium, secundum suam causam sicut dixi. Ecce tibi vindictam imposui*[3]," at the same time touching it with a wand (*festuca*). The other party now made a similar claim in the same form, this *vindicatio* and counter *vindicatio* being called *manus consertio*. This completed, the praetor ordered them both to stand away: "*Mittite ambo hominem.*" Then the first party formally asked the other the ground of his claim: "*Postulo anne dicas qua ex causa vindicaveris.*" The other replied: "*Ius feci sicut vindictam imposui*[4]." Then the first party said: "*Quando tu iniuria vindicasti, sacramento*[5]" (50 or 500) "*te provoco,*" and the second replied: "*Et ego te.*" The *sacramentum* was a sum of 50 *asses* if the matter was worth less than 1000 or it was a question of liberty, in other cases 500. The successful party recovered his *sacramentum*, but the loser's was forfeited to the State[6]. In historic times the money was not actually deposited, but security was taken[7]. A third party, called a *praes*, pledged land (*praedium*) for the *sacramentum*[8]. Then the praetor assigned interim possession to one of the parties—*vindicias dicere*, normally, no doubt, to the party in present possession[9]. Security was taken by way of *praes* for the thing and the interim profits *litis et vindiciarum*, for the event of judgment against the holder[10]. The next step was the appointment of a *iudex* of the qualified class to try the issue, originally at once, but after a *l. Pinaria* of uncertain date, after 30 days' delay[11], so that the parties had time to come to terms. At some time in

1 XII Tab. 1. 2. 2 The praetor in Rome. As to Italy, Girard, *Org. Jud.* 1. 272 sqq. The view in the text is that of Bethmann-Hollweg, 3. 106. On another view it was a formal *manus iniectio* (Puchta, *Inst.* 2. § 160; Karlowa, *C.P.* 321 sq.) as to which, *post*, § CCXI. 3 The words "*secundum...dixi*" are obscure. *Causa* in the sense of mode of acquisition has clearly not been stated; probably the reference is to *causa* in the sense of accessories, etc. Cp. 12. 1. 31. pr. 4 "*Ius feci*" is not easily translated but the general sense of the declarations is clear. 5 "To" *sacramentum* or "by" *sacramentum*? Karlowa, *C.P.* 16, takes the latter view but the account of Gaius makes the whole *sacramentum* come later. On the meaning of the word *sacramentum*, see Strahan-Davidson, *Problems of the Roman Crim. Law*, 1. 46 sqq. 6 G. 4. 13. 7 Originally it was deposited with the pontifices, "*ad pontem,*" Varro, *L.L.* 5. 180. 8 Varro, *L.L.* 6. 74; Festus, s.v. *Praes*; Cicero, *ad Att.* 12. 52; *Verr.* 2. 1. 150; *Phil.* 2. 78; *pro Rab. Post.* 4. 8. See Debray, *N.R.H.* 34. 528 sqq. 9 Bethmann-Hollweg, *C.P.* 1. § 42; Girard, *Org. Jud.* 1. 74. In *causae liberales* the *vindiciae* are given *secundum libertatem*, 1. 2. 2. 24; in claims against the people, in favour of them, Festus, s.v. *Vindiciae*. 10 G. 4. 16. The exact meaning of *vindiciae* is disputed. Interim profits is the meaning suggested by this text, but the word seems to have covered all advantages of interim possession. See Festus, s.v. *Vindiciae*. 11 G. 4. 15.

the proceedings[1], there was a joint formal appeal to witnesses, a proclamation to bystanders: "*testes estote*[2]," said by Festus to be *litis contestatio*[3]. The *iudex* did not proceed at once; there was a delay to the third day, *i.e.* the next day but one, *dies perendinus*[4], on which the hearing began. The *iudex* does not appear to have given a direct judgment, *condemnatio* or *absolutio*, but a *sententia* that the *sacramentum* of one of the parties was *iniustum*[5]. If the party justified was the interim possessor, the matter was at an end; if it was the other, the *praedes* would be liable for the thing and its fruits, and one or the other would always forfeit the *sacramentum*[6].

Where *sacramentum* was brought to enforce an obligation, it was less dramatic in form. There was no *manus consertio*. The plaintiff said: "*Aio te mihi dare oportere* (*tantum*)[7]," and the defendant denied liability. There was then the machinery of *sacramentum*, but no question of *praedes litis et vindiciarum*[8]. The *iudex* gave his decision in the same way, and if it was a question of a fixed sum, the way was clear for proceedings in execution. If the amount was uncertain, there was a further proceeding, an *arbitrium litis aestimandae* in which the arbiter would determine the money value of the claim[9], and the case was then ripe for execution. Whether this same *arbitrium* was applicable to claims *in rem* is disputed; no doubt the remedy against the *praedes* would be more usually adopted[10].

This description assumes that the matter proceeded normally with no complications, but, apart from doubts resulting from lack of authority, and of the obscurity, and scattered nature, of such as does exist, there were variations in the course of the proceedings which must be mentioned. *Manus consertio* is spoken of above as taking place in court, but there are traces of *manus consertio ex iure*, in case of land; the parties

1 Later analogy suggests the end of the *legis actio*, but it has been suggested that it was at the beginning. See Girard, *Manuel*, 992, and literature there cited. 2 Festus, s.v. *Contestari*. The words may be either a summoning of witnesses for the future hearing, or an appeal to bystanders to bear witness that the ceremonial has been properly performed. 3 As to this expression, *post*, §§ CCXV, CCXXXV. 4 G. 4. 15; Val. Probus, "*in legis actionibus*"; Festus, s.v. *Res comperindinata*. 5 Cicero, *pro Caec.* 33. 97; *de Domo*, 29. 78. See however von Mayr, *Mél. Girard*, 2. 177, and lit. there cited. 6 The *praedes* are adapted from the *praedes* who were sureties for debtors to the State, and may therefore have been like them subject to executive seizure without legal process. But while the *praedes sacramenti* gave an undertaking to the praetor, the others gave it to the adverse party (G. 4. 16). We have no further information. 7 Val. Probus, *loc. cit.* 8 Probus gives the form of challenge where the claim is denied. If admitted there would probably be *manus iniectio*. If it was neither admitted nor denied the plaintiff used a phrase beginning "*quando neque ais neque negas*" (Probus, *loc. cit.*), but the result we do not know. See for different views, Karlowa, *C.P.* 112; Girard, *Manuel*, 1004. 9 Val. Probus, *loc. cit.*: little is known of this, Keller-Wach, *C.P.* § 16. 10 See for various views, Girard, *Manuel*, 343, and *post*, § CCXI.

went to the land[1]. Even in historic times there was a pretence of this; the praetor said: "*Ite viam*," and the parties left the court, "*Redite viam*," and they returned with a turf[2]. This use of a symbol was not confined to land; if what was being claimed was too large or too numerous an aggregate to be brought into court, part could be brought in to represent the whole[3].

It has been assumed above that the party appeared personally under an *in ius vocatio*, but the *vindex* mentioned by Gaius[4] under the *formula*, who appeared also in *manus iniectio*, might probably also act in *sacramentum*. It is probable, however, that his intervention occurred only where there was some ground of excuse for non-appearance, *e.g.*, *morbus sonticus*, or the like. Many views have been held[5] as to the function of such a *vindex*, but while it is fairly clear that he was not a representative by whom the procedure was continued, for there was no representation in the *legis actio*, the weight of argument seems to be in favour of the view that he pledged himself in some way for the future appearance of the party summoned. But we know no details.

There was perhaps another way in which a third party might intervene. A text of Probus shews a litigant asking: "*Quando te in iure conspicio postulo anne far auctor*[6]*?*" This may mean that the party summoned might offer as a substitute the person through whom he claimed a right, but it is also possible that the phrase is part of the plaintiff's *nuncupatio* in the *actio auctoritatis*[7].

CCIX. Since the *legis actio* involved co-operation, it could not proceed if, after the *in ius vocatus* had been brought into court, he refused to take the further steps. There could be no decision. It is possible that in real actions the thing was simply left in the hands of the holder, and that in personal actions the facts were treated as *confessio*, but it is also possible that in each case it entitled the claimant to detain the other party till he took the necessary steps[8]. The case was different *in iudicio*; the *iudex* waited till the middle of the appointed day and if either party had not by that time presented himself, judgment went in favour of the other[9].

1 Cicero, *pro Murena*, 12. 26; Aul. Gell. 20. 10. 2 Cicero, *pro Murena*, 12. 26. 3 G. 4. 17; a sheep to represent a flock, a tile for a building, and perhaps an article to represent a *hereditas*. 4 G. 4. 46. 5 See Bertolini, *Il processo civile*, 94, and his reff. 6 Val. Probus, *loc. cit.* 7 *Ante*, § CLXXI. See however Karlowa, *C.P.* 75, who cites for the first opinion, Cicero, *pro Caec.* 19. 54, and *pro Mur.* 12. 26, which however are far from conclusive. As to the possibility of a *cognitor in iudicio*, *post*, § CCXXXIX. 8 See Girard, *Manuel*, 988, n. 4; Bertolini, *op. cit.* 1. 98; Karlowa, *C.P.* 323. These writers are dealing with the necessary giving of *vadimonium* (and they cite Plautus, *Persa*, 2. 4. 18, the application of which to this point does not seem certain). The same rule would no doubt apply to other failure to comply with procedural rules. See however as to *actio in personam*, *ante*, p. 607, n. 8. 9 XII Tab. 1. 8. Girard, *Textes*, 12; Bruns, 1. 19.

The whole proceeding would not be completed in one day; even the *legis actio* might not, and there were then the delay of 30 days for the appointment of a *iudex*, and the *diei perendinatio*, while the actual hearing might well take many days. The question arises how the presence of the party summoned was secured for these adjournments. The *vadimonium* of the formulary system originated in the *legis actio*. In its later form security was given by ordinary verbal contract, but in the *legis actio* it was by a special undertaking by sureties called *vades*[1]. It is not quite clear in which of these various delays they were used; on the whole it seems probable that *vadimonium* was used in all adjournment of the *legis actio*[2], and for the transfer from *ius* to *iudicium*[3]. If postponement of the *iudicium* was needed (*ampliatio*), it was, as it seems, not to the next day but to *dies perendinus* and there might be more than one such *diffisio*[4]. But *vadimonium* does not seem to have been taken here; the fact that judgment went by default, if a party had not appeared by noon on the appointed day, would suffice[5].

Vadimonium as we know it was usually limited in amount; it might not exceed half the value of the issue or 100,000 sesterces, except in *actiones iudicati* and *depensi*; here it was for the full amount[6]. It had different forms, sometimes a mere promise, sometimes with surety, sometimes under oath[7]. It is uncertain how far the distinctions go back to the *legis actio*, but we learn that in actions for land *vadimonium* was *purum*, *i.e.* without security[8], and this no doubt applied to *legis actio*, since the immobility of land and the liability of the *praedes* gave sufficient security[9]. And, in some cases, in the *legis actio*[10], the *vades* gave security by way of *subvades*.

In historical times the reference was most commonly to a single *iudex*[11], who was sworn[12]. It has however been held, mainly on the strength of the text of Pomponius which says that "*actiones apud collegium pontificum erant*," one of whom was annually appointed, "*ut praeesset privatis*[13]," that the pontiffs sat as *iudices* in early law, but this is not

1 Fliniaux, *Vadimonium*, review by Debray, *N.R.H.* 1910, 142, also *ib.* 521 sqq. D. considers the question whether the party also promised to appear. See also *ib.* 534 as to Varro (*L.L.* 6. 74) on *Sponsor*, *Praes* and *Vas*. Gaius, 4. 184 sqq. 2 G. *ib.*; Aul. Gell. 6. 1. 9. 3 G. 3. 224; 4. 15; *L. Rubria*, 21 in f. Girard, *Textes*, 76. 4 XII Tab. 2. 2. Apart from non-completion, there might be *diffisio* for *morbus sonticus*, etc. 5 These points are matter of controversy, Bertolini, *op. cit.* 1. 96; Karlowa, *C.P.* §§ 41, 42; Fliniaux, *op. cit.* 1. 6 G. 4. 186. 7 G. 4. 185. In some cases *recuperatores* were named at once with power to give judgment for amount of *vadimonium* if it was not observed. *Ib.* 8 D. 2. 8. 15. pr. dealing with later system, but probably equally applicable to earlier. 9 See however Keller-Wach, *C.P.* n. 543. 10 Aul. Gell. 16. 10. 8. 11 Details as to *iudices*, *post*, § CCXVII. 12 Cicero, *de Off.* 3. 10. 44. 13 1. 2. 2. 6; Karlowa, *C.P.* 23. The probable originally religious character of *sacramentum* aids this opinion.

generally accepted[1]. On the other hand the *iudex* was not the only person to preside in a *iudicium*. In some cases the matter went to an *arbiter*, as is now usually held, where an expert was required[2], in others before three *arbitri*, *i.e.* in *finium regundorum*, and for the purpose of estimating the value of interim fruits in *sacramentum*[3], which issue, however, was probably tried by *iudicis arbitrive postulatio*[4].

Where peregrines were concerned the case might go before *recuperatores*, but, as peregrines had in general no right to the *legis actio*, this was confined to those communities with which there existed special treaties. It is not indeed certain that these cases were tried by *legis actio*, but it is probable that the treaty sometimes provided for this[5]. If the transaction had taken place on Roman soil the *recuperatores* were Romans; if elsewhere, of the nation of the peregrine[6]. The proceeding was intended to be speedy and thus recuperators must give their judgment within ten days[7].

Another possible tribunal was that of the *centumviri*. These seem to be of no great antiquity; the organisation with which we know them cannot be earlier than B.C. 240, when the tribes became 35 in number[8]. They were chosen from the tribes, but the method is not known. They adjudicated in *hereditatis petitio*, in claims of *tutela*, and, apparently, in some other real actions[9]. Under Augustus the court was reorganised; the *decemviri stlitibus iudicandis* were incorporated with it and took precedence in it[10]. The court was increased in number[11] to at least 180. It sat in four groups or sections (*consilia*), acting, however, sometimes together (*quadruplex iudicium*), sometimes separately, and, it seems, sometimes in pairs, but the principle of these distinctions is uncertain[12]. The court continued in existence throughout the classical age[13].

The *decemviri stlitibus iudicandis*[14] are perhaps more recent than the *centumviri*. Pomponius speaks of them as created after, and seemingly not long after, the creation of the *Praetor Peregrinus*[15], but they are not

1 See Girard, *Org. Judiciaire*, 1. 58. The actions were with them in the sense that they were guardians of the forms. 2 See Eisele, *Beiträge*, 1 sqq., who infers from etymology that an *arbiter* was originally one who had to investigate on the spot. 3 XII Tab. 12. 3; Cicero, *de Leg.* 1. 21. 55. See Wlassak, *Processg.* 2. 293 sqq. 4 See Girard, *Manuel*, 1006. 5 Girard, *Org. Judic.* 1. 83, 99 sqq.; Wlassak, *Processg.* 2. 299 sqq. 6 Dion. Hal. 6. 95. 7 *Ib.*; Girard, *Org. Judic.* 1. 102. See also *l. Colon. Genetivae* 95, which gives 20 days (Girard, *Textes*, 97; Bruns, 1. 130). 8 Festus, s.v. *centumviralia iudicia*. Not found before 190 B.C. Girard, *Org. Judic.* 1. 23. 9 Cicero, *de Or.* 1. 38. 175; *pro Caec.* 18. 53. There is dispute as to the extent of their jurisdiction and as to the extent to which it was exclusive. See Pissard, *Les questions préjudicielles*, ch. III; Wlassak, *loc. cit.*; see also Daremberg et Saglio, s.v. *Centumviri*. 10 Sueton. *Aug.* 36. 11 Pliny, *Ep.* 6. 33. 12 See Girard, *Manuel*, 1014. 13 Obsolete in time of Diocletian, Wlassak, Pauly-Wissowa, 1950. 14 Not to be confused with an earlier plebeian tribunal of *decemviri*, see Girard, *Org. Judic.* 1. 83. 15 1. 2. 2. 29.

traceable before the beginning of the seventh century[1]. They tried cases of liberty[2], and perhaps *civitas*. They ceased to exist as a separate court under Augustus[3].

Not every day was available for the proceedings *in iure*. The utterance of the formal words "*do, dico, addico*," besides being limited as to place[4], was also confined to certain days[5]. Some days, *dies fasti*, were wholly available; others, *dies nefasti*, were wholly excluded. Others were available if the *comitia* did not meet, and others were, for various reasons, available only partially, *dies intercisi*. In the later Republic there were alterations in the assignment, of which the chief was that market days, which had been excluded, were made available unless they fell on a day expressly *nefastus*[6]. Further even *dies fasti* might be rendered unavailable by a temporary closing of courts of justice, a *iustitium*, which appears to have been done by the authority of a magistrate, especially in times of tumult or national lamentation[7]. In the same way the *iudicium* might not take place except on lawful days. But while it seems clear that the mere fact that a day was *nefastus* would not necessarily bar proceedings, as there was no question of using the formal words, the whole question of the days available is obscure[8].

Though the word plaintiff has been used in the foregoing account, this does not properly express the relation of the parties; it is the language of a later system[9]. Each made a claim in real actions, and neither could get judgment, without proving his title; there was no question of burden of proof, on one rather than on the other. But this was in practice less important than it looks. In the absence of proof on either side, the party in possession, under the system of *vindiciae*, was left in possession, so that if the original *vindicans* made no case, the other remained in possession whether he had made a case or not[10].

The foregoing is an account of *sacramentum* in its historically known form. Its name suggests a religious origin, and it is probable that the *sacramentum* was originally an oath, in support of which an expiatory offering was made, to be forfeited to the gods by the party whose oath was proved false[11]. It has also been held that the offering was not on account of falsity, but for removing the matter from the arbitrament of

1 *C.I.L.* 1. 38; Mommsen, *Röm. Staatsr.* 2. 1. 605; *D.P.R.* 4. 314. 2 Cicero, *pro Caec.* 33. 97. 3 The *tresviri capitales* (1. 2. 2. 30; Livy, 9. 46; Ep. lib. 11) elected in the sixth century by the centuries were essentially police magistrates, but there is some evidence for a certain subordinate function in civil jurisdiction. Mommsen, *op. cit.* 2. 1. 599; *D.P.R.* 4. 307. As to a *l. Papiria*, giving them certain functions in *sacramentum* (Festus, s.v. *Sacramentum*), Girard, *Org. Judic.* 1. 178. 4 As to the place or places, Girard, *Org. Judic.* 1. 183. 5 See Bruns, 1. 41 sqq. 6 See Girard, *Org. Judic.* 1. 19, 60, 181. 7 Cuq, Daremberg et Saglio, s.v. *Iustitium*. 8 Girard, *op. cit.* 1. 86. 9 G. 4. 16, 17 avoids this language. 10 So, presumably, if both are *iniusta*. 11 See the reff. in Bertolini, *op. cit.* 1. 115.

the gods[1], and also, with probability, that the postponement under the *l. Pinaria* is associated with secularisation of the proceeding; it was no longer necessary to settle at once the question before the gods[2].

Originally presided over by the *rex*, the proceeding passed to the consuls, on the founding of the Republic, and, by the *l. Licinia*, to the praetor. The *praetor peregrinus* had jurisdiction where aliens were concerned, *praesides* in their provinces, and possibly in certain cases the curule aediles. But only those mentioned could act; inferior magistrates, *e.g.* municipal magistrates, had not ordinarily the *legis actio*[3].

CCX. *IUDICIS ARBITRIVE POSTULATIO.* Of this process nothing is certainly known except that it existed, that, in the opinion of Gaius, some of the matters which could be tried by *condictio* could be tried in this way, and that it involved an application to the praetor in the words, "*Te praetor iudicem arbitrumve postulo uti des*[4]." Among the conjectures as to its application, the most widely accepted is that it was used to decide issues which did not admit of a simple yes or no, *e.g.* the *arbitrium litis aestimandae*, the divisory actions, and some others. It would thus be the field of *arbitria* as opposed to *iudicia*. But it is difficult to reconcile this limitation with the word *iudicem* in the formal demand, or with the statement of Gaius, which seems to mean that matters coming within *condictio* could be tried by *iudicis postulatio*. The remark may, however, mean no more than that the whole field of *obligatio* was covered by existing actions. It has also been conjectured that this process is the ancestor of the later *bonae fidei iudicia*[5].

The action is no doubt later than *sacramentum*, but there is no reason to suppose it later than the XII Tables. There would be *in ius vocatio*, where it was not a pendant to *sacramentum*, and *vadimonia*, if necessary. There was probably the 30 days' delay, though this is proved only for *sacramentum* and *condictio*. There would be *diei perendinatio*, and it is probable that the judgment was a *condemnatio* for a money payment[6].

CONDICTIO. This action was introduced by a *l. Silia* for the enforcement of obligations for *certa pecunia* and extended later by a *l. Calpurnia* to claims for *certa res*[7]. The dates are not known, but it is commonly held that they were nearly of the same date, about B.C. 250[8]. They were probably associated with the new verbal contract, *stipulatio*, though the

1 Ihering, *Evolution of the Aryan*, 359. 2 Eisele, *Beiträge*, 222. Von Mayr, *Mél. Girard*, 2. 171, traces it from *sacratio capitis*, through *sacratio bonorum*, to expiatory offering. The article contains much discussion of other views. The notion of *sacramentum* as a bet, which neither wins, seems to ignore the probable origin. 3 1. 7. 4; cf. P. 2. 25. 4. 4 G. 4. 12. 20; Val. Probus, "*in legis actionibus.*" As to Cicero, *de Or.* 1. 36. 166, see Huvelin, *Mél. Gérardin*, 319 and Girard, *Mélanges*, 1. 127. 5 Keller-Wach, *C.P.* 35. 171. 6 Bethmann-Hollweg, *C.P.* 1. 64. 7 G. 4. 19. Jobbé-Duval, *Proc. civile*, 63 sqq. 8 Girard, *Manuel*, 1006.

legislation can hardly have been for the purpose of making these enforceable, since Gaius tells us that the existing actions sufficed, and does not know why this was introduced[1]. But it provided a simpler form, and had the advantage that it did not involve getting security for the *sacramentum*; this must sometimes have been a denial of justice. Not every poor litigant could get a friend to risk 500 *asses*. Further, the stake of which we shall hear went to the winner[2].

The action was presumably available not only on contract, but also to recover the fixed penalties prescribed in certain cases by the XII Tables[3]. It owes its name to the *condictio*, which Gaius explains as *denuntiatio*[4], by which the plaintiff gave the defendant notice to appear on the thirtieth day to receive a *iudex*. We do not know the form of the notice or if it was *in iure*, but this seems probable, as the proceeding would hardly have derived its name from what was not conceived of as part of the *legis actio*[5]. If it was, there must presumably have been *in ius vocatio*, and the effect seems to be that a simpler process is substituted for the machinery of the *sacramentum*. *Con-dicere* suggests a mutual arrangement, but this is not inevitable; it may mean no more than communication. There was probably a *condemnatio* in money[6].

In the later *actio certae pecuniae creditae* we are told[7] that the plaintiff could insist on a *sponsio* and *restipulatio tertiae partis*, and it seems that this was a matter of course[8]. As this action descended from *condictio e lege Silia*, it is commonly held that that also had this characteristic[9]. Assuming its existence, it may have been made at the time of the *condictio* or at the appointment of the *iudex*[10], and it is not certain whether the action was tried on the *sponsio*, as in the *actiones per sponsionem*, or on the original issue[11]. On this point the state of things in the *actio certae pecuniae creditae* suggests the latter view. There seems no reason to suppose a *sponsio* and *restipulatio* in *condictio e lege Calpurnia*[12].

1 G. 4. 20. 2 Jobbé-Duval points out that the penal character of the earlier modes rendered them unsuitable to an advancing civilisation. He thinks, but his evidence is slight, that compurgation was admissible in these. He considers that the main purpose of the introduction is to make the position of debtors easier, referring especially to the immediate operation of *manus iniectio*. 3 *E.g.* XII Tab. 8. 3. On the question whether it was alternative to *sacramentum* or exclusive, see Jobbé-Duval, who thinks it exclusive (*op. cit.* 109), and Girard, *Manuel*, 1006. 4 G. 4. 18. 5 Cp. the language of Gaius, 4. 29; Karlowa, *C.P.* 231. 6 The limitation to *certa* suggests this: it is probably the source of the *condemnatio* of the *formula*. 7 G. 4. 171. 8 See the reff. in Karlowa, *C.P.* 233. 9 Karlowa, after adopting it, denies its existence in a later work, *R.Rg.* 2. 595; indeed the evidence is not very good. 10 Karlowa at one time held the latter, arguing from the so-called *l. Iulia municipalis*, 41, *C.P.* 233. 11 The fact that in the *actio certae pecuniae creditae* it was tried on the main issue, the *sponsio* being "*si secundum me iudicatum erit*" or the like (G. 4. 180; Lenel, *E.P.* 232 and reff.), strongly suggests this. Jobbé-Duval takes the other view, treating *condictio* as affording a model for the actions *per sponsionem* (*post*, § CCXIV), *op. cit.* 180. 12 Jobbé-Duval accepts the bet for *condictio e lege Silia*, but he also finds in it *c. e. l.*

Another new institution supposed to attach to this action is the *iusiurandum necessarium*, the plaintiff being entitled to put the defendant to his oath as to the existence of the debt[1]. This institution certainly existed under the formulary system for claims of a *certum*, and it is mentioned in Plautus[2], before the date of the *l. Aebutia* which introduced the *formula*, so that it seems inevitable to refer it to *condictio* as a *legis actio*. From the scope of the *iusiurandum necessarium*, in the formulary system, it would seem to have applied equally to *condictio* under the *l. Calpurnia*.

CCXI. These three actions were forms of litigation, reference of a dispute for settlement. We pass to two others which, at least primarily, had not this characteristic, but were modes of enforcement of a right, regulated self-help.

MANUS INIECTIO. This was, essentially, seizure of a person against whom there was a claim, no doubt older than organised redress by way of litigation. As we know it, it was subject to exact rules of form, involving appearance before a magistrate, and strict limitation as to the cases in which it might be used. Gaius describes it as of three types: *iudicati*, *pro iudicato* and *pura*[3].

Manus iniectio iudicati. The process was as follows: after 30 days from the judgment[4] or other event justifying the seizure the claimant brought the party liable before the magistrate (*in ius ducit*) and said, *in iure*, "*quod tu mihi iudicatus*" (or *damnatus*) "*es sestertium* (*X milia*), *quandoc non solvisti, ob eam rem ego tibi sestertium X milium iudicati manum inicio*[5]." The defendant might not defend himself against the *manus iniectio* (*manum depellere*), but if it was from any cause not justified, someone must appear on his behalf to prove this—a *vindex*. The effect of the intervention was that the defendant was released, and further proceedings were against the *vindex*[6]. The action of the *vindex* was not an appeal: there was no rehearing of the original dispute. He might shew that there had been no such fact basing the *manus iniectio* as was claimed or that the creditor had been satisfied or had come to terms. It is possible that he might be allowed to shew that the *iudex* had taken a bribe, a capital offence under the XII Tables[7], but he was not entitled to shew simply that the judgment was wrong.

We are not told how the proceedings against the *vindex* were framed,

Calpurnia. He considers the bet and the *iusiurandum* as part of the same mechanism and thus both essential (*op. cit.* 163 sqq.), but does not explain why the bet disappeared in *formulae* for *certae res*.

1 *Post*, § CCXV. 2 See Girard, *Manuel*, 1007, n. 1. 3 G. 4. 21 sqq. 4 XII Tab. 3. 1. 5 G. 4. 21. See Gradenwitz, *Mél. Girard*, 1. 506, for suggestions of divergence here from the original form. The account in the text is of the institution in historical times. 6 G. 4. 21. There were rules, not fully known, as to the financial standing of persons admissible as *vindices*, according to the position of the debtor; XII Tab. 1. 4. See also *l. Colon. Genetivae*, 61. 7 Aul. Gell. 20. 1. 7.

but it may be inferred from the practice in the later *actio iudicati*[1], which seems to have been modelled, in its substantial elements, on *manus iniectio*, that it was referred to a *iudex*[2], and it seems fairly clear that if the *vindex* failed he was condemned *in duplum*[3]. Apart from this intervention, or satisfaction of the claim (*iudicatum facere*), the *manum iniciens* might carry off the debtor, who, in historic times, was "*addictus*" to him by the magistrate[4]. The creditor might keep him for 60 days in a private prison, during which time they might, of course, come to terms[5]. There was as yet nothing definitive; the debtor was still free and a *civis*, and had not lost his property. The holder must produce him publicly on three successive market days[6] and proclaim the amount of the debt, presumably to provide an opportunity of redemption. At the expiration of this time "*capite poenas dabant aut trans Tiberim peregre venum ibant*[7]," which is understood to mean that the creditor might either kill him or sell him into foreign slavery. Another text says that, where several creditors had obtained *manus iniectio*, "*partis secanto: si plus minusve secuerint se fraude esto*[8]." The later Romans understood this to mean that the creditors might cut the debtor to pieces without responsibility if they cut more than their share, but it is spoken of as unheard of; there was no record of its ever having been done[9]. "*Capite poenas dare*" might mean merely enslavement, and since this would deprive him of his property it has been contended that "*partis secanto*" means merely division of the property, any inequality being capable of adjustment[10]. It is indeed objected that a *civis* could not become a slave at Rome. But this lofty principle, which was in any case not true of later law, is not well evidenced[11], and is difficult to reconcile with the dispute mentioned by Gaius, of an age, as the context shews, earlier than the praetor's edict[12]. There is nothing inconsistent with the notions of a primitive people in the literal understanding of the rule. The whole institution is the subject of much controversy[13].

1 *Post*, § CCXIX. **2** It is clear that it was referred from the magistrate to another tribunal in certain quasi-criminal cases of *manus iniectio pura*, which went before the *tresviri capitales*. See Girard, *Org. Judic.* 1. 177. **3** This is inferred from the existence of double damages in cases known to have descended from *manus iniectio*, *e.g.*, *actio depensi*, *ante*, § CLVI. The proof drawn from the obscure *l. Colon. Genetivae*, 61, is disputed. See Girard, *Manuel*, 999; *Textes*, 91. **4** G. 3. 189; Aul. Gell. 20. 1. 44. See Karlowa, *C.P.* 158. **5** The XII Tables contain elaborate rules as to his treatment during this time (3. 3, 4). **6** Apparently the last three *nundinae* of the 60 days, for we are told "*tertiis nundinis partis secanto.*" **7** Aul. Gell. 20. 1. 47. **8** XII Tab. 3. 6; Aul. Gell. 20. 1. 48. **9** Aul. Gell. 20. 1. 52. **10** Karlowa, *C.P.* 163, 178; *secare* he compares with *bonorum sectio*. **11** It seems to rest mainly on Cicero's rhetorical language, *pro Caecina*, 34. But see Mommsen, *Strafr.* 945. **12** G. 3. 189, on the question whether a *fur manifestus* became a slave immediately on *addictio*. See also Aul. Gell. 20. 1. 7, quoting Caecilius on the same rule of the XII: "*in servitutem tradit.*" **13** Ihering's view, Scherz und Ernst, *Eine civilprozessualische Attrappe*, who

The *l. Poetelia*, of 326 B.C.[1], provided, *inter alia*, some amelioration of the position of the *addictus* for debt. Debtors were not to be chained or imprisoned or to pay with their persons, but rather with their goods, a statement of Livy[2] which is supposed to mean that the power of killing or selling was taken away. This seems to imply that they could work out the debt and as a corollary, that the limit of 60 days disappeared[3].

The question remains: what were the cases of *manus iniectio iudicati*? As judgment, though the typical case, was certainly not the original, for the system is, no doubt, older than judgments in the modern sense, it may be assumed that it applied to the other ancient cases, of which *nexum* is the most prominent[4], and to *legatum per damnationem* of a certain sum[5]. It applied also, even primarily, to a *confessus*[6]. Gaius speaks of its application to *iudicatus* and *damnatus*[7], giving the form, however, not merely for *iudicati*, but for all *manus iniectio*. "*Damnatus*" appears to cover not only one condemned in a judgment, but one *damnatus* (*damnas esto*) by will, or by a contract, *e.g.*, *nexum*, or by *lex*, *e.g.*, *l. Aquilia*[8]. There was probably *condemnatio* in *condictio* and in *iudicis postulatio* (and thus in the *arbitrium litis aestimandae* after a *sacramentum*), though here and in *sacramentum in personam* for a *certum*, and in *sacramentum in rem* (if proceedings were taken against the actual party, and not against the *praedes*) the person liable was a *iudicatus*. The fact that both *sacramentum* and "*lis et vindiciae*" were recoverable from another person seems to put the actual party in a very favourable position. In effect, however, if the matter stood thus, it would be oppressive, for a poor man would hardly get *praedes* on such terms. It must be noted however that the case differs from that of a *vindex*, who certainly took over the liability[9], while in the case of the *praedes* no event had happened to release the party himself, against whom the proceedings continued[10]. It seems probable therefore that if the winner preferred he might when the matter had been reduced to a *certum* by *arbitrium litis aestimandae*, proceed by *manus iniectio* against the original party[11]. On the other hand the *praes* was apparently a *sponsor*, and, if he had satisfied the obligation, by *depensio*, had *manus iniectio*

treats it as a device compelling sale of the debtor to one of them, has been the source of much discussion.

1 Girard, *Man.*, 493. 2 Livy, 8. 28. See Varro, *L.L.* 7. 105. 3 Girard, *Man.*, 1000. 4 *Ante*, § CL. 5 The double liability of *infitians* indicating the origin in *m. ini.* applied only to the case of *legatum certi*, *ante*, § CXVII; G. 4. 9. It is presumably *iudicati*, as G. does not mention it among later extensions. 6 XII Tab. 3. 1, but see for limitations, *post*, § CCXVI. 7 G. 4. 2. 1. As to this distinction, see Karlowa, *C.P.* 58. 8 Double damages *contra infitiantem*, G. 3. 216. 9 "*Vindicem dabat qui pro se causam agere solebat*," G. 4. 21. 10 G. 4. 16 sqq. 11 Koschaker, *Z.S.S.* 37. 358 sqq. See however Girard, *Manuel*, 343.

(*pro iudicato*) against his principal. It has also been suggested on the evidence of a passage in Gaius[1] that the magistrate would take steps to seize for the winner the property in question, but this is improbable and not justified by the text, whatever it may mean.

CCXII. *Manus iniectio pro iudicato.* Gaius tells[2] us that statutes had extended the right of *manus iniectio* to certain cases, as if there had been a judgment, *i.e.* with the same incidents as in that case, of which the most important is that any defence must be raised by a *vindex*. The *l. Publilia* gave it to a *sponsor* not reimbursed within six months, perhaps only where the payment had been formally made *per aes et libram, depensio*[3]. The *l. Furia de sponsu* gave it against one who had exacted from *sponsor* or *fidepromissor*, under a judgment, more than his share of the debt. Perhaps here too *solutio per aes et libram* is assumed. He tells us that there were other cases of the same kind[4]. In practice the function of the *vindex* in these cases was somewhat different from that in *m. i. iudicati*. Nominally it was the same; he could not go behind the facts which justified the seizure. But in *m. i. iudicati* these were definite readily established facts which the *vindex* must disprove; here it was in effect an ordinary litigation, begun in an unusual way. The *vindex* cannot have been under the burden of proof; it is for instance impossible that anyone, by merely charging me with having put filth on sacred ground, as in the Luceria case[5], could compel me to find someone who could prove that I had not done so, on pain of double liability in case of failure. It was in fact merely a device, which survived in the later *actiones in duplum contra infitiantem* of later law, to shorten proceedings by penalising groundless defences.

Manus iniectio pura. This was a somewhat later development. Gaius[6] speaks of several cases in which *leges* gave *m. i. pura*, in which the defendant had no need of a *vindex*, but could defend himself. As there had been a *manus iniectio*, he might be said to be his own *vindex*. It has indeed been contended that there was no liability *in duplum*[7], but the institution would be meaningless without this: *manus iniectio* would be only another form of *in ius vocatio*. Gaius indicates differences between this and the other cases, but says nothing of a difference as to the liability. And as the *l. Vallia* turned nearly all *manus iniectio* into *m. i. pura*[8], it is difficult to understand how the cases should have survived into later law as actions with double liability on denial if they had not

1 G. 4. 48. 2 G. 4. 23. 3 *Ante*, § CLVI. 4 The only other certain case seems to be a provision for the town of Luceria that for certain offences against public order, anyone might proceed for a fixed penalty by *manus iniectio pro iudicato* (Girard, *Textes*, 25). No doubt there were other cases of the same type. 5 See *post*, p. 619, n. 8. 6 G. 4. 23 sqq. As to *nexum*, see *ante*, § CL. 7 Mitteis, *Z.S.S.* 22. 114. 8 See *post*, p. 618.

had this character in their last phase as *manus iniectiones*[1]. The whole conception of *m. i. pura* seems to be a clumsy device for securing double liability of *infitians* in certain cases. Gaius gives as instances the claim under the *l. Furia testamentaria* against one who took a legacy greater than 1000 *asses*, and that under the *l. Marcia* against usurers[2]. It is uncertain for many of the other recorded cases of *m. iniectio* whether it was *pro iudicato* or *pura*[3].

The conditions were altered by a *l. Vallia* of uncertain date, but probably not long before the *l. Aebutia*[4], which made all *manus iniectio* "*pura*" except under judgment and in the *actio depensi* of the *sponsor*[5]. It is clear from this and other known facts, that the *l. Poetelia*, notwithstanding the language of Livy[6], had not abolished execution on the person; it long survived the disappearance of the *legis actio*.

Manus iniectio differed from the cases of *legis actio* previously discussed in that it was not essentially litigation. It has been suggested that it is grouped with the others because by the intervention of a *vindex* it might result in litigation[7]. But this can hardly be the reason unless this litigation is itself a part of the *legis actio* totally unrecorded. Gaius says nothing of any formal words spoken by the *vindex*, or of the litigation. The idea seems to involve a sharp distinction between litigation and execution which might have been expected from Gaius, but hardly from the ancients from whom the classification is derived. It appears to have been grouped with the other forms because it was, like them, a formal process prescribed under the *lex* for the enforcement of a right[8].

CCXIII. *PIGNORIS CAPIO*. This was essentially the seizure of property of the debtor in order to put pressure on him. It is obviously primitive, dating from days before the *legis actio*, when it had in strictness no legal effect. Even after it had become a regulated *legis actio*, it no doubt con-

1 The action on *legatum per damnationem* (of a *certum*) and the Aquilian action were both *in duplum* and were presumably *m. iniectiones purae* under this law whatever they were before. That they were *m. i.* is assumed from the expression of the liability as "*damnas esto*" (G. 2. 201; D. 9. 2. 27. 5) coupled with the later double liability and the word *damnatus* in *m. i.* All other recorded *m. i.* is on a *certum* but the Aquilian action is not. As to 12. 1. 9. 1, see Naber, *Mnemosyne*, 19. 182. See also G. 2. 213; Lenel, *E.P.* 196. It is conceivable that to get this remedy the plaintiff had to assess the value beforehand, as he had to do in *furti nec manifesti* (12. 3. 9; Lenel, *E.P.* 318) which also gave double liability though it is not only *contra infitiantem*. 12. 1. 9. 1 may be a reminiscence of this. 2 The exact conditions of this are uncertain, G. 4. 23. 3 See, for a list, Girard, *Manuel*, 1001, n. 2. 4 Girard, *Manuel*, 1001. 5 G. 4. 25. 6 Livy, 8. 28. 7 Ihering, *Geist* (5), 1. 150 sqq. If, as is sometimes said, the further proceeding against the *vindex* was a separate *legis actio*, presumably *sacramentum* at first, this view is necessarily excluded. 8 This is substantially the definition of *legis actio* given by Ihering elsewhere (*op. cit.* (4), 2. 639; *Tr. Franç.* 3. 331). In the other passage he is considering not the character of *legis actio*, but the character of *modi lege agendi*.

tinued to be applied beyond the legal sphere. If a man seized a chattel of his debtor, having no legal right to do so, the debtor could claim it, but only at the risk of being at once proceeded against for the debt, and no doubt such extra-legal pledges often resulted from agreement. As a legal institution it is explained by Gaius[1] as follows: the creditor, where *pignoris capio* was allowed, seized property of the debtor to hold as a pledge, using formal prescribed words (*certa verba*), as in other *legis actiones*, but there was no appearance in court, the debtor himself need not be present, and it could be done on *dies nefasti*, when, in general, because the intervention of the magistrate was involved, *legis actio* was not possible.

Gaius tells us that it was allowed by custom where a soldier's stipend (*aes militare*), or the money needed to procure a horse for an *eques* (*aes equestre*), or fodder for the horse (*aes hordearium*), was not provided by the person liable, this charge being, at least in case of *aes hordearium*, imposed on certain persons as a tax[2]. The XII Tables allowed it against one who had bought a beast for sacrifice and failed to pay the price, or had hired a horse from one who meant to use the hire money to buy a sacrifice, and had not paid the hire. It was allowed by a provision of the censors to a *publicanus*, for unpaid taxes. Gaius does not suggest other cases, but it is sometimes supposed that these are only examples and that it was a much more general remedy[3]. There seems no evidence for this. Gaius indeed tells us[4] that in *damnum infectum*, though the praetorian remedy was usually adopted[5], it was possible to proceed by *legis actio* and it is suggested that this was *pignoris capio*, for which view there is not much evidence[6]; the liability is of a very different type from that in the recorded cases. There is another recorded case in the Empire[7], but that was seizure by persons exploiting under the State and had no relation to the *legis actio*. There is another somewhat earlier case in which *manus iniectio* and *pignoris capio* were allowed where filth was thrown in a certain area, which may have been a private case, *i.e. popularis*[8], but is not ancient or very closely connected with the old *legis actio*. On the whole the list given by Gaius seems probably to be exhaustive for early law.

The fact that some of these cases are based on *mores* and not on *lex* has suggested the view that in the expression *legis actio* the word *lex* is used in an extended sense, though there are different opinions as to

1 G. 4. 26 sqq. 2 See Mommsen, *Staatsr.* 3. 195; *D.P.R.* 6. 1. 219. 3 *E.g.* Lenel, *Essays in Legal Hist.* ed. Vinogradoff, 132. 4 G. 4. 31. The cases of extra-legal seizure are of no importance in this connexion. 5 *Post*, § CCXLV. 6 So Karlowa, *C.P.* 216 sqq., who gives the evidence. 7 *Lex Metalli Vipacensis*, 16, 35, 41, etc. Girard, *Textes*, 120; Bruns, 1. 189. 8 *Sc. de pago Montano*, Girard, *Textes*, 130; Bruns, 1. 189.

what this extended meaning is[1]. But the forms are regulated by statute, and the fact that some of the applications are older than the statute does not seem to require this concession; *tutela legitima* is older than the statute.

What is the common quality of the recorded cases of *pignoris capio*? They all, with the very doubtful exception of *damnum infectum*, affect the State or religious interests[2], and it is contended that as the State can do itself justice, these are cases in which the State had delegated the power of enforcement to the person more immediately concerned and responsible. The interests of religion were indeed only remotely affected, and neither State nor religion was in any way concerned in *damnum infectum*. But leaving this doubtful case out of account, they were all certainly cases in which there was public interest, and they were all cases in which there was no juristic relation between the parties. Those who were to provide the funds for the soldier were not responsible to him but to the State. The tax was not due to the *publicanus* but to the State. Informal sale and hire were not recognised as giving an action in early law. This indirect remedy was given because the public interest was concerned.

The seizure of a pledge was in itself a poor remedy. It might indeed, if a quantity of valuable and indispensable property was seized, put pressure on the defaulter, but one would expect further steps to be possible. Gaius tells us of none, and other sources give little help. There is no hint of a right of sale. Whether the system was or was not a delegation of the magistrate's power of seizure, by way of *coercitio*, it was plainly modelled on it and would probably give the same rights over the pledge. In that case the practice was, apparently, to destroy it, if the claim was not satisfied[3]. This right may have existed here, and, on the same analogy, may have been the only right. Sale in the State cases would have suggested action in our case[4], but as the State did not sell, that analogy fails. It is, however, widely held that the further proceedings were an action[5], and that to this fact is due the position of *pignoris capio* in this group. This would not be an action by the victim claiming that the seizure was wrong, for that would be a *vindicatio*, presumably *sacramentum*, and certainly a distinct *legis actio*. It must therefore have been an action to enforce redemption of the pledge, perhaps, in view of the language of Gaius[6] and of analogous provisions of the so-called *l. Iulia municipalis*[7], for an amount larger than the

1 See Mitteis, *Privatr.* 1. 34. 2 Cuq, *Inst. Jur.* 1. 430; *Manuel*, 843. 3 Mommsen, *Strafr.* 53. 4 That is the way in which the State enforces its claims, as action is for *privati*. 5 Ihering, *Geist* (5), 1. 158 sqq. 6 G. 4. 32. 7 *E.g.* 44; Girard, *Textes*, 84; Bruns, 1. 104.

original claim, but recoverable only after a certain lapse of time. But it is surprising, if this special machinery existed, that Gaius, whose account is full, should not have thought it worth mentioning. He tells us of the *iudicium in sacramentum* and *condictio*. He tells us that there was difference of opinion on the question whether *pignoris capio* was a *legis actio*; some refused so to regard it because it was not *in iure*, did not need presence of the adversary and could take place on *dies nefasti*, all impossible in the others[1]. He says that the general view was that it was a *legis actio*, because of the *certa verba* used. He does not advert to the existence of this *iudicium* which must, one would suppose, have involved appearance before the magistrate for the appointment of the *iudex*.

Two texts are however cited to prove the existence of this action. One is a text of Cicero in which he calls the *publicanus* "*pignerator ac petitor*[2]." But another reading is "*aut petitor*," which makes some difference. And it is impossible to attach much importance to a rhetorical utterance dealing with provincial procedure and made after *formulae* had existed for a century. The other text, of Gaius[3], is more important. He tells us that there was in later times an *actio fictitia* given to the *publicanus* containing "*talis fictio . . . ut quanta pecunia olim si pignus captum esset, id pignus is a quo captum erat luere deberet tantam pecuniam condemnetur.*" The fiction is complex. The form given is, it seems, that of the *formula*, in *oratio obliqua*. He gives other illustrations of *formulae fictitiae in personam*, but this is the only one which says "*luere debere*" and not "*oportere*," a fact which suggests that the remedy it replaced was not an action. If the seizer had no action, but only means of putting pressure, this fiction seems exactly designed to give an action instead. If there had been an *actio* it is not easy to see why the expression "*dare oporteret*" was not used; the whole *formula* would have been much simpler.

CCXIV. DECAY OF THE *LEGIS ACTIO*. The rigid formalism and consequent inexpansibility of the *legis actio* was unsuited to the needs of an advancing civilisation. Still less was it suited, since its forms and ceremonies were to a great extent secrets in the hands of patrician magistrates and pontiffs, to the plebeians, steadily growing in importance and strength. The opening of various magistracies to plebeians and the publication of the Calendar and other information by Cnaeus Flavius, about 300 B.C.[4], did something to help them, and when, half a century later, a plebeian *pontifex maximus* expounded the law publicly[5], all the value of the system, even to the patricians, was gone. Only its inconveniences were

1 G. 4. 29. 2 *In Verr.* 2. 3. 11. 27. 3 G. 4. 32. 4 Livy, 9. 46; D. 1. 2. 2. 7. 5 1. 2. 2. 35.

left, and it was superseded by the more rational Formulary System. A certain simplification had already begun within the *legis actio* itself, by the introduction of the actions *per sponsionem*[1]. This was a method of evading the real action by *sacramentum*[2]. One of the parties, apparently the party in possession, made a promise of a small sum to the other, if the thing claimed belonged to that other. At the same time he gave security for delivery of the *res* and the interim profits, by way of surety, replacing the old *praedes*, and therefore called *satisdatio pro praede litis et vindiciarum*[3]. Action was brought on the promise. It was probably tried by *condictio*[4], and the trial of the question whether the *summa sponsionis* was due would in effect settle the property question. The language of Gaius[5] makes it clear that the action was in form *in personam*, a claim for the amount of the *sponsio*. The decision rendered possible a claim against the sureties for the thing, so that it was in effect a decision on the *ius in rem*. The *sponsio* was, as we know it, *praeiudicialis*, not *poenalis*, *i.e.* it was not actually exacted[6]. Its amount would therefore be indifferent. Though the action would normally be *condictio* after this action was introduced, a certain *l. Crepereia* of unknown date shews that, if the case was one going before the *centumviri*, the claim would be by *sacramentum in personam*, and it is possible that this alternative was always open. The same statute also provided that the *sponsio*, in the same case, should be 125 sesterces[7]. The purpose of this provision may have been to secure that the resulting *sacramentum* should be on the lower scale, but it is obscure, and the fact that, on the money values of the late republic, 125 sesterces were equivalent to 500 *asses*, *i.e.* the *sacramentum* in important cases, has given rise to other explanations[8].

The praetor's interdict played, as we shall see, a very important part in the formulary system, but it cannot be doubted that interdicts were issued under the *legis actio* system. How far the praetor could, at that time, create new obligations in that way we need not here consider, but he could certainly issue orders requiring obedience to existing law and

1 See Karlowa, *C.P.* 97 sqq. 2 Naber, *Mél. Girard*, 2. 309 sqq., states and rejects various opinions as to the actual reason for its introduction, himself concluding that it was for the purpose of substituting a single issue—is the thing the plaintiff's?—for the duplex question which we have seen to be the essential characteristic of *sacramentum in rem*. 3 See G. 4. 91, who is however dealing with the later system. 4 M. Jobbé-Duval, *Études de procédure civile*, 485 sqq., holds that they were not tried by *legis actio* at all, but by a procedure not clearly defined, the *sponsio* forming the instruction to the *iudex*. He rests this mainly on Cicero, *in Verr.* 2. 1. 45. 115, which he considers to distinguish between *legis actio* and procedure *per sponsionem*. But it seems only to distinguish between *lege agere in hereditatem* and the more circuitous process. He associates with this action the enigmatic "*deductio quae moribus fit*" (Cicero, *pro Tullio*, 7. 16, etc.; *pro Caec.* 10. 27, etc.) which has been assigned by different writers to *sacramentum in rem*, interdict *uti possidetis* and interdict *unde vi*. 5 G. 4. 95, "*summam sponsionis petimus.*" 6 G. 4. 94. 7 G. 4. 95. 8 See, *e.g.*, Naber, *loc. cit.*

enforce them by his power of *coercitio*[1]. It is likely that some of the interdicts found in later law, giving the ordinary interdictal procedure, either to a person aggrieved, or, where the interest was public, to any citizen, are older than the formulary system. If that is so their character in later law suggests that they were tried by *sponsiones*.

The recuperatory procedure already mentioned[2] was probably in some cases by *legis actio*, in others by a different method, since the treaties on which it rested may have varied in their terms. We know little or nothing of this other procedure[3], but it has been conjectured that the instructions to the *recuperatores* were written.

In the formulary system, dominant in the classical age, the main lines of the procedure were unchanged. The issue was brought before a magistrate, exactly formulated in his court (*in iure*), and referred to another tribunal, *iudex*, *arbiter*, etc., for settlement. But this general similarity is accompanied by fundamental changes in the character of the proceedings, of which the most important are the following.

The most significant change is that instead of the "*certa verba*" of the *legis actio* there were "*concepta verba*[4]." The proceedings *in iure*, instead of consisting in the recitation of invariable traditional forms of words now resulted in a statement of the issue in a *formula* or instruction to the *iudex*, taken from one of a set of models provided by the praetor as an accompaniment of his Edict, and modified, so far as was necessary, to state the exact question, subject to the praetor's approval. This control was only one expression of a great change which had occurred in his share in the control of litigation. He had now an extraordinarily free hand. He could create new actions by his Edict, thereby creating rights and liabilities not known to the civil law. He could admit defences not known to civil law and he could refuse actions where civil law allowed them[5].

Another important change was that the instructions to the *iudex* (*formula*) were put into writing, an almost inevitable result of the greater elasticity of the proceedings; without it, disputes as to the exact issue submitted would have been frequent.

The judgment was now, apart from the divisory actions, either a *condemnatio* for a sum of money or an *absolutio*[6]. Other minor points will be considered in dealing with the course of an action.

There remains the question of the history of these changes. Of their legislative history a few words must suffice. Gaius tells us that the

1 See, as to "*de glanda legenda*," Pliny, *H.N.* 16. 5. 15. 2 *Ante*, § CCIX. 3 Karlowa, *C.P.* 213 sqq.; Girard, *Org. Judic.* 1. 99 sqq. 4 G. 4. 30. 5 See, however, *post*, p. 625. 6 As to non-existence of *absolutio* in early law, see a view of Huvelin, *Mél. Gérardin*, 344 sqq.

legis actio was superseded by the effect of the *l. Aebutia*, and the *ll. Iuliae*[1]. The *l. Aebutia* is held by Girard to have been enacted between 149 and 126 B.C.[2] The *ll. Iuliae* appear to date from Augustus and are no doubt parts of the piece of legislation called the *l. Iulia Iudiciorum*[3]. Gaius does not tell us what part was played by each of these enactments, and many views are held. According to one the *l. Aebutia* substituted the *formula* for the *legis actio per condictionem*, and did not affect the others, the work being completed by the *l. Iulia*[4]. According to another, now most widely accepted, the *l. Aebutia* merely authorised the *formula*, so that suitors could proceed in either way while the *l. Iulia* swept away the *legis actio* altogether[5]. In any case, after its enactment the *legis actio* was gone, apart from fictitious litigation[6], except, as Gaius tells us[7], in the case of *damnum infectum* (in which, he observes, it was not used), and where the case was to go before the *centumviri*, in which case it must be tried by *sacramentum*. To this extent it survived to the time of Paul[8]. As we have seen[9], the jurisdiction of the *centumviri* was of limited range and need not be considered further here.

The statement of the legislative provisions which caused the disappearance of the *legis actio* leaves open the question, whence come the new ideas of the new system? The disappearance of the dramatic element was prepared by the *legis actio per condictionem*, and thus this action has been described as not only the last development of the *legis actio*, but also the first step in the new system[10]. In fact, little but the writing separates it from the early *formula*. The source of the writing is obscure. It has been said that the *recuperatores* received their instructions in writing, and this suggested it, but there is no evidence for the fact. It is also said that it may come from the practice in provincial jurisdiction[11], and it may also be considered a natural result of the more

1 G. 4. 30. 2 *Mél.* 67 sqq., 114 sqq.; *Manuel*, 1012. His point is that there is evidence that, at the earlier date, *legis actio* was the only mode, while at the later the magistrate had the power *denegare actionem*, which was a result of the *l. Aebutia*, but this is disputed, *post*, p. 625. 3 Girard, *Z.S.S.* 34. 295 sqq.; *Manuel*, 1013. He dates the *l. Iulia iudiciorum publicorum*, on conclusive evidence, in 17 B.C., and the other, *privatorum*, which abolished the *legis actio*, in the same or the next year, but this though highly probable is not so securely made out. He rejects the view (Wlassak, *Processg.* 1. 191 sqq.) based on the plural in G. 4. 30 that there were two *ll. Iuliae iud. privatorum*, one dealing with Rome and the other with the *municipia*, and shews the untenability of the view frequently expressed by Mommsen (*e.g.*, *Strafr.* 128) that these *ll. Iuliae* are identical with the *l. Iulia de vi.* 4 Cuq, *Instit. jurid.* 1. 714; *Manuel*, 852. 5 Wlassak, *Processg.* 1. 85 sqq. 6 *Cessio in iure*, manumission *vindicta*, etc. 7 G. 4. 31. 8 P. 5. 16. 2. 9 *Ante*, § CCIX. 10 Keller-Wach, *C.P.* 95. 11 Girard, *Manuel*, 1011. It is also suggested that the instructions in the *arbitrium litis aestimandae* were written. Huvelin, *Mél. Gérardin*, 333. See also Koschaker, *Z.S.S.* 34. 434. Partsch, *Schriftformel* (48 sqq.), arguing from the form in which disputes between certain Greek communities were referred by the *pr. peregrinus*, under direction of the Senate, to arbitral courts for decision, concludes that something

complex nature of the issue, and the increased prevalence of writing, but in truth there is no certainty. The use of variable "*concepta verba*" instead of the old "*certa verba*" came no doubt from one of these sources, perhaps from the provincial procedure through the intervening stage of the *praetor peregrinus*[1]. This variability is one aspect of the changed position of the magistrate. He could now create actions, refuse actions, admit new defences and so forth. This power can hardly have been expressly conferred by the *l. Aebutia*; the rights resulting would have been thought of as civil law rights. Probably it was a usurpation of the praetor rendered possible by the power of issuing *formulae* given by the statute. It was no doubt contemplated as an exercise of the *imperium*, favoured by public opinion, and therefore not checked by authority. These powers were, no doubt, not all exercised at the beginning. The *exceptio doli* did not exist till Cicero's time[2]. *Praescriptio pro reo* became an *exceptio* later still[3]. Whether any of the powers existed under the *legis actio* system is disputed. Girard holds that none of the powers in litigation which we regard as essentially praetorian (*missio in possessionem*, *interdicta*, etc.) existed under the *legis actio*, except so far as they enforced civil law rights[4], but a different view is elsewhere held[5]. The most doubtful case is that of *denegatio actionis*. Of several recorded cases of this, one is older than the *l. Aebutia* and others may be. The first is a case concerning *manumissio*; and on the instructions of the Senate, both circumstances which lessen its weight, but hardly destroy it[6]. It is certain that in B.C. 177 the Senate could direct the praetor as to the exercise of his *imperium*, but it is not so clear that it could order him to do what was not within the limits of his *imperium*. The other cases can be but little later than that statute, and if we have to choose between immediate exercise of this great power, without precedent, and the possibility that it was already, in the period immediately before the *l. Aebutia*, to some extent in operation, the latter seems to be the more probable[7].

like the *formula* was in use in the court of *pr. peregrinus* before the *l. Aebutia* and, *a fortiori*, in the provinces.

1 Girard, *ib.* An internal origin of the *formula* may seem in itself more probable. Some hypotheses start from this point of view. Thus Keller (*loc. cit.*) traces it from the freer hand the magistrate had in *condictio*, the magistrate's instructions here being an anticipation of the *formula*. Huvelin (*Mél. Gérardin*, 319) traces it from the instructions to the *iudex* in the *arbitrium litis aestimandae*, the *formula* having begun in similar instructions without any previous trial by *sacramentum*. But the interpretation of his principal text (Cicero, *de Orat.*, 36. 166, 167) is not very satisfactory. 2 *De Off.* 3. 14. 60. 3 Arg. G. 4. 133. 4 Girard, *Mélanges*, 1. 75 sqq., 126 sqq., 170 sqq. 5 See the opposing views of Mitteis, Lenel, and Wlassak, cited and considered by Girard, *loc. cit.* 6 Livy, 41. 9. 7 See also Costa, *Profilo Storico*, 32, and Cornil, *Aperçu historique*, 92, for expressions of this view.

CCXV. COURSE OF AN ACTION UNDER THE FORMULARY SYSTEM[1]. The normal beginning was *in ius vocatio*[2], and, as before, the adversary, now describable in all cases as the defendant, must come or give a *vindex*[3]. The Edict provided that if he did not appear, or give a *vindex*, an *actio in factum* for a penalty would apparently be given against him, and it contained other auxiliary rules on the matter[4]. There was an *actio in factum* against the *vindex* who failed to produce his man, and *missio in possessionem* against the defaulter himself[5]. And it seems that the old right of taking him by force before the magistrate if he would not come or give a *vindex* still remained[6]. There was however an alternative to *in ius vocatio*. *Vadimonium*, which was still used in case of postponement, might also be used to initiate proceedings[7]. *Vadimonium* was now by verbal contract[8], and, in the present case, as it was extrajudicial, and matter of agreement, it does not seem that there was any rule requiring surety[9]. It must be noted that it was distinct from the undertaking of a *vindex*. That presupposes *in ius vocatio*; this replaces *in ius vocatio*. The Edict also provided[10] that if a defendant hid and so made *in ius vocatio* impossible, the creditor might be given possession of the goods of the *latitans* (*missio in possessionem*) with an ultimate right to sell them, *venditio bonorum*[11].

The parties being in court, the plaintiff stated the nature of his claim and evidence, *editio actionis*[12], and asked of the praetor the *formula* he wanted, *postulatio*, *impetratio actionis*[13]. The possible variety of defences and answers to these defences made the matter *in iure* much more complex than it had been under the old system. Thus, in a claim on a loan of money, the defendant might wish to plead that he was a *filiusfamilias* at the time of the loan, *exceptio Sci. Macedoniani*[14], and the plaintiff might answer that he had represented himself as a *paterfamilias*, *re-*

1 The following account is of procedure at Rome. For rules as to jurisdiction, see Bethmann-Hollweg, *C.P.* 2. §§ 72 sqq.; Bertolini, *Il processo civile*, 55 sqq., and *post*, § CCXX. 2 Accompanied by a statement of the nature of the claim—an informal "*editio actionis*," required by the Edict. Lenel, *E.P.* § 9. As to *litis denuntiatio*, *post*, § CCXXVI. 3 G. 4. 46; Lenel, *E.P.* 65. The *vindex*, if he fails to produce his man, is liable to *actio in factum* for "*quanti ea res erit*" (2. 8. 2. 5), an obscure saying not cleared up by h. t. 3 and 5. pr. Cuq (*Manuel*, 868) holds it to mean that he is liable whether the actual defendant was or not, though the *vindex* of the *legis actio* was liable only if the defendant would have been. The *vindex* of classical law has become *fideiussor iudicio sistendi causa* in the Digest. 4 Perhaps *missio in possessionem*, Beseler, *Beiträge*, 3. 20. 5 Lenel, *E.P.* 70 sqq. 6 See, *e.g.*, 50. 17. 103. 7 Cicero, *pro Quinctio*, 19. 61. Not stated in extant legal texts. 8 G. 4. 184. 9 See, however, Fliniaux, *Vadimonium*, 48 sqq., and as to circumstances barring action for *vadimonium desertum*, *ib.* 79. 10 See Lenel, *E.P.* 400. 11 42. 4. 7. 1 sqq. 12 See 2. 13. 1, where however it is not clear what refers to this *editio* and what to that which accompanied *in ius vocatio*. Something of the sort there must have been. 13 Cicero, *in Verr.* 2. 3. 65. 152; C. 3. 9. 1; C. 2. 57, rubr.; D. 13. 7. 34. 14 *Ante*, § CLXIII.

plicatio doli[1]. These and similar matters might take time. If the business could not be completed in the day there would be *vadimonium*. Ultimately the issues agreed on would be embodied in a *formula*, approved by the praetor. It was issued under his authority, but it was not his duty to see that it stated correctly the dispute between the parties; that was their affair. What he had ordinarily to see to was that it stated a real issue of fact and law, or, in some cases, of fact, satisfying himself, in this last case, that the facts alleged were such as to justify the issue of the *formula in factum*[2].

The next step was the appointment of a *iudex*, whose identity was arrived at by a method to be considered later. This settled, the *formula* was issued and accepted by the defendant, the transaction amounting, according to the view now dominant, to a contract between the parties[3]. This is the stage called *litis contestatio*, the very important effects of which will be considered later[4]. Whether it was still accompanied by a joint appeal to witnesses, "*testes estote*[5]," is uncertain. There appears to have been an express authorisation or instruction by the praetor to the chosen *iudex* to proceed in accordance with the *formula*, *iudicare iubere*[6]. The exact machinery of the issue of the *formula* is disputed. It may have been accepted by the defendant from the praetor[7], or, more probably from the plaintiff, under the praetor's authority[8], in a written form, or dictated by the plaintiff to the defendant and written down by him[9].

Something must be said of important variations of the proceedings *in iure*. In certain actions, *actiones interrogatoriae*[10], the plaintiff, before asking for his *formula*, might question the defendant as to circumstances which affected, not the liability in general, but his personal liability. This might be done in noxal actions, where the question was whether the defendant had or had not "*potestas*" over the slave, probably only where the slave was absent[11]. If he admitted *potestas* the noxal action proceeded. If he denied it, but the plaintiff wished nevertheless to con-

1 *Post*, § CCXXIII. 2 In dealing with unlearned and insufficiently advised suitors he might no doubt, on occasion, be much more helpful. 3 See Wlassak, *Litis contestatio*; Wenger, Pauly-Wissowa, s.v. *Editio*. For a different and not generally accepted view, rejecting the contract theory, Schlossmann, *Litis contestatio*, especially 124 and the summary, 188 sqq. 4 *Post*, § CCXXXV. 5 Festus, s.v. *Contestari*. 6 See Partsch, *Schriftformel*, 10 sqq. 7 "*Accipere iudicium*" is equivalent to "*accipere formulam*," Wlassak, *R. Processg.* 1. 72 sqq.; 2. 13, 28. Acceptance from praetor, Keller, *Litis contestatio*. 8 Wlassak, *Litis contestatio*; see Girard, *Manuel*, 1027. 9 Lenel, *Z.S.S.* 15. 374 sqq. These points are not insignificant. The view that the *formula* was received by the deft. from the praetor led Keller to the conception of the relation as quasi-contractual. The view that it is an agreed issue, a contract, suggests acceptance between the actual parties. The conception of the *formula* as a contract has important consequences, especially in relation to *translatio iudicii*, *post*, § CCXLI. 10 Demelius, *Die Confessio*, 245 sqq. 11 See reff. to texts and literature, Buckland, *Slavery*, 102.

tinue, he had a *formula* with no right of surrender, so that if it were eventually shewn that the defendant had *potestas* he would be liable *in solidum*[1]. Probably, if the slave was present there was an *interrogatio* "*an eius sit*" with similar results[2]. The *interrogatio* also occurred in actions against the *heres* of a debtor. The plaintiff asked whether and for what share the defendant was *heres*[3], an important point as the XII Tables divided the liabilities among the *heredes*. If he refused to answer or answered falsely that he was not *heres*, or as to his share, he was liable *in solidum*[4]. Apart from this the action proceeded as if any admission made was true, but as this praetorian action might make one liable who was not really *heres*, there is much dispute as to its exact formulation[5].

In certain cases the plaintiff might offer an oath to the defendant (*iusiurandum necessarium*). If he accepted it the action was lost[6]. If he refused it he was condemned. If he offered it back (*referre iusiurandum*), the analogous alternative was before the plaintiff[7]. But the defendant, instead of offering the oath back, might offer the plaintiff a *iusiurandum calumniae*. If this was refused the action was refused—*denegatio actionis*[8]. If this oath was taken the defendant must then swear or *referre*. It appears the better view[9] that this machinery of *iusiurandum necessarium* applied only to *condictio certae pecuniae* and *triticaria*[10], *actio de constituto*, and *actio operarum*, *operae* being contemplated as specific *danda*, like sums of money[11]. There are, however, other cases of *iusiurandum in iure*. Thus in noxal actions if the defendant denied *potestas*, the plaintiff had the alternative of an action *sine noxae deditione* or of offering an oath to the defendant. If he took it he was absolved. If he refused it he was condemned, with a right of surrender[12]. It does not appear that this oath could be offered back. So also in the *actio rerum amotarum* an oath might be offered after a preliminary oath *de calumnia*[13], but the oath could not be referred back.

In any action in which the mere fact of losing it did not involve the

1 2. 9. 2. 1; 9. 4. 22. 4. **2** 9. 4. 26. 3, etc. Lenel, *E.P.* 155 sqq. **3** 11. 1. 1. pr. Lenel, *E.P.* 141. **4** 11. 1. 5; h. t. 11. 3, 4. If he falsely says he is *heres*, and is insolvent, so that plaintiff suffers, the action against the true *heres* will be restored. The interrogations in *damni infecti* (11. 1. 10, 20. 2; see Cuq, *Manuel*, 873) seem to have a different character and effect. **5** See for various reconstructions, Lenel, *E.P.* 140. **6** 12. 2. 7. **7** 12. 2. 34. 6, 7. **8** 12. 2. 34. 4. There has been no *consumptio litis*. The *iusiurandum calumniae* has a wider field, *post*, § CCXVIII. **9** Girard, *Manuel*, 1019. **10** The evidence for its application to *condictio certae rei* is not good, and it is contended by Biondi, *Giuramento decisorio*, c. I, that it applied only where there was a penalty (*sponsio tertiae partis*) and that the effect of refusal was not condemnation but merely that the action, with its liability to the penalty, would proceed. Cornil, *Aperçu historique*, 476, confines it to *condictio certi*. **11** 38. 1. 4; Lenel, *E.P.* 327. It is possible that such *operae*, dayworks, acquired a definite fixed money value, as appears to have been the case in the old English land law. **12** 9. 4. 21. 4. **13** 25. 2. 11–14.

defendant in any liability beyond the *interesse*, *i.e.* excluding cases in which there was a *sponsio poenalis*, or liability to condemnation beyond the *simplum*, the plaintiff might offer the defendant a *iusiurandum calumniae*, *i.e.* that he was defending in good faith. In like manner the defendant might offer a similar oath to the plaintiff. If this was taken the action proceeded. If the plaintiff refused he was barred from proceeding with the action, but there was nothing to prevent his bringing another. A defendant who refused was probably treated as an *indefensus*[1].

Besides these cases there is a possibility of *iusiurandum voluntarium*, already considered[2].

CCXVI. Instead of defending, the defendant might admit the claim[3]. If it was on an obligation for *certa pecunia*, there was no difficulty; he was treated as *iudicatus*. *Confessus pro iudicato habetur*[4]. But in all other cases, it seems the better view that he was not *iudicatus*, as all *condemnatio* was for a fixed sum of money and the formulary system had no *arbitrium litis aestimandae*[5]. A text of Ulpian[6] shews indeed that even if the claim was for an *incertum* there might be admission of liability for a certain sum, and if the sum acknowledged satisfied the plaintiff, it would in classical law[7] be a case of *confessio certi*. Apart from this modern opinion is divided. The view now perhaps dominant is mainly based on words in the *l. Rubria*[8], which is not unreasonably regarded as reflecting Roman practice. They lay it down that a *confessus incerti* was to be treated as an *indefensus* unless he gave full security[9]. This seems hard measure for one who admits liability but disputes the amount, but it is justified as a survival of the rule of the *legis actio* in which *confessio* barred the right to defend in any case. But the sting is taken from this by the rule suggested by the closing words of the same chapter of the *l. Rubria* that, in the case of mere dispute as to the amount due, the defendant would not be treated as a *confessus* if he was still ready to defend[10]. If this is so, a mere acknowledgment of general liability in the case of an *incertum* has little legal effect. But opinions differ[11].

1 G. 4. 171 sqq. 2 *Ante*, § CLXXXII. There is much controversy, Bertolini, *Il proc. civ.* 1. 261, n. 4. In the Digest (12. 2) the different cases of oath are inextricably confused owing to changes in the law. 3 Demelius, *Die Confessio*; Giffard, *Confessio in iure*. 4 P. 5. 5 a. 2. 5 As to this, *ante*, § CCVIII. 6 42. 2. 6. 1. 7 For the practice in the earlier days of the *formula*, see Giffard, *Confessio in iure*, 88. 8 Cap. XXII. Girard, *Textes*, 76; Bruns, 1. 99. It deals with Gallia Cisalpina and the name *Rubria* has no real authority. 9 We shall see shortly that in all cases of claim for a *certum*, anyone *indefensus*, in any of the possible ways in which this might occur, was treated as *iudicatus*, so that in all cases of *confessio*, *certi* or *incerti*, the defendant was treated as *indefensus*, but it was only in the former case that this was equivalent to *iudicatus*. 10 But it is not the most obvious interpretation of the opening words of the chapter. 11 See Lenel, *E.P.* 395, 398.

In the case of *actio in rem* the principle was the same: *confessio* did not make the party *pro iudicato*. The practical effect was somewhat different. It was as if there had been a "*pronuntiatio*[1]." The subsequent proceedings varied according as the *res* was a moveable or land. In the former case the praetor authorised the plaintiff to take the thing[2]. In the latter he issued the interdict "*quem fundum*" or one of its congeners[3]. Only if this was not obeyed or not properly met, did the defendant become *indefensus*[4].

An *indefensus* was one who did not take the steps of procedure necessary to defence; it was still a characteristic of the process that it needed the cooperation of the parties. He was one "*qui se non defendit ut oportet*[5]." This might occur in many ways. He might refuse "*accipere iudicium*[6]," or to give security where this was required[7], or to answer interrogations lawfully put to him[8], or to make the *sponsio* in an *actio per sponsionem*[9]. He might "*latitare*[10]," and so forth[11]. The effect of this in other than real actions[12] was that the praetor issued a decree of *missio in possessionem*, under which the plaintiff might enter into possession of the defendant's property and ultimately proceed to *bonorum venditio*. The process might be stayed at any moment if the defendant fell into line and did what was required, and the *possessio* would be vacated[13]. But where the action was for a certain sum of money the *indefensus* in all these cases was treated as *iudicatus*[14].

Another variation is that a party might wish to proceed by representative, but this will be considered later[15].

It will be evident that the function of the magistrate was very different from his part in the *legis actio* and details, later to be considered, will shew this still more clearly. He had to decide difficult points and exercise a wide discretion, so that it is not surprising that he habitually acted with a *consilium* of lawyers[16]. It should also be noted that the case might occur of agreement as to the material facts, but dispute as to the law. We shall see later that there were many matters which the praetor did not refer to the *iudex*, but decided himself, a practice which

1 42. 2. 6. 2; *post*, § CCXVIII. **2** 2. 3. 1. 1, "*duci vel ferri iubere.*" If the claimant was not really owner, still "*qui auctore praetore possidet iuste possidet*": he has the Publician and will usucapt. But for the protection of the owner who may exist, he is required to give security. P. 1. 11. 1. See Pissard, *Études Girard*, 1. 255 and reff. **3** *Post*, § CCXLIX. **4** Giffard, *op. cit.* 135. **5** 42. 4. 5. 3; G. 3. 78; *lex Rubria*, c. XXI; Lenel, *E.P.* 398. **6** 46. 7. 18. **7** 2. 3. 1. 1; *post*, § CCXL. **8** 11. 1. 9. 4. **9** *L. Rubria*, c. XXI. **10** *Ante*, § CCXV. He is none the less an *indefensus* if having given a *vindex* he still fails to appear. **11** Mere absence without defence, and exile, and death without *heres* gave the same right. As to the history of the edicts on *latitatio* and *absentia*, Fliniaux, *Études Girard*, 1. 43. **12** Dealt with as above stated. **13** 42. 5. 33. 1. **14** *L. Rubria*, c. XXI. See Girard, *Manuel*, 1021, n. 1. **15** *Post*, § CCXXXIX. **16** Bethmann-Hollweg, *C.P.* 2. 136.

tended to increase. On the present case it is enough to say that if on the agreed facts the praetor held that there was no case he could refuse the action, but if he held that there was a claim the admission of the facts would probably amount to a *confessio*, with practical effects, as we have seen, varying in different cases. But we are not fully informed.

CCXVII. *Iudex* and *Iudicium*. The colleges of *centumviri* and *decemviri* did not appear in the formulary system, but the other tribunals already mentioned recurred[1]. The common case was reference to *iudex* or *arbiter*. Apart from consent[2] the *iudex* was determined by a system of names offered by the plaintiff[3], till one was accepted. Any rejection was under oath of belief that the *iudex* proposed was not likely to be fair[4]. There seems to have been no limit to the number of rejections, but it is supposed that one who was obviously refusing without reason was treated as an *indefensus*. The *iudex* chosen could not refuse to serve and he was sworn[5].

Both *iudex* and *arbiter* were drawn from the *album iudicum*[6]. There was no fundamental distinction between them; an *arbiter* was a *iudex*. *Arbitri* seem to have acted in cases where there was a greater discretion, notably in *bonae fidei iudicia*[7], but *actiones arbitrariae* were not necessarily tried by an *arbiter*. The "*Album*," or list, normally contained, in the Republic, all the qualified members of certain high classes of society, varied on political grounds from time to time[8].

Immediately before Caesar the list consisted of 3 *decuriae* of 300 each of senators, *equites* and *tribuni aerarii* (then a large class, somewhat less wealthy than the *equites*). Caesar excluded these, but maintained 3 *decuriae*, the third now consisting also of *equites*. Augustus added a fourth *decuria* of less wealthy persons for minor cases, and Caligula added a fifth of the same class. As these classes did not now include all the members of the groups[9] a list was issued annually under the control of the Emperor, but a name remained till the age of exemption from service[10], and the *equites* were always predominant among the *iudices*.

Recuperatores now tried also cases in which *cives* alone were con-

1 The *tresviri capitales* may be neglected. 2 By consent of parties it seems that a *iudex* might be chosen not on the *album*. So Girard, *Manuel*, 1025, citing 5. 1. 12. 2, but the text is not conclusive. 3 Cicero, *pro Rosc. com.* 15. 45. 4 Bethmann-Hollweg, *C.P.* 2. 455. 5 5. 1. 39; 50. 5. 13. 2; Cicero, *de Off.* 3. 10. 44. 6 It is possible that originally *arbitri*, being experts, were not required to be on the *album*. 7 Cicero, *de Off.* 3. 17. 70. 8 See Mommsen, *Staatsr.* 3. 528 sqq.; *D.P.R.* 6. 2. 132. From the list of qualified persons prepared by the praetor the quaestors made out a list for the year. 9 See, however, as to senators, *D.P.R.* 6. 2. 489, n. 1, where an opinion in the German text is modified. 10 Mommsen, *Staatsr.* 3. 537; *D.P.R.* 6. 2. 142.

cerned[1]. The exact scope of their competence is not recorded, but it seems that, apart from the provinces and municipalities, their jurisdiction was mainly, though not exclusively, in actions with a certain delictal character[2]. They did not, at least in some cases, exclude the *unus iudex*[3], and it is not clear whether the choice was with the parties or the magistrate[4]. As we have seen[5], the main advantage of the recuperatory procedure was increased celerity, secured especially by a short limit of time within which the judgment must be delivered, and other rules.

The instructions to the *iudex* were in a *formula*, a complex structure to which we shall recur. Here it is enough to say that it was in the general form "if you find such facts" or "such liability" in the defendant, or "if you find such a right to belong to the plaintiff," "give judgment in his favour; if you do not so find, absolve the defendant." It does not appear that the 30 days' delay of the *l. Pinaria* survived in this system, but the practice as to *dies perendinus* and, in general, postponements, where needed, to the next day but one, remained in operation[6].

The parties were present but took no part, formally, in the proceedings. The case was handled by advocates (*patroni*, *oratores*[7]). It was usual, though not universal, to begin with speeches of the respective advocates, then to proceed to the evidence, and then, after other speeches and discussion with the *iudex*, to pass to the judgment[8]. There were no strict rules of evidence. Hearsay was admissible, though recognised as less weighty than direct testimony. Documents were of course admitted, and even written statements, under oath or not, by persons not produced as witnesses[9]. There were however rules excluding certain witnesses. In general slaves could not be witnesses, except in a few cases, especially transactions by them where there was no other evidence. Their examination was normally by torture. They could not give evidence against their master, or, from the middle of the second century of the Empire[10], for him. But most of the recorded exclusions belong to *publica iudicia* with which we are not concerned. There was no general limit on the number of witnesses, but according to the Digest the *iudex* might set a limit if he thought it desirable[11], and in the recuperatory

1 G. 4. 46. 141, 185; Ulp. 1. 13 a. **2** See Girard, *Manuel*, 1025. **3** Wlassak, *Processg.* 2. 313 sqq. **4** As to "*sortitio*," Keller-Wach, *C.P.* 45. **5** *Ante*, § CCIX. **6** Aul. Gell. 14. 2. 1. **7** As to these, see Bertolini, *Il processo civ.* 2. 295. **8** See G. 4. 15, written of *legis actio* system but probably equally applicable here. See Bethmann-Hollweg, *C.P.* 2. 586 sqq. In Cicero's speeches it is usually clear that the court is already in possession of the evidence. **9** Bethmann-Hollweg, *loc. cit.* As to the obligation to produce documents, *editio*, Lenel, *E.P.* 59 sqq. **10** See Buckland, *Slavery*, 86 sqq. **11** 22. 3. 25. 3, probably interpolated. In later law there was a good deal of legislation prescribing a certain minimum of evidence, see *e.g.* C. 4. 20. 15. 6; C. 4. 20. 9, "*nemo iudicum unius testimonium in quacumque causa facile patiatur admitti*," but this is under the system of *cognitiones*.

procedure it was provided in some enactments, but not in all, that a limited number of witnesses, usually 10, might be formally summoned, *denuntiati*, and so placed under an obligation of attendance[1]. This does not shew that more could not be heard, and there was no question of *denuntiatio* and compulsion in ordinary cases; the attendance of witnesses was voluntary. As the *iudex* must decide for himself, he was not bound by any piece of evidence. Thus the defendant might confess liability, but the *iudex* was probably not bound to believe him; such admissions are not always trustworthy[2]. If one party offered another an oath *in iudicio*, its taking or refusal probably did not bind the *iudex*, though it might affect his mind[3]. In doubtful cases the *iudex* might offer an oath; the effect of the result was for him to consider[4].

If both parties were absent on the appointed day, nothing happened, and there seems nothing to prevent a new hearing on a later day. If the plaintiff was away, as the *iudex* must absolve unless the plaintiff proved his case, the burden of proof being on him, the defendant was entitled to *absolutio*. If the defendant was absent, the plaintiff must perhaps still prove his case, as voluntary abstention might have other causes than knowledge that there was no defence, but it is more generally held that *condemnatio* went as a matter of course[5]. In any case absence means non-appearance after a long period of waiting. It seems that the *iudex* ought not to give judgment in such a case till 4 o'clock, and then only after sending out a messenger to proclaim the need of attendance, otherwise he ran the risk of having made *litem suam*[6]. All this might be avoided if the absent party sent a messenger to justify his absence and asked for a postponement, or, in case of defendant, if a voluntary *defensor* appeared for him[7]. Apart from this, as there was no appeal, the only relief was by *restitutio in integrum*, which was given only on certain grounds[8].

Roman Law had no system of precedent[9]; a *iudex* was not bound by previous decisions, even though, as often happened, the same affair

1 Bethmann-Hollweg, *op. cit.* 2. 598. 2 *Ib.* 595. Demelius however (*Die Confessio*, 357 sqq.), while agreeing that it could be withdrawn, holds, on general principle, that the *iudex* must follow it if it was not withdrawn. 3 22. 3. 25. 3, interp. Demelius, *op. cit.* 85 sqq. 4 C. 7. 45. 11 (interp.?). Biondi, *Giuramento*, c. II, holds that the oath offered and taken *in iudicio* was decisive and that the *iudex* had, in classical law, no power to tender an oath. As to the presumptions conclusive or rebuttable, drawn from proof of certain facts at different epochs in the law, see Cuq, *Manuel*, 898. 5 See Girard, *Manuel*, 1053, n. 3 and lit. there cited; Kipp, Pauly-Wissowa, s.v. *Eremodicium*; Eisele, *Abhandlungen*, 184; Bertolini, *Il pro. civ.* 2. 131. But the texts are inconclusive. Some sort of hearing there must have been, for the *iudex* had to fix the amount of the *condemnatio*. Cornil, *Aperçu historique*, 425, thinks him authorised, but apparently not bound, to find for the other. 6 Bethmann-Hollweg, *C.P.* 2. 603. 7 3. 5. 31. 2; 46. 7. 5. 1. Bethmann-Hollweg, *loc. cit.* 8 *Post*, § CCXLIV. The procedure *per contumaciam*, seems to belong to the system of *cognitiones*, *post*, § CCXXVI. 9 C. 7. 45. 13.

had been before another court, between different parties, or, *a fortiori*, where it was merely a similar case. But such previous decisions were not without effect; they seem to have operated much as they do in modern continental courts[1].

The issue was fixed by the *litis contestatio* and the *formula*, and it was, *prima facie*, the business of the *iudex* to decide on the matter as it stood at *litis contestatio*, disregarding what had happened since. This was a survival from *sacramentum*, in which it was strictly logical. The question whether a *sacramentum* was *iustum* or not could not be affected by later events. But the rule operated unreasonably where the defendant had satisfied the plaintiff in the meantime. It was not applied in *bonae fidei iudicia*; all agreed that it was within the *officium iudicis* to absolve in such a case; it could not be said that a man ought, *ex fide bona*, to pay twice. All agreed that it did not apply in *actiones arbitrariae*, since the *iudex* was authorised to absolve if the thing was restored at his desire. The Sabinians held that it ought never to apply on such facts, *omnia iudicia absolutoria esse*[2], and this view ultimately prevailed; it is uncertain when[3]. Similar questions might arise as to accidental destruction of the thing. In contract and real actions these are considered elsewhere[4].

CCXVIII. *Officium Iudicis*[5]. We have spoken of the *iudex* as bound by the *formula*, but he had, in fact, much discretionary power, most of which indeed was not excluded by the *formula*, but some of which seems somewhat at odds with it. Most of his special powers will best be considered in dealing with the different actions[6], but those of the second type must be considered here. In all *bonae fidei iudicia* he might allow certain kinds of set off. It might be said (indeed Gaius says something like it[7]) that this was only applying the words *ex fide bona* in the *intentio*. But this would require him to take it into account, whereas he had absolute discretion[8]. Another illustration is provided by what Pomponius calls "*stipulationes iudiciales*[9]" which do not appear to be provided for in the *formula*, though they might be covered by the *clausula arbitraria*. He mentions "*de dolo*," and the case was, apparently, such as that given by Gaius[10]. A defendant might have usucapted *pendente*

1 1. 3. 38. We have already considered how far a *iudex* was bound by the opinion of patented jurists and by *decreta* of the Emperor, *ante*, §§ VII, IX. 2 G. 4. 114. 3 Inst. 4. 12. 2. In D. 45. 1. 84 Paul seems to express the Proculian doctrine, but it has been suggested that the action is not on the promise to build, but on one for a penalty if this is not done by a certain time. 4 *Post*, § CCXXXVI. 5 Inst. 4. 17. 6 Many of the Digest texts which speak of things done *officio iudicis* refer, not to the *unus iudex* of the formulary system, but to the official *iudex* of the *cognitio* system, 23. 2. 13; 3. 3. 73, etc. 7 G. 4. 63. 8 *Ib.* A mere consideration of convenience might determine his course. 9 45. 1. 5. pr. The expression is used by Ulpian in another sense, 46. 5. 1. 1. 10 6. 1. 20. pr.

iudicio, and might then have pledged or even mancipated the *res*. Giving it back would not destroy the right of a third party thus created. Accordingly *absolutio* was withheld till the defendant promised that he had not committed and would not commit *dolus*; if this was not made good, the facts would give a new claim. The texts give other cases[1].

According to the *formula* the *iudex* must condemn or absolve[2]. This does not provide for the case of inability to make up his mind, and in fact it seems to have been usual to have repeated hearings till he could decide[3]. It was however possible, by leave of the magistrate, for the *iudex* to be released on his swearing "*rem non liquere*," in which case a new *iudex* was appointed[4], a case of *translatio iudicii*[5].

The *iudex*, who might be aided by advisers[6] (*adsessores*), must give judgment openly by word of mouth, in the presence of the parties and at a time and place at which his court lawfully and usually sat[7]. There was no such thing as conditional judgment[8]; it must be *condemnatio* or *absolutio*. The place of conditions on the judgment was taken, as we have seen, by requiring undertakings before it was given. The *condemnatio* was not a mere statement that the plaintiff was entitled; it must state how much was due[9], as there was no *arbitrium litis aestimandae*. The task might be difficult, as the mode of calculation of damages, the date as at which they were to be assessed, and the factors coming into account varied greatly. One case was specially provided for by edict. A promise for performance at one place might be sued on at another, where the defendant was. As payment here might be more costly to the promisor there was risk of *plus petitio*. It might indeed be worth less to the promisee. The Edict provided an action "*de eo quod certo loco*," in which the *iudex* was authorised to take these matters into account[10]. Having arrived at the amount due, the *iudex* ordered payment of that sum, allowing, if he liked, a certain time for payment[11]: apparently a judgment merely written or not delivered as stated above, or not stating the amount due, was a mere nullity[12].

Where there were several judges, *e.g. recuperatores*, all must be present and the majority decided[13]. If one had been allowed to swear, *rem non liquere*, he must be there[14]. If there was not an absolute majority either

1 Inst. 4. 17 *passim*. 2 In view of the effect of *lit. contest.* it might be thought that not to condemn was to absolve, but the case would be still pending and there would be no *exc. rei iudicatae*. Apart from the practical advantage of being able to point to a judgment, there may have been cases in early law in which *exc. rei in i. ded.* was not available (Eisele, *Beitr.* 13). 3 Aul. Gell. 14. 2. 11. 4 Aul. Gell. 14. 2. 25. 5 *Post*, § CCXLI. 6 2. 2. 2; Cicero, *Top.* 17. 65. On the following matters, see Bethmann-Hollweg, *C.P.* 2. 621 sqq. 7 42. 1. 47; C. 7. 43. 4–8; 42. 1. 59; h. t. 1; h. t. 5. 1. 8 49. 4. 1. 5. 9 G. 4. 48, 52. 10 There was evolution as to what might come into account, Dumas, *N.R.H.* 34. 610. 11 42. 1. 4. 5. 12 C. 7. 43 *passim*; C. 7. 44. 1; D. 42. 1. 59. 13 42. 1. 39. 14 42. 1. 36, 37.

way, there must be *absolutio*[1], but Antoninus decided (perhaps only declared) that in *causae liberales* the decision in such a case must be for liberty, whichever way the action was framed[2]. If there was a majority for *condemnatio*, but disagreement as to amount, the smallest was taken, says Julian; all were agreed to this extent[3].

The *iudex* must abide by the *formula*, but a decision not authorised by it was not a nullity. Gaius tells us that a *condemnatio* for more than the *certum* claimed, or one which went beyond a *taxatio* in the *condemnatio* was valid, though the *iudex* was liable for any loss caused, as one who "*litem suam fecit*[4]." A judgment once given could not be corrected; *semel enim male seu bene officio functus est*[5].

The duty of the *iudex* was not always merely to condemn or absolve. The possible variations will be considered later, but the chief may be enumerated here. In some actions there was no *condemnatio*, but a question was submitted to the *iudex*, *e.g.*, "*an Titius civis sit*," *actiones praeiudiciales*. Here his judgment was a *pronuntiatio*, that *T.* was or was not a *civis*[6]. In real actions and some others the *iudex*, if he found for the plaintiff, might, before *condemnatio*, make a *pronuntiatio* to that effect, and, if he thought fit, order restoration of the *res*, and, only if the order was disobeyed, issue a *condemnatio—actiones arbitrariae*[7]. In actions for division of property or adjustment of boundaries he had a power, already considered, of *adiudicatio*, *i.e.* of issuing a decree vesting such divided shares as he thought fair among the parties, his act constituting a transfer of the ownership[8]. In noxal actions the defendant might be ordered either to pay the penalty or to surrender the wrongdoer[9], the result being somewhat like that in *actiones arbitrariae*, but essentially different. It was not alternative to *condemnatio*, but embodied in it, and it was merely a *facultas solvendi* entirely at the discretion of the defendant[10].

If there was *absolutio*, as there was no appeal, the matter was ended, apart from a claim to *restitutio in integrum*[11], and subject to the rules as to *calumnia*. If he had not offered the *iusiurandum calumniae* according to the rules already mentioned[12], the defendant, after *absolutio*, might bring the *iudicium calumniae*, in which, if he shewed that the proceedings were in bad faith, he would recover one-tenth of the claim, or, if it was a claim of liberty from slavery, one-third of the value of the man from the *assertor*[13]. Even apart from bad faith, there was a *iudicium contrarium*

1 42. 1. 38. pr. 2 *Ib.* The *l. Petronia* had provided the same thing, 40. 1. 24. 3 4. 8. 27. 3; 42. 1. 38. 1. 4 G. 4. 49–52. 5 42. 1. 55. 6 *Post*, § CCXXII. 7 *Post*, § CCXXIV. 8 *Ante*, § XC; *post*, § CCXXIV. 9 *Ante*, § CCV. 10 *Post*, § CCXXIV. 11 *Post*, § CCXLIII. 12 *Ante*, § CCXV; G. 4. 174 sqq. 13 G. 4. 175.

for one-tenth in a case of *iniuria*, and one-fifth in a small group of other cases[1]. And there was an *actio in factum* (also called *calumniae*) against one who for reward brought an action in bad faith, for fourfold within a year, and in *simplum* after the year[2]. These *iudicia contraria* create the possibility that the plaintiff might be condemned. As the condemnation went as a matter of course if the action was lost, the two issues might be embodied in one *formula*, the part referring to the claim for *calumnia* being an appendix to the rest[3]. It is, however, contended that the main *intentio* embodied the two issues as in the divisory actions[4], but the name *iudicium contrarium* does not suggest this. It is possible that the same method was applied in other cases[5]. The defendant could of course stay further proceedings by satisfying the creditor. What was now due was a sum of money, and this obligation might be discharged like any other. But, if it was not, further proceedings were in execution.

CCXIX. EXECUTION OF JUDGMENT. In the formulary system, as in the *legis actio*, it was for the plaintiff to take the necessary steps for the enforcement of his right. It was not now by *manus iniectio*, but by *actio iudicati*, a new method which, as has been pointed out[6], was a praetorian copy of the older one of which it retained most of the substantial characteristics, with different formalities. The defendant was brought before the magistrate after a delay of at least 30 days[7], as before, and an *actio iudicati* was demanded. The *formula* is not known, but it is clear that in the case of *iudicia legitima*[8], immediately connected with the old system, it expressed a civil obligation, while in the others, *iudicia imperio continentia*, it was a praetorian *formula* of some kind, persons condemned in such actions not being *iudicati* in the sense of the old law[9]. If the validity of the judgment was disputed so that the matter went to a *iudicium*, personal surety must be found, who gave *satisdatio*[10], thus resembling the *vindex*, and the liability would be, in general, for double damages[11] as under the *manus iniectio*. No text expressly states the requirement of *actio iudicati*, but though it was formerly thought that it was needed only where the judgment was disputed[12], its necessity in all cases can be inferred from many texts[13], and none indicates that execution was possible without it. It has been suggested that the requirement was to guard against execution where there

1 G. 4. 177, 178. Abolished under Justinian, but the *iusiurandum* was now exacted in all cases and by the court itself. C. 2. 58. 2. pr. 2 Or, conversely, failed, corruptly, to take such steps, 3. 6. 1. See Lenel, *E.P.* 104. 3 See, *e.g.*, Lenel, *E.P.* 304. 4 Partsch, *Neg. Gestio*, 55 sqq. *Post*, § CCXXXIV. 5 *E.g.*, *ante*, § LIX. 6 Girard, *Manuel*, 1061. 7 G. 3. 78 *partim lege XII Tabularum, partim edicto praetoris, i.e.* for *iudicia imperio continentia*. The *iudex* can extend, but not shorten the time, 42. 1. 4. 5. 8 As to this distinction, *post*, § CCXXXII. 9 Lenel, *E.P.* 427 sqq. 10 G. 4. 102. 11 G. 4. 9. 12 Bethmann-Hollweg, *C.P.* 2. 635. 13 *E.g.* 20. 1. 13. 4; 42. 1. 6. 1; 44. 4. 9, etc.

had been no judgment, the creditor, in case of dispute, having of course to prove the fact of the judgment, the defendant having to prove, if he could, that it was in some way defective. There are some indications of a right in the defendant to challenge the judgment without waiting for the plaintiff to proceed, *revocatio in duplum*[1], but it does not seem that the plaintiff had a similar right to challenge an *absolutio*[2]. In none of these cases was there any question of disputing the soundness of the decision; it was not appeal. The only grounds were objections to the formal validity of the judgment[3]. And as allowing this proceeding to go to a *iudicium* involved double liability in case of failure, it would not normally go so far; the defendant admitted liability and execution proceeded.

The abolition of *manus iniectio* was abolition of formalities; it did not essentially alter the right of the judgment creditor. Personal seizure still remained; the creditor, authorised by the magistrate (*duci iubere*[4]), carried off the debtor and kept him in confinement, being bound to supply him with necessaries[5], and, probably, to allow him to work off the debt[6]. Some literary texts speak of the debtor as *addictus*[7], but Gaius does not use the expression in this connexion[8]. In any case the right of destroying or selling into slavery which resulted from *addictio* in the *legis actio* no longer existed. The confinement put pressure on the debtor, and no doubt it was mainly used for solvent debtors. It continued through the classical age[9].

Just as, in the old system, the debtor's property did not pass to the holder during the detention, whatever happened at its end[10], so too, the *ductio* gave no right to the property, and, accordingly, the praetor[11] introduced *Bonorum Venditio*, modelled on the mode by which the State recovered from its debtors[12]. It does not appear that seizure of the man barred procedure under this Edict[13]. The proceedings were as follows. The praetor, on the application of the creditor, issued a decree of *missio in possessionem*[14], under which the creditor might enter into possession

1 Cicero, *pro Flac.* 21. 49. See also other texts cited, Lenel, *E.P.* 429. **2** Lenel, *E.P.* 430. **3** 49. 8. 1. pr. **4** P. 5. 26. 2. **5** 42. 1. 34. **6** See Bethmann-Hollweg, *C.P.* 2. 668. **7** See reff. in Bethmann-Hollweg, *C.P.* 2. 662, nn. 4, 5. **8** G. 3. 189, 199. **9** See Lenel, *E.P.* 395 sqq. **10** *Ante*, § CCXI. **11** Gaius attributes it to Publilius Rufus (4. 35) who is probably P. Rutilius Rufus, praetor before B.C. 100; see Girard, *Manuel*, 1064. Our knowledge of the system is very imperfect, being largely derived from texts which have been altered to express the later system of *distractio bonorum*. See Degenkolb, *Magister und Curator*, who holds that the general administration was with the *curator*, the *magister* having only such powers of administration as the individual *missi* (whose delegate he was) possessed, *e.g.* the right to sell specific things in case of necessity (42. 5. 8. 1) and no right of action except to enforce fulfilment of undertakings given by the *bonorum emptor*, other than the actual promise of a dividend, as to which see *ante*, § CXLII. **12** Mommsen, *Staatsr.* 1. 178; *D.P.R.* 1. 203. **13** Arg. *l. Rubria*, c. XXII in f.; Girard, *Textes*, 77; Bruns, 1. 100. **14** See Cicero, *pro Quinct.* 6. 2.

for custody of the property and advertise the seizure (*proscribere*[1]). After 30 days the praetor authorised him to summon a meeting of creditors, who appointed a *magister bonorum* to conduct the sale[2], at which point the debtor became *infamis*[3]. The interim care of the property was provided for either by the creditors or some of them or by a *curator bonorum*[4] appointed by them, those who administered being responsible to the others for *dolus* and entitled to refund of proper expenses out of the fund[5]. The *magister* published the conditions, consisting mainly of an inventory of the goods and a list of the debts[6]. After another delay he sold the goods, normally *en bloc*, to the highest bidder[7]. The bids were not of money, but of a dividend on the debts[8], and there were rules determining which was to be preferred of those offering the same dividend[9]. Secured creditors retained their rights, and privileged debts, of which there were many kinds, were paid first, in full, so far as the assets would go[10]. The necessary information on these points was no doubt part of the conditions announced by the *magister*. We do not really know how debts due *ex die* or *sub condicione* were treated, but probably they became due when they would, apart from the *venditio*[11]. Nor are we informed as to the amount of proof necessary to allow a claim to rank in the schedule of debts; it certainly was not confined to judgment debts[12]. The position of creditors who have abstained from claiming in the *venditio* is also obscure; they can hardly have had a claim against the *bonorum emptor* or the *magister*[13]. The purpose of the delays and notices was to give everyone a chance to come in, but there may well have been persons who never heard of the matter. No doubt they retained full rights against future acquisitions[14], as those who had claimed did in respect of the unsatisfied part of the debt[15].

1 G. 3. 79; D. 42. 4. 7. 1. This appears to mean putting notices in prominent places. **2** G. 3. 79. **3** G. 4. 102; P. 1. 2. 1; *l. Iul. Munic.* 117. **4** As to interim administration, *post*, § CCXLV. **5** 42. 5. 8; h. t. 9. **6** Cicero, *pro Quinc.* 15. 50. **7** G. 3. 79. His account is supplemented by Theophilus, *ad Inst.* 3. 12. pr., not wholly consistent. Hence different views as to details. Kniep, *Mél. Girard*, 1. 623, makes the "*proscribi*" come at the end of 30 days' possession, and amends the later part of the text, in which the delays are imperfectly stated. **8** G. 2. 155, "*pro portione.*" **9** A large creditor to a smaller, a creditor to a relative, a relative to an outsider, 42. 5. 16. **10** 42. 5. 24. 2. Lenel (*E.P.* 413) gives a list of these priorities. **11** Paul says in one text that conditional creditors can get *M. i. p.* and in another that they cannot, but only those can who can sell (42. 4. 6. pr.; h. t. 14. 2). Probably they could come in and claim but could not initiate proceedings. See for various opinions Ramadier, *Missio in possessionem*, 45 sqq. He suggests that conditional creditors could claim only where, as in case of *pupillus*, there would be long possession. **12** The matter is regulated by Justinian, C. 7. 72. 10. **13** Cuq, *Manuel*, 904, suggests on the authority of 17. 1. 22. 10 and 42. 7. 5, that such creditors had an *actio in factum* against one who had received a dividend, for a *pro rata* refund. But these texts are not concerned with *bonorum venditio*, see *post*, § CCXXVII. **14** See C. 7. 72. 10. 1 a. There has been no *capitis minutio*. **15** As to rights of action under the *venditio*, *ante*, § CXLII.

As we have seen, these proceedings in execution were available not only against a *iudicatus*, but against *confessus certi* and *indefensus* in a claim for a *certum*[1]. But the method had a wider field. It was available in the other cases of *confessi* and *indefensi*[2], and it also occurred in cases which have nothing to do with litigation. It was originally not for enforcement of judgment primarily, but a means of pressure in a variety of conditions. It was in effect the Roman equivalent of bankruptcy proceedings. It lay against a debtor who hid or absconded, fraudulently (*fraudationis causa latitans*), unless he was prepared to defend an action, which stayed the proceedings[3]. It lay against a dead man's estate if there was no *heres*, and here the delays were cut down by half, because, as Gaius says, "*de vivis curandum erat ne facile bonorum venditiones paterentur*[4]." It lay also against one who had made a voluntary surrender of his estate to his creditors (*cessio bonorum*). This was provided for by a *l. Iulia* at the beginning of the Empire and gave the debtor some advantages. He was not thereafter liable to personal seizure for what was unpaid of the debts, as an ordinary bankrupt was[5]. He was not liable for them at any time beyond his means[6], a protection given to other bankrupts only for a year[7], and he did not become *infamis*[8]. Conversely, where a debtor was a *pupillus* or was absent "*rei publicae causa, sine dolo malo*," although there might be seizure, the praetor would not authorise a sale[9].

Under a *sc.* of unknown date it was provided that in the case of "*clarae personae*" the creditors might choose whether they would proceed by *bonorum venditio*, of the whole estate, or have a *curator* appointed after the *missio in possessionem* to sell in detail so much of the goods as would satisfy the claim, *bonorum distractio*[10]. This avoided *infamia* and, in view of the limitation to persons of some distinction, was probably introduced for this reason rather than on economic grounds. The creditors, having chosen one course, could not fall back on the other[11]. This *curator bonorum* must be distinguished from the edictal *curator* appointed in some cases where there was a *missio*, not to be followed by immediate sale, whose business it was to administer the estate in the

1 *Ante*, § CCXVI. **2** *Ib.* **3** 42. 4. 7. 1. **4** G. 3. 79. **5** G. 3. 78; C. 7. 71. 1. The advantages are such that the question arises why, as is clearly the case, some insolvents did not do it. The suggestion that it was allowed only in insolvency from misfortune has no textual support. As to reasons for not taking this course, Bethmann-Hollweg, *C.P.* 2. 689. It is possible though not quite clear that there must have been an action. See 42. 3 and C. 7. 71 *passim*. **6** Inst. 4. 6. 40. **7** C. 7. 75. 6. **8** C. 2. 11. 11. A *cessio* could be revoked before the sale, D. 41. 3. 5. **9** 42. 4. 3; h. t. 6; Lenel, *E.P.* 399. **10** 27. 10. 5. **11** 27. 10. 9. It may be that, as Ramadier suggests (*op. cit.* 144 sqq.), this implies an extension to other cases, since the purpose of the original introduction would not have been served if the choice had been left to the creditors. Degenkolb, *Magister und Curator*, 16.

meanwhile[1], as in the case of debtor *pupillus* or *absens reipublicae causa*, or in cases other than insolvency, *e.g.* where a *heres* was instituted conditionally, and other cases[2].

CCXX. The foregoing account assumes that proceedings under the judgment went against the debtor, but this was not always the case. Often[3] the defendant had to give security, by way of surety (*iudicatum solvi* or *pro praede litis et vindiciarum*), and in such a case the plaintiff might, if he preferred, bring action against the sureties.

The appeal found early in the Empire does not seem to have applied to the *formula*. But proceedings under the judgment might be stopped in some ways which need mention. There might be *restitutio in integrum* on certain recognised grounds[4], varying in form as the case required, but in general undoing so far as possible the impeached transaction. But mere mistaken or even dishonest judgment was not a ground; the remedy was against the *iudex, qui litem suam fecit*[5]. If the judgment had been obtained by fraud of the other party, there might be *actio doli* against him, but there was also *restitutio* in such a case[6]. If a man became a *confessus certae pecuniae* under threats of violence, there was an *actio metus*[7] and there might be *restitutio*, but all this gave no relief against mere error. There might be *denegatio actionis iudicati*[8], but this was a form of *restitutio in integrum*; it was not a mode of appeal on error, but only shewed that there were circumstances in the case which made it unfair to treat the judgment as conclusive. There might also be *intercessio*. Though the act of the *iudex* could not be vetoed, any colleague of the praetor could veto a decree of his, in furtherance of execution[9], but there is little trace of this and no sign that it was used to give relief in error.

In the foregoing account it is assumed that the procedure was at Rome, and initiated before the praetor. A few words must be said on other jurisdictions[10]. In Rome there were, besides the praetors, the curule aediles[11] with similar powers in matters within their competence. But though in the Empire much civil jurisdiction passed to other officials, the various *praefecti*, etc., it does not seem that the methods of the *formula*, the *ordo iudiciorum*, had any application in these cases.

In the provinces the *praeses* was the magistrate, the aedilician part being in his hands in imperial provinces, but in those of quaestors in

1 Lenel, *E.P.* 418. 2 See 42. 7 *passim*. 3 *Post*, § CCXL. 4 *Post*, § CCXLIII. 5 *Ante*, § CCIV. 6 4. 3. 25. 7 On general principle. Cicero records a case in which it was granted, where *recuperatores* had been coerced and others of less weight as precedents. See Girard, *Manuel*, 1067, n. 4. 8 *E.g.* 9. 4. 14; 42. 1. 4. pr. 9 Mommsen, *Staatsr.* 1. 266 sqq.; *D.P.R.* 1. 304 sqq. 10 See for the system up to Cicero's time, Greenidge, *Legal Procedure*, § 2; Girard, *Org. Judic.* 1. 272 sqq. In general, *actor sequitur rei forum*, Vat. Fr. 326. 11 G. 1. 6.

the others[1]. The *praeses* held periodical assizes in the principal towns of his province[2]. The law was essentially the same as at Rome, for *cives*, but there are indications that it was influenced by local usages and that the details of form in litigation were not quite the same as at Rome, or identical in all provinces[3].

In Italy, till the Social War resulted, in effect, in the conferring of *civitas* on the whole of Italy, there were many regions, some Latin, some merely peregrine, which were governed from Rome, but under their own laws. If there were *cives* resident in them, their litigation among themselves would have to take place at Rome, with some limitations not very well known[4]. After the Social War it remains true that the Roman courts were in principle the fit tribunals for litigation between Romans, wherever domiciled, but of this principle there were important derogations. In many towns there survived for a time the practice, belonging to the earlier state of things, of sending *praefecti iure dicundo* who held periodical assizes, probably exercising all the jurisdiction of a Roman magistrate, in civil matters, but possibly with a limitation on amount. The generalisation of municipal institutions superseded these, and for classical law the system was that municipal magistrates had jurisdiction in matters below a certain amount[5], not necessarily the same in all places, but with power in more important cases to require *vadimonium* from a defendant for appearance at Rome[6]. They were barred from trying certain types of action, the exclusions no doubt not being always the same[7]. And they had *iurisdictio* only, not *imperium*. Thus, on the one hand, they had not the *legis actio*, as expressed in the fictitious litigation of manumission, etc., which, however, is not really *iurisdictio*[8], and, on the other, they could not proceed to the steps by which the praetor, under his *imperium*, facilitated execution and compelled the taking of the proper steps in litigation. They could not order *bonorum venditio* under judgment[9], though they could order personal seizure. Interdicts, *missio in possessionem*, *restitutio in integrum* were beyond their powers[10]. Such matters must be referred to Rome, though it is clear that there were exceptionally privileged places[11].

CCXXI. THE STRUCTURE OF THE *FORMULA*. The *formula* usually contained many parts. In general outline its construction is well known, but there are many important details of which we are not informed[12],

1 G. 1. 6. 2 Greenidge, *op. cit.* 129. 3 Greenidge, *op. cit.* 124. 4 Girard, *Org. Judic.* 1. 272 sqq. 5 *L. Rubria*, cc. XXI, XXII; *Fr. Atestinum* (Girard, *Textes*, 79); P. 5. 5 a. 1. 6 *L. Rubria*, *ib.* 7 Mommsen, *Staatsr.* 3. 815 sqq.; *D.P.R.* 6. 2. 466. 8 P. 2. 25. 4. 9 50. 1. 26. 1. 10 *Ib.*; 2. 1. 4; G. 4. 139. 11 The appointment of *Iuridici* for regions of Italy under Marcus Aurelius (Vat. Fr. 205; *Vita M. Ant. Phil.* 11. 6), following Hadrian, cuts down to some extent the jurisdiction of Roman magistrates. But their functions were very limited. Pius had abolished Hadrian's system, Mommsen, *Staatsr.* 2. 1084; *D.P.R.* 5. 391. 12 See Lenel, *E.P.* ix, for remarks on this point.

and there is much resulting controversy. The various parts must be considered separately; it must be remembered that they did not all occur in any one *formula*.

Nominatio iudicis. This necessary preliminary part occurred in every *formula*. It ran "*T. iudex esto*," and even where the single judge was an *arbiter* he was called *iudex* at this point[1]. But where *recuperatores* were employed they were called such here[2], and the same rule was perhaps applied in the few cases in which there were three *arbitri*[3], if indeed any of these survived into the formulary system[4].

Praescriptio. This too was a preliminary part, as its name indicates. Gaius tells us that there had been two types[5]:

Praescriptio pro actore, i.e. to safeguard the plaintiff. He gives two examples. If there was a stipulation for a number of payments and one or more, but not all, were overdue, an action on the promise would bring the whole *obligatio* into issue, and thus the whole right of action would be consumed by *litis contestatio*[6]. To prevent this the scope of the action might be limited by inserting the words: "*Ea res agatur cuius rei dies fuit*[7]." Again, on a contract for sale of land, if action was brought for formal conveyance, to prevent this from barring further action for other obligations under the contract, the plaintiff might insert the words: "*Ea res agatur de fundo mancipando*[8]." These were designed to allow of later action on the same transaction, but Gaius gives other instances, of a different type. Where a contract was made by a *filius-familias* or slave the right vested in the *paterfamilias*; there was a *praescriptio* stating that it was a contract made by the subordinate, perhaps only in cases of *condictio certae pecuniae*[9]. In action on a *stipulatio* for an *incertum*, Gaius tells us there was a *praescriptio loco demonstrationis*, but what he gives is merely a *demonstratio*[10]. But if an action on such a *stipulatio* was brought against a surety, there was a true *praescriptio*[11]. There is, however, much controversy about these *praescriptiones*[12].

Praescriptio pro reo[13]. This was inserted on behalf of the defendant. It belongs to the early days of the *formula*[14]; in the time of Gaius the defences originally raised in this way were raised by *exceptio*, by which it seems to have been replaced in some cases as early as Cicero[15]. In

1 G. 4. 36; Bethmann-Hollweg, *C.P.* 2. 105. 2 G. 4. 46. 3 *Ante*, § CCIX. 4 See Wlassak, *Processg.* 2. 293 sqq. 5 G. 4. 133. 6 *Post*, § CCXXXV. 7 G. 4. 131. 8 G. 4. 131 a. 9 G. 4. 134, 135. The imperfect text speaks of *intentio* in "*dare oportere*," which points to this limitation. 10 G. 4. 136. 11 G. 4. 137. 12 See Partsch, reviewing Schlossmann, *Z.S.S.* 28. 440 sqq. They resemble in effect *demonstrationes*. 13 Pissard, *Questions Préjudicielles*. 14 G. 4. 133. 15 He speaks freely of *exceptiones*, see, *e.g.*, *de Inv.* 2. 19. 57. It is probable that many, indeed all the older, *exceptiones* were originally *praescriptiones*.

the time of Gaius it was entirely obsolete. The principal recorded cases are:

1. *Praescriptio praeiudicii*[1]. Certain actions might not be brought if the decision would prejudice that of another more important issue. There appear to be three cases in which a *praescriptio*, or, later, *exceptio*, on the ground of *praeiudicium* was admitted[2]. These were: (i) *Exceptio quod praeiudicium hereditati non fiat*, which bars any action for what could be recovered by *hereditatis petitio*[3]; (ii) *Exceptio extra quam si in reum capitis praeiudicium fiat*[4], but this does not appear in legal texts[5]; (iii) *Exceptio quod praeiudicium fundo partive eius non fiat*, barring action for a right based on ownership, where that was disputed between the parties, till the *vindicatio* had been brought[6].

2. *Praescriptio longi temporis* (which hands on the name to *praescriptio longissimi temporis*, which has nothing to do with the formulary system). In view of the late date of this institution (it cannot be traced earlier than the end of the second century)[7], it is probable that it never was a *praescriptio* in the formulary sense; the name is elsewhere applied to cases of *exceptio* which never were *praescriptiones*[8].

The *praescripta verba* at the beginning of certain actions are not expressly called *praescriptiones*, and it is matter of dispute whether they were properly *praescriptiones* or *demonstrationes*[9]. In view of the fact that their earliest application was to cases in which there was a civil obligation, but it was uncertain under what head it should come[10], they seem to have rather the character of *demonstrationes*.

The *praescriptiones pro reo* give rise to an important and difficult question. In their later form, as *exceptiones*, they had the effect that proof of the *exceptio* involved loss of the action, and this, by *consumptio litis*, commonly involved destruction of the claim. The question is whether this was equally true of the *praescriptio*, or whether the effect of proof of the *praescriptio* was to withdraw the issue, the *litis contestatio* being conditional on the failure of the point raised in the *praescriptio*. Both views are maintained by writers of authority[11].

1 Pissard, *op. cit.*, ch. III. 2 But this does not exclude *denegatio actionis* in a wider field. 3 G. 4. 133. Many opinions have been held as to the reason of this rule. The chief are stated and considered by Pissard, *loc. cit.* 4 Cicero, *de Inv.* 2. 20. 59. 5 But these shew a wider rule, that a civil suit must not be brought so as to prejudice a criminal trial (*post*, § CCXLII), probably enforced by *denegatio actionis*. 6 44. 1. 16; h. t. 18. There is a general rule that a *maior causa* must not be prejudiced by a *minor*, enforced by *denegatio actionis*. Pissard gives the recorded cases (pp. 148 sqq.). There is no certainty as to what is and what is not a *maior causa*, and P. holds that in later law the distinction is replaced by the principle that the "procès conditionnant" must be tried before the "procès conditionné" (p. 232), which is probably what is meant by *maior causa*. 7 See Partsch, *Longi temporis praescriptio*, 109 sqq. 8 See Bethmann-Hollweg, 2. 404; Pissard, *Questions Préjudicielles*, 122. 9 Lenel, *E.P.* 292. 10 *Ante*, § CLXXXI. 11 See Wlassak, *Z.S.S.* 33. 80 sqq.; Partsch, *Longi*

Demonstratio. This is one of the four parts which Gaius speaks of as the "*partes formularum*" (*demonstratio, intentio, adiudicatio, condemnatio*)[1]. This does not mean that they must occur in an action, for though this may be true of the *intentio*[2], it is certainly not so of the rest. The meaning seems rather to be that the *formulae* in which these parts were used would be meaningless without them, while the omission of an *exceptio* or *taxatio*, etc., would not vitiate the *formula*, but only alter its effect. This appears to be true even of the *demonstratio*, for a *formula* which said that the *iudex* was to condemn to "whatever on this account (*ob eam rem*) proves to be due" had no force unless the *demonstratio* was present to shew what the matter in question was. The *demonstratio* was not a statement of the issue, but of the nature of the matter in issue. It was a short statement of the transaction on which the claim rested, as a guide to the *iudex*. It need not state the wrong, but rather the facts which constitute the legal relation in connexion with which the wrong is alleged. This was simpler than embodying it all in the *intentio*, but not logically necessary. It was not necessarily a statement of admitted facts[3], though it often might be, but the fact that sale was alleged in a *demonstratio* did not dispense with the necessity of proving it, if it was disputed. It was not important in the sense of being a critical part. Errors in it could be adjusted—*falsa demonstratione rem non perimi. Plus petitio* or *minus petitio* in it could be set right, in the sense that a new action could be brought, the *litis contestatio* not having been operative[4] (subject perhaps to limits which will be considered later[5]). Thus if the matter was wholly wrongly described in the *demonstratio* there was no valid *iudicium*; the *intentio* referred explicitly to the case in the *demonstratio*, and the real question had not been put in issue.

The *demonstratio* was used only in some personal actions, not in actions *in rem*, or in actions *in factum* (with possible exceptions[6]), because in these cases the *intentio* stated the material points. But on the question

temporis praescriptio, 70; Pissard, *Questions Préjudicielles*, 112 sqq. The chief arguments for the latter view are the form "*ea res agatur*," which expresses a limit on the submission, and is the same as in *pr. pro actore*, which certainly had this limiting effect, a very probable assumption that *pr. pro reo* descends from *denegatio actionis*, which excluded *litis contestatio*, and its close resemblance to and affinity with the *demonstratio* which certainly operated in the suggested way (G. 4. 58). On the other hand, it is pointed out that Gaius speaks of the change to *exceptio* as a formal change and does not hint at so great a change in effect, that not all *prs. pro actore* aim at limiting the submission, that "*ea res agatur*" need be no more than words introducing the question, without strict technical significance, and that *pr. pro reo* does not probably descend from *den. actionis*, but from *praeiudicia* separately submitted. It is not of course certain that all were treated alike.

1 G. 4. 39. 2 See, however, *post*, § CCXXII. 3 See for criticism of a hypothesis of its origin in such a statement, Koschaker, reviewing Ruiz, *Z.S.S.* 34. 433. 4 G. 4. 58. 5 *Post*, § CCXXXVI. 6 *Post*, p. 648; and § CCXXXI.

what actions *in personam*, *i.e.* on *obligatio*, needed it, there is some difficulty. There is no sign of it in *condictio certae pecuniae*[1], though here the fact that the *intentio* did not state the *causa* seems to render some guide necessary, or the *iudex* might seem to have a roving commission to enquire into any transactions of that type which might have occurred between the parties[2]. It occurred in *actio ex stipulatu*, *i.e.* on a *stipulatio* for an *incertum*[3], but probably not in *actio ex testamento* on a legacy *per damnationem*, where the *intentio* stated the *causa*[4]. It occurred in divisory actions[5], and, apparently, in all *bonae fidei iudicia*[6]. It is not clear whether it occurred in *condictio incerti* of which we know little[7]. There does not seem to have been any *demonstratio* in the *actio furti manifesti*, which was an *actio in factum*[8], nor was there, according to Gaius, in *furti nec manifesti*, if his *formula* is correct[9]. It may have occurred in some of the *formulae* under the *l. Aquilia*, and it appears to have occurred in the *actio iniuriarum*, though this was *in factum*, of a special type[10].

An ordinary *demonstratio* contained, after the statement of facts, the words "*qua de re agitur*" or the like, which is the logical basis of the rule that error in the *demonstratio* excluded the real issue from the *iudicium*[11].

CCXXII. *Intentio*[12]. This was the most important part of the *formula*. It defined the issue submitted to the *iudex*, and by it the claim stood or fell. Error in it might be fatal, for there was no power of amendment, except by *restitutio* in certain circumstances[13], and, the action being lost, the right was destroyed by *litis contestatio*[14]. It was accordingly drawn with great care and precision. A properly drawn *intentio* shewed whether the action was *in rem* or *in personam*, *in ius* or *in factum*, for *certum* or *incertum*, a *iudicium strictum* or *bonae fidei*, each type having its characteristic words. In the ordinary *formula* ending with a *condemnatio*, the *intentio* raised a hypothesis which was, in principle: "if you find such and such points proved." In an *actio praeiudicialis*, however, it was in an entirely different form: it was a question submitted to the *iudex*, of

1 Lenel, *E.P.* 230. 2 This is indeed suggested by Cicero, *pro Rosc. com.* 4–6, 13–16. 3 G. 4. 136. 4 Lenel, *E.P.* 355. 5 Lenel, *E.P.* 201; Audibert, *Mél. Appleton*, 11 sqq. 6 G. 4. 47. 7 Lenel, *E.P.* 151. 8 Lenel, *E.P.* 321. 9 G. 4. 37. But Lenel shews reason for doubting if it is complete. Somewhere the value seems to have been stated (50. 16. 192: cp. 12. 3. 9). See too Ulpian in 47. 2. 19, "*demonstrari.*" A *scholium* in the Basilica (Basil. Heimbach, 2. 583) seems to put this in the *intentio*. It might be either there or in *taxatio* or *demonstratio*. Lenel rejects *intentio* and *taxatio*, on grounds that do not look very strong and holds that it is a *demonstratio*. 10 G. 4. 60; Coll. 2. 6. 4. See *post*, p. 648; and § CCXXXI. 11 But Cicero laughs at them as useless, as, apart from this, they seem to be, in view of the "*ob eam rem*" in the *intentio*. *Pro Murena*, 13. 28; *Brut.* 79. 275. 12 G. 4. 41. As to its presence in all *formulae*, *post*, p. 648. 13 *Post*, § CCXLIV. 14 *Post*, § CCXXXV.

which "*an Titius libertus Auli sit*" may be taken as the type[1], the answer of the *iudex* being a *pronuntiatio*. As its name shews this was commonly a preliminary to some other proceeding. In actions *in rem* for ownership, the *intentio* ran[2]: "*si paret fundum Cornelianum quo de agitur, Auli Agerii ex iure Quiritium esse*[3]," with special forms for rights less than ownership (*ius itineris in f. C. Ai. Ai. esse*[4]) and further complications in *actiones ficticiae, e.g., actio Publiciana*[5]. The characteristic of an *intentio in rem* was that it alleged a right in the *res* and not a claim against the defendant, so that it did not contain the defendant's name. In actions *in personam* the *intentio* stated an obligation in the defendant "*dare oportere*[6]," "*dare facere oportere*[7]," "*damnum decidere oportere*[8]" (and possibly other forms[9]) according to the nature of the *obligatio*, as will later appear. In actions *in factum* it stated a hypothesis of fact according to the truth or falsity of which the *iudex* was to condemn or absolve[10].

If the claim was for a *certum* or it was a *vindicatio*, the *intentio* began with "*si paret*[11]," and stated the *certum*, or subject of the *vindicatio*. If it was for an *incertum* it began "*quicquid paret*[12]," referring to the statement in the *demonstratio* or *praescripta verba*[13]. In an *actio ex testamento* on a legacy the *intentio* stated the fact of the legacy[14], and in the *actio furti* it stated the thing stolen[15], though, as we have seen[16], there may

1 G. 4. 44: Lenel, *E.P.* 302, 329. Gaius (*ib.*) tells us that *praeiudicia* are numerous. Those recorded seem to be (see Pissard, *Questions Préjudicielles*, ch. VI) *An libertus sit* (G. *ib.*; the corresponding *an ingenuus sit* is not recorded, but see Lenel, *E.P.* 329); *An liber sit* (Inst. 4. 6. 13), declared to be the only one of statutory origin (but see Lenel, *E. P.* 367, 370, who thinks it an interpolation of Justinian, and rejects the corresponding *an servus sit*); *utrum ex servitute in libertatem petatur an ex libertate in servitutem* (40. 12. 7. 5; C. 7. 16. 21); *de partu agnoscendo*, to compel a father to recognise a child (Inst. 4. 6. 13; C. 8. 46. 9. In 6. 1. 1. 2, a corresponding one for a father claiming a child is mentioned, *an filius Agerii sit*); *quanta dos sit* (G. 4. 44, purpose uncertain); *an ex l. Cicereia praedictum sit* (G. 3. 123; *ante*, § CLVI); *an iure bona venierint* (42. 5. 30, M. Aur. and Verus, to raise the question whether the *bonorum venditio* was justified); *an ea res qua de agitur maior sit* 100 *sestertiis*, and another apparently connected with it (P. 5. 9. 1; purpose obscure—Lenel, see now *E.P.* 504, has at different times suggested three different explanations). The list was probably much longer in classical law: there may have been many in connexion with obsolete questions of Latinity and *civitas*. The *praeiudicia* mentioned in C. Th. 1. 2. 5 and in many *leges* in C. Th. 11. 30 and 36 appear to be the interlocutory decisions which are so prominent in the later procedure by *cognitio* (*post*, § CCXXVI), but the *praeiudicium sanguinis* of C. Th. 16. 2. 19 may perhaps, as Gothofredus suggests (ad h. l.), refer to one of the *praeiudicia* affecting *status*. 2 G. 4. 3, 36. 3 *Aulus Agerius* (from *agere*) is the name given to the plaintiff in these model *formulae*. Similarly the defendant is called *Numerius Negidius* (from *negare*). 4 See Lenel, *E.P.* 188. They do not contain the words "*ex iure Quiritium.*" 5 G. 4. 36; *ante*, § LXX. 6 G. 4. 4. 7 G. 4. 2, 47, 60. 8 G. 4. 37, 45. 9 Lenel finds "*praestare oportere*" in the divisory actions, and in *pro socio*. Others find it in the *de peculio* group, *E.P.* 202, 205, 260, 287. As to the *formula* in the divisory actions, Audibert, *Mél. Appleton*, 1. 10 Variations, *post*, § CCXXXI. 11 G. 4. 41. 12 G. 4. 41, 47. 13 *Ante*, §§ CLXXXI, CCXXI. 14 G. 2. 213; Lenel, *E.P.* 355. 15 G. 4. 37. 16 *Ante*, § CCXXI.

have been a *demonstratio* as well. But details of formulation in delictal actions are somewhat uncertain.

A statement of the issue seems essential to all litigation and it is sometimes said that every *formula* had an *intentio*. But there are two cases which have raised difficulty. In the divisory actions, in their earlier form, before there was any question of allowances, *praestationes*, there was nothing that could be called an *intentio* except the words "*quantum adiudicari oportet*," which Gaius quotes as part of the *adiudicatio*[1]. But the point here is hardly more than verbal, apart from certain historical inferences on the origin of the *formula* which are connected with it[2]. The other case is that of the *actio iniuriarum* and perhaps the other actions "*ex bono et aequo*[3]," where there was a *demonstratio* followed by "*quantum bonum aequum videbitur condemna*[4]," in which the *intentio* was so to speak merged in the *condemnatio*. Here too historical inferences are drawn from the form, which has been the subject of much controversy[5].

CCXXIII. *Exceptio*[6]. This was an accessory part of the *formula*. As we know, it is a creation of the *l. Aebutia*, and the praetor's power of formulation. The question whether it existed, or what if anything replaced it, in the *legis actio* system, need not here be considered[7].

An *exceptio* was a defence which did not deny the *prima facie* validity of the claim, but alleged some circumstance which nevertheless barred it. It may be called a collateral defence, but in fact the nature and sources of *exceptiones* are so various that no general description is very informing. Though they were in form praetorian the defence they set up was not necessarily such. Some *exceptiones* gave effect to defences based on *leges*[8], or on *senatusconsulta*[9], or on imperial enactments[10]. The

1 G. 4. 42. **2** See Ruiz, *Le formule con demonstratio*, review by Koschaker, *Z.S.S.* 34. 434; Audibert, *Mél. Girard*, 1. 48. It contains the word *oportet*, the mark of an *intentio*. It bears the same relation to the *adiudicatio* as the undoubted *intentio* which follows it does to the *condemnatio* for *praestationes*. It is not completely stated, for this part of the *formula*, like the *praestatio* part, was "*bonae fidei*" (10. 3. 4. 2). And Gaius habitually includes, in his statement of a part of the *formula*, other connected parts, see G. 4. 34, 136. **3** *Post*, § CCXXXI. **4** Lenel, *E.P.* 385. **5** Lenel, *loc. cit.*; Partsch, *Schriftformel*, 29 sqq., 39 sqq.; Huvelin, *Mél. Gérardin*, 337 sqq., and especially Audibert, *Mél. Girard*, 1. 35 sqq. The grounds on which Partsch (40 sqq.) maintains that there was after the *demonstratio* an *intentio* in the form "*si N. N. in ea re iniuriam fecit*" or the like are hardly met by Lenel's remark in *E.P.* 385, n. 4. As to *actio ad exhibendum*, see Lenel, *Z.S.S.* 37. 116. **6** G. 4. 115 sqq. **7** See Girard, *Mélanges*, 75 sqq., 148 sqq. and the reff. **8** *Exc. l. Cinciae*, excessive gifts, *ante*, § XCI; *exc. l. Plaetoriae*, fraud on minors, *ante*, § LXII; perhaps under the *l. Furia testamentaria*, excessive legacies, some writers holding that there was an *exceptio* here, *ante*, § CXIX. **9** *E.g.*, *Sci. Macedoniani*, loans to *filiifamilias*, *ante*, § CLXIII; *Sci. Trebelliani*, where *heres* is sued after handing over a *hereditas* under *fideicommissum*, *ante*, § CXXIV; *Sci. Velleiani*, where a woman has become surety, *ante*, § CLVI. **10** *Ante*, § CLVII.

reason why the transaction was met in this way, instead of being declared simply void, in these civil cases, was not always the same. In the case of the *senatusconsulta* it was probably because these *senatusconsulta* date from a time before the Senate had assumed the power of directly varying the civil law, and still acted by way of issuing directions to magistrates[1]. In the case of the *leges* many explanations are offered, but they are more or less conjectural[2]. In the case of Hadrian's *beneficium divisionis* among sureties, which was in some cases enforced by *exceptio*, it is probably because the *exceptio* was designed not exactly as a defence but as a means of forcing the creditor to modify his *intentio*, as in some well-known applications of the *exceptio doli*[3]. But the great majority of *exceptiones* were praetorian both in form and character. Many have presented themselves in the course of the treatment of substantive law, *e.g.*, *doli, metus, pacti conventi, rei venditae et traditae, iusti dominii*[4], etc. Some, *e.g.*, *cognitoria*[5], *rei iudicatae vel in iudicium deductae*[6], will be considered later, but while it is impossible to enumerate them all a few must be mentioned here.

The so-called *exceptio senatusconsulti* was in fact a general *exceptio* to cover all cases in which an *exceptio* was available on account of the provisions of a *lex* or senatusconsult. It was open to the parties to use either this general form[7], for any such provision, or to use an *exceptio* specifying the enactment, *exceptio senatusconsulti Velleiani, legis Cinciae*, etc., or one merely alleging the facts which brought the *exceptio* into operation[8].

The *exceptio litis dividuae* dealt with the case of one who, having a claim which admitted of subdivision, *e.g.* a single contract for the sale of two things, elected to sue on one part of it. He could not then sue on the other part in the same magistracy; if he did, he was met by this *exceptio*[9]. In like manner, one who having several claims against one person brought one or more, but deferred others, so that, as Gaius says, they might go before different *iudices*, could not sue on these in the same magistracy, but would be met by the *exceptio rei residuae*[10]. These rules seem to have disappeared from Justinian's legislation, except for a trace in one text[11]. The *exceptio rei litigiosae* was aimed at trafficking in property the subject of litigation[12].

Exceptiones are sometimes spoken of as equitable defences, and no

1 *Ante*, § v. 2 See Krueger, *Röm. Rechtsq.* 21, n. 82. 3 *E.g.*, *compensatio*, under M. Aurelius, *post*, § CCXXXVIII. The principle is that it is *dolus* to persist in a claim after knowledge that it is unfounded. See 50. 17. 177. 1. 4 Some under procedure, *e.g.*, *exc. iurisiurandi, praeiudicii.* 5 *Post*, § CCXXXIX. 6 *Post*, § CCXXXV. 7 Lenel, *E.P.* 492, "*si nihil in ea re contra legem vel senatusconsultum factum est.*" 8 *Post*, p. 652. 9 G. 4. 56, 122. 10 G. 4. 122. 11 46. 8. 4. 12 As to this remedy, *post*, § CCXLIV.

doubt most of them can be so described. But there was nothing particularly equitable about most of the *exceptiones* based on *lex* or senatusconsult or about some of praetorian origin, *e.g.* the obscure *exceptio annalis Italici contractus*, which seems to have limited action on pledges taken in Italy to one year[1], or the similar *exceptio* in the *actio de peculio annalis*[2], or the *exceptio rei iudicatae*[3]. The point is of some importance in connexion with the rules as to statement of *exceptiones* in *bonae fidei iudicia*[4].

The *exceptio* did not deny the allegation of the *intentio*, but raised a counter-hypothesis, "unless something else is true." Hence it was negative in form, introduced by *nisi*, *si non*, *si nihil* or the like. It thus directed the *iudex* not to condemn if the *exceptio* was proved. In the *exceptio* the defendant was *in loco actoris* and the burden of proof was on him[5]. The *exceptio non numeratae pecuniae* which was later than the consolidation of the Edict[6], provided an exception to two of these propositions. It imposed on the plaintiff the proof of the loan, and if the claim was on a *mutuum* it was in fact a denial of the basis of claim altogether. It excluded the presumption against the defendant otherwise created by the acknowledgment[7].

To the proposition that an *exceptio*, successfully brought, must, on the logic of the *formula*, destroy the action, there were two apparent, or suggested, exceptions. It has been maintained that, where the *exceptio doli* was used as a means of compelling allowance of a counter-claim, it caused no more than a reduction of the *condemnatio*. The point will arise later[8]; here it is enough to say that this view is not generally accepted. Again, it is clear that where a man could not be condemned beyond his means, failure to allow for this would cause only reduction. We are told in the Digest that the means of raising this point was an "*exceptio quod facere potest*[9]." But the description of this as an *exceptio* dates from a time when the *formula* and the true *exceptio* have long been obsolete; in classical law it was in all probability a *taxatio*[10]. A text, attributed to Paul, which says that *exceptiones* sometimes merely reduced the *condemnatio*[11], is no doubt in its present form compilers' work, probably in reference to this case.

Just as an *intentio*, though proved, might be defeated by an *exceptio*, so, in turn, an *exceptio*, though proved, might be met by a further reply,

1 C. 7. 40. 1; *Fr. Ulp. disputationum*, 3; Girard, *Textes*, 491. See Lenel, *E.P.* 486; *Z.S.S.* 27. 71. 2 *Ante*, § CLXXXIV. 3 *Post*, § CCXXXV. 4 *Post*, § CCXXIX. 5 44. 1. 1. 6 It is unknown to Gaius, 4. 116 a. See *ante*, § CLIV. It is sometimes held that it had no application in the formulary system at all. 7 As to Justinian's changes, *ante*, § CLIV. 8 *Post*, § CCXXXVIII. 9 44. 1. 7. pr. 10 See Girard, *Manuel*, 1051. 11 44. 1. 22. In 16. 1. 17. 2 the last words are interpolated.

put in by the plaintiff—a *replicatio*[1]. As this raised a new hypothesis in the event of which there was to be a *condemnatio*, it was introduced by "*aut si*" or the like[2]. Thus, if there had been a breach of contract and an agreement not to sue on it, this agreement having been induced by fraud, the *exceptio pacti conventi*, "*nisi inter eos convenerit ne peteretur*[3]," would be followed by a *replicatio*, "*aut si in eo pacto aliquid doli mali N. Negidii factum sit*," or the like. The matter did not necessarily end here. There might be a further reply by the defendant, called a *duplicatio*, or *triplicatio* (for the name *duplicatio* was sometimes applied to the *replicatio*[4]), though not in the case given, for to an *exceptio* or *replicatio doli*, no reply but disproof was admitted[5]. Proof of it was decisive. But it is doubtful how far these remoter cases occurred in practice.

Exceptiones were classified in several ways. They might be *perpetuae* (*peremptoriae*) or *temporales* (*dilatoriae*)[6]. The former were always available and would bar the action whenever brought. Such were *exceptio doli*, *metus*, *pacti conventi in perpetuum*, *rei iudicatae vel in iudicium deductae*, *quod contra legem senatusconsultumve factum est*[7]. These are the illustrations given by Gaius[8]. The others were effective only for a certain time or under certain conditions, and might be avoided by delaying the action or bringing it in a manner not open to the objection. Of the first type he mentions *pacti conventi*, where the agreement not to sue was only for a certain time and the *exceptiones rei residuae* and *litis dividuae*[9]. The *exceptio non numeratae pecuniae* is another[10]. Of the second type, which he speaks of as *ex persona*, as opposed to *ex tempore*, he mentions the *exceptio cognitoria*[11], which could be avoided by bringing the action personally or choosing a fit *cognitor*. Even the *exceptio doli* in some applications had this character. Thus it was the means by which allowance of *compensatio* could be compelled[12]. Gaius does not mention this; the rule of M. Aurelius for *stricta iudicia*[13] was introduced after he wrote[14]. It must be remembered that though this class of *exceptiones* is called *dilatoria*, they were just as destructive to the action as the others. If successfully brought they destroyed the action[15]; they were *dilatoriae* in the sense that the threat of them would cause the plaintiff to delay or remould his action.

Gaius also classifies *exceptiones* as "*in edicto propositae*" and "*causa*

1 G. 4. 126, 127; Vat. Fr. 294; D. 44. 1. 2. 1. 2 G. 4. 126 a. In 4. 126 he introduces a *replicatio* with "*si non*," but in the case put "*aut si*" would give the meaning. 3 G. 4. 121, 126. 4 44. 1. 2. 3; Vat. Fr. 259; G. 4. 127. 5 44. 4. 4. 13. And no *replicatio doli* was allowed to an *exceptio iurisiurandi*, 44. 1. 15. 6 G. 4. 120 sqq.; Inst. 4. 13. 8 sqq. 7 As to this, see Lenel, *E.P.* 492, and *ante*, p. 649. 8 G. 4. 121. 9 G. 4. 122; *ante*, p. 649. 10 *Ante*, § CLIV. 11 G. 4. 124. See *post*, § CCXXXIX. 12 *Post*, § CCXXXVIII. 13 Inst. 4. 6. 30. 14 As to *restitutio* of omitted *exceptiones*, *post*, § CCXLIV. 15 G. 4. 123; D. 44. 1. 3.

cognita datae[1]." This implies that those which were given only after enquiry, and not as a matter of course on demand, were not set out in the Edict though there would be no difficulty in promising them conditionally, with such expressions as "*si qua mihi iusta causa videbitur*" or "*causa cognita*" which the Edict uses in other connexions[2]. But apart from the *exceptio iusti dominii* these *exceptiones causa cognita datae* seem to have been mostly *in factum conceptae*. This name, which is given to a class of *exceptiones*, is unfortunate, since nearly all *exceptiones*, except *iusti dominii* and the *exceptio ususfructus*[3] and the like, were *in factum*, in the sense that they alleged facts and not rights. Those, however, to which the name was specially applied were such as had no special name and were framed for the special case. Thus in actions by *parens* or patron or the *heres* of patron it was not permissible to use the *exceptio doli* or others of like character, and an *exceptio* would be framed setting out the facts complained of without the use of the objectionable word[4]. Again, where parties were agreed as to what was the act alleged to be dolose, and it was denied, the task of the *iudex* might be limited by alleging the fact instead of making a general allegation of fraud[5]. A somewhat similar case is provided, as we have seen, where an *exceptio* was based on an enactment[6].

Exceptiones are also distinguished in the texts as being *rei cohaerentes* or *personae cohaerentes*[7]. The latter were not necessarily available to every party who might be sued on the transaction. Thus an *exceptio pacti conventi*, where there were several debtors, might be *in personam*, *i.e.* so expressed as to be available to only one of them[8]. Paul in the Digest gives as an example the *exceptio in id quod facere potest*[9], the so-called *beneficium competentiae*, not available to sureties of the debtor, but this does not seem to have been an *exceptio* at all in classical law. The great majority were available to any defendants[10]. It does not however follow that they were equally available against all plaintiffs. As we have seen[11], the *actio doli* lay, in general, only against the wrongdoer, the *actio metus* against anyone who had profited. This is reflected in the corresponding *exceptiones* which can be distinguished from this point of view as *in personam* and *in rem*. The *exceptio doli* could not be brought against a plaintiff by reason of the *dolus* of one from whom he derived title, at any rate unless he held by gift[12], but the *exceptio metus* was not under the same restriction; like the action, it was available

1 G. 4. 118. **2** 2. 13. 6. 8; 4. 3. 1. 1, etc. **3** *Exceptio iusti dominii*, 17. 1. 57; as to this *exceptio*, Appleton, *Propr. Prét.* ch. XVI; *exceptio ususfructus* not evidenced, but supposed to have been the reply where a *dominus* vindicated from the fructuary. **4** 44. 4. 4. 16. **5** 46. 2. 4. **6** *Ante*, p. 649. **7** 44. 4. 4. 27; 44. 2. 7; Inst. 4. 14. 4. **8** *Ante*, § CXCV. **9** 44. 1. 7. pr. *Post*, § CCXXXIV. **10** *E.g.*, *doli*, *metus*, *Sci. Velleiani*, *Macedoniani*, etc. 44. 1. 7. pr. **11** *Ante*, § CCIII. **12** 44. 4. 4. 31.

against those deriving title from the wrongdoer. Thus, like the action, it was said to be "*in rem scripta*[1]."

Exceptiones may be left with two further remarks. We shall see later[2] that there were some types of action in which *exceptiones*, or, rather, some *exceptiones*, need not be expressly pleaded. Further, the structure of the *formula* shews that the *exceptio* was not a part of its original design. The "*si paret*" of the *intentio* links directly with the "*condemna, si non paret absolve*" of the *condemnatio*. The *condemnatio* does not refer to the "*nisi*" of the *exceptio*, so that logically construed the *formula* appears to direct the *iudex* not to condemn if the *exceptio* is proved, but does not tell him to absolve in that case. This is due to the conversion of *praescriptio pro reo* into *exceptio* after the structure of the *formula* was settled. In practice, the logical point was not taken: the *iudex* absolved.

CCXXIV. *Condemnatio.* This was the direction to the *iudex* to condemn the defendant, if the conditions specified for condemnation were satisfied, if not, to absolve him[3]. For a *certum*, Gaius gives the form: "*Iudex Nm. Nm. Ao. Ao. sestertium x milia condemna, si non paret absolve*[4]." In the case of *incertum*, in an *actio in factum*, he gives: "*quanti ea res erit, tantam pecuniam iudex Nm. Nm. Ao. Ao. condemna, s. n. p. a.*[5]." For a *bonae fidei iudicium* he gives a form differing slightly but not essentially[6]. In real actions it was as in the form stated for an *actio in factum*[7]. In many cases it was of course for a multiple[8]. As the *interesse* taken into account was differently calculated in different actions, the words expressing this varied. In some actions it was estimated as at *litis contestatio*, in others, notably *condictio furtiva*, real actions and actions *in factum* (other than those *in bonum et aequum conceptae*), it was taken as at judgment, or even in some cases at the highest value in the meantime[9]. In these it was "*quanti ea res erit*" or the like[10], in the former class it was "*quanti ea res est*," as, *e.g.*, in *condictio triticaria*[11]. The contrary rule in *condictio furtiva* is due to the fact that a thief was always

1 44. 4. 4. 33. 2 *Post*, § CCXXIX. 3 As to importance of actual *absolutio*, *ante*, § CCXVIII. It is contended by Audibert, *Mél. Girard*, 1. 57, citing 42. 1. 3 and 50. 17. 37, that there were cases in which there was no direction to absolve. This he holds is the case in *formulae* which on his view had no *intentio* (*ante*, § CCXXII), and he rejects the view that the texts refer to cases in which the *absolutio* clause has been omitted by error. This doctrine of Audibert is difficult to reconcile with the very general language of Gaius (4. 48 sqq.). That this language does not fit neatly into the *formula* in *actio iniuriarum* may be admitted, but we have just seen a similar lack of coherence with the *exceptio*. The words "*s. n. p. a.*" do not fit neatly with an *intentio* in "*quidquid paret*," but they certainly occurred there, G. 4. 47. 4 G. 4. 43. 5 G. 4. 47. 6 G. 4. 47. 7 G. 4. 51, which shews a similar form for any action on an *incertum*. *Lex Rubria*, XX, gives an instance in action on a *stipulatio* for an *incertum*. 8 *E.g.*, *actio furti*. 9 As in *condictio furtiva*. 10 In *bonae fidei iudicia* the form is slightly different, but the effect is the same, G. 4. 47; D. 19. 1. 1. pr. 11 13. 3. 4; *post*, § CCXXX.

in mora[1]. On principle the word in *condictio incerti* should be "*est.*" In the actions *in factum* "*in bonum et aequum conceptae*" it appears to run "*quantam pecuniam tibi bonum aequum videbitur*[2]."

The *condemnatio* was always for a sum of money, but, apart from subsidiary clauses with special names, there were one or two special cases which must be mentioned. In some cases *condemnatio* produced, besides the pecuniary liability, *infamia* in the defendant[3]. This did not apply to the *actio contraria* where this existed[4], or to cases in which a *heres*, as such, was condemned, as he was not condemned *suo nomine*. The same applied to a representative, for the same reason, and the principal was not *infamis* as he was not condemned at all[5]. In noxal actions the *condemnatio* ran "*tantam pecuniam dare aut noxam dedere*," the surrender being a *facultas solvendi*[6].

The *condemnatio* occurred in all actions other than *praeiudicia*. It is probable that in the earlier form of the divisory actions it did not exist, for the only function of the *iudex* was *adiudicare*[7], before allowances were taken into account, and the same might still be true in the case of things which admitted of equal division, but, in view of the fact that allowance for expenses and damages had to be made, it is probable that in classical law there was always a *condemnatio*. But the formulation of these actions is much disputed[8].

The *condemnatio* might contain certain subsidiary clauses.

1. *Clausula arbitraria*. This was an instruction to the *iudex* to order actual restitution, to his satisfaction, and to condemn only if this was disobeyed. Its form was "*nisi arbitratu tuo restituat*[9]," or the like, so that it was another negative condition on the *condemnatio*. If the order was disobeyed there was no question of direct enforcement, by *multa* or *missio in possessionem*, for it was an order, not of the praetor, but of the *iudex*. But the machinery used was effective. The plaintiff was entitled to assess the value under oath of good faith (*iusiurandum in litem*[10]) and the condemnation was pronounced for that amount. Paul tells us that in such a case the assessment was not too carefully looked at from the point of view of perjury[11]. Still, there were restrictions. The *iudex* need not allow the assessment under oath; he might condemn on his own valuation[12]. According to the Digest, even if the oath was taken, he

1 G. 2. 79; D. 13. 1. 8. 1. 2 *Post*, § CCXXXI. See Lenel, *E.P.* 385. For other variations and details, see Cuq, *Manuel*, 857, n. 3. 3 These appear to be *furti, rapinae, doli, iniuriarum* (in all of which *transactio* is on the same level), *pro socio, tutelae, mandati, fiduciae, depositi*, and perhaps some others. See Cuq, *op. cit.* 227; Greenidge, *Infamia*, 131. 4 3. 2. 1. 5 3. 2. 1; 3. 2. 6. 2. See Greenidge, *Infamia*, 130. 6 *Ante*, § CCV; Lenel, *E.P.* 190. 7 *Ante*, § XC; *post*, p. 657. 8 Lenel, *E.P.* 200 sqq.; Audibert, *Mél. Appleton*, 1. 9 4. 2. 14. 11; Inst. 4. 6. 31; G. 4. 114. But see Levy, *Z.S.S.* 36, 1 sqq., who denies the existence of the words "*arbitratu tuo*" in the *formula*. 10 D. 12. 3. 11 12. 3. 11. 12 12. 3. 4. 2; h. t. 5. 1.

might ignore the estimate[1], and in some cases he might, beforehand, fix a maximum, a sort of *taxatio*[2]. Further, the oath was never allowed unless the disobedience was wilful[3], or the defendant had already fraudulently made restoration impossible[4]; here it operated as a penalty.

It is difficult to say exactly what actions had this *arbitrium* clause. Most of our information is from Justinian, and there are indications that the word *arbitraria* is loosely used. It is clear that *actiones in rem* (with a possible exception for praedial servitudes[5]) were *arbitrariae*, at any rate if tried by the *formula petitoria*[6]. Among personal actions there were *ad exhibendum*, *doli*, *metus*[7], *Fabiana*[8] (and, no doubt, *Calvisiana* and *Pauliana*), *aquae pluviae arcendae*[9], *actio in factum* on an alienation *iudicii mutandi causa*[10], *actio redhibitoria*[11], and some cases under interdicts[12]. It is not clear, however, that in all these cases there was *iusiurandum in litem*. There are other more doubtful cases. The *actio de eo quod certo loco* is the only action called *arbitraria* in classical texts[13], but it does not seem to have been *arbitraria* in the present sense at all. It was so called because it gave the *iudex* discretion to determine what allowance was to be made where what was due in one place was sued for at another[14]. In the noxal *actio iniuriarum* the master could evade condemnation by allowing the man to be castigated, *arbitratu iudicis*. But there was no question of *iusiurandum in litem* or of an order of the *iudex*; it was entirely for the master to decide[15]. Ordinary noxal actions are sometimes so called in view of the language of some texts[16]. But there was no *iusiurandum*, surrender was not ordered by the *iudex* and was not alternative to *condemnatio*, but was a *facultas* embodied in the *condemnatio*[17]. In the *formula in ius* given by Gaius for deposit and *commodatum*, the letters N.R. occur after the word *condemnato*, no doubt meaning "*nisi restituat*," but as they are out of place and there is said to be no other trace of this clause in a *bonae fidei iudicium* in "*dare facere*," they are usually rejected as an error. This is strengthened by the fact that Gaius does not insert the words in the corresponding *formula in factum*[18], though most of the *arbitrariae actiones in personam*

1 Or even absolve, 12. 3. 4. 3; h. t. 5. 2. The first text is probably interpolated, but this rule appears to be classical. 2 12. 3. 4. 2, perhaps not classical. See 6. 1. 68 and Girard, *Manuel*, 658, on the question of possible historical development. 3 12. 3. 2; h. t. 4. 4; h. t. 5. 3. 4 42. 1. 41. 1. 5 See Lenel, *E.P.* 186. 6 6. 1. 35. 1. If it was embodied in the *formula per sponsionem* it must have been in a different form. 7 Inst. 4. 6. 31. 8 *Fr. de f. Fab.* 1. 9 39. 3. 22. 1. 10 4. 7. 4. 6. 11 *Ante*, § CLXXII. 12 *Post*, § CCL. 13 Even this is not certain; they may be interpolated. They are Inst. 4. 6. 33 a; D. 13. 4. 2. pr.; h. t. 2. 8; h. t. 3; h. t. 4. 1; h. t. 5; h. t. 8; h. t. 10; 13. 5. 16. 1; C. 3. 18. 1. 14 This action has been much discussed. See the reff. in Girard, *Manuel*, 1055, n. 5, and May, *Mél. Girard*, 2. 151 sqq. 15 47. 10. 17. 4–6. 16 9. 4. 14. 1; Inst. 4. 17. pr. 1 (*arbitrium, officium iudicis*); Inst. 4. 6. 31. 17 42. 1. 6. 1. 18 G. 4. 47.

are *in factum*. But the clause occurs in several actions for *incertum*, and Marcian and Ulpian, late in the classical age, tell us that there might be *iusiurandum in litem* in any *bonae fidei iudicium*[1], which however does not necessarily refer to this use of it. Texts which speak of *restitutio* as avoiding condemnation in deposit[2] are not conclusive—*omnia iudicia absolutoria sunt*, and this very rule makes the extension less probable. The language of these texts: "*condemnandum te nisi restituas*," "*condemnandum tamen si res non restituetur*," recalls the *arbitrium*, but the form may be due to Justinian. The possibility remains that in post-classical times the notion was extended to such actions, the letters N.R. being an interpolated expression as are many other things in the MS.[3] But it does not in any case appear that the *clausula arbitraria* could be used for any purpose other than restitution[4], *e.g.* to compel specific performance of a bargain[5].

2. *Taxatio*. This was a limitation on the *condemnatio*, having more than one type. It might be a limitation to a fixed maximum sum, *e.g.* "*dumtaxat 5 millia*[6]." It is not easy to say where this was admitted. It is not found in real actions or the *actio ad exhibendum*, or, of course, where the claim was for *certa pecunia*, but Gaius seems to assume that it was always present in claims for an *incertum*[7]. It is actually recorded in some cases of *iniuria*, and in *furtum*[8], but not in the Aquilian action. It is found in the *actio ex empto*[9]. It seems possible that it might always occur in actions on consensual contracts. The language of Gaius would admit it in deposit and *commodatum*, but he does not put it in the *formula*, and Lenel therefore rejects it[10]. The omission is hardly conclusive; his purpose is to compare two *formulae* and he may well have omitted unessential parts identical in both. In the *actio ex stipulatu*, *i.e.* on a *stipulatio* for an *incertum*, it seems to have occurred, though we know it only in *damnum infectum*[11]. Beyond these cases we

1 12. 3. 5. pr.; 13. 6. 3. 2 (? interp.). 2 16. 3. 1. 21; h. t. 22. 3 See for an extreme view, Kniep, in his commentary on Gaius, *passim*. 4 As to later law, *post*, § CCXXVII. "*Restituere*" is not in itself conclusive against its application here; in *vindicatio* there need have been no previous possession. 5 The propositions stated in the text represent the ordinarily accepted opinion, but this has been attacked from many points of view. Biondi (*Studi sulle Actiones Arbitrariae*, 1) holds that the expression *actio arbitraria* was not known to the classical law as indicating a special type of action having a *clausula arbitraria*, and that though such a clause did occur in some actions (see G. 4. 114) its appearance in the texts is in many cases, notably in *doli*, *metus*, and other penal actions, due to the compilers. Levy (*Z.S.S.* 36. 1 sqq.) holds that the clause did not contain the words "*arbitratu tuo*." 6 G. 4. 51. 7 *Ib.* 8 G. 3. 224; D. 50. 16. 192. As to *furtum*, it is not clear whether this was in the *condemnatio* or not. Lenel now holds that it was in a *demonstratio*, *E.P.* 318. See *ante*, § CCXXI. 9 C. 4. 49. 4 (A.D. 290), but this dates from a time when the formulary system was practically obsolete. 10 G. 4. 47. Lenel, *E.P.* 149. 11 *L. Rubria*, c. XX; Lenel, *E.P.* 149.

know nothing, but a plaintiff could always put in a *taxatio* if he chose[1].

Another type of *taxatio* was that expressing the limitation of the *condemnatio* to the content of a particular fund, *e.g.*, "*dumtaxat de peculio et in rem verso*[2]," and it is probable that the limitation in certain cases to the extent of actual profit, "*quod ad eum pervenit*," was similarly expressed[3]. There was also the limitation called *beneficium competentiae*, probably expressed by a *taxatio*, "*dumtaxat in id quod facere potest*[4]," or the like. It may be that where a *res* was vindicated and the defendant had *bona fide* ceased to possess, but was still liable for any "*causa*" in his possession[5], and on similar facts in the *actio redhibitoria*, this was limited by *taxatio*, but the words "*quanti ea res erit*" may have sufficed.

3. *Adiudicatio*[6]. This has already been considered in its effect and scope as a mode of acquisition[7]. The form given by Gaius is "*Quantum adiudicari oportet, iudex Titio adiudicato*[8]," no doubt incomplete, and as the power must cover *adiudicatio* to more than one, probably corrupt. The word *Titio* has been amended in various ways[9], but there is no evidence. It must be noted that while in *communi dividundo* and *familiae erciscundae* what was divided was previously common property, in *finium regundorum* there was or might be a complete transfer from one to the other.

4. *Deductio* in actions by *bonorum emptor*[10].

CCXXV. The System of *cognitio extraordinaria*[11]. We have seen that the function of the magistrate in the formulary system, the *ordo iudiciorum*, was far more independent than in the *legis actio*; we have noted the incidental matters, apart from control of the *formula*, which he dealt with[12], and we shall later have to discuss the specially magisterial remedies which he utilised[13]. It is plain that in proceedings of this kind the line between judicial and administrative action was likely to be a little blurred, both being based on the *imperium*. In the system of procedure which superseded the *formula* altogether in the third century, procedure "*extra ordinem*[14]," the outstanding change apart from differences of detail, also to be considered, is that there was no longer any reference from *ius* to *iudicium*; the *ordo iudiciorum* was gone and the whole matter was tried by the magistrate or his deputy. The other changes will shew that the basing of all litigation, and the steps in it, on

1 See, *e.g.*, Cicero, *pro Tull.* 3. 7. 2 *Ante*, § CLXXXIV. 3 *E.g.*, *heres* liable on delict, see *post*, § CCXXXIII. 4 *Post*, § CCXXXIV. 5 Gaius says there is no *taxatio* in a real action, but he is referring to a fixed maximum, G. 4. 51. 6 G. 4. 39, 42. 7 *Ante*, § XC. 8 G. 4. 42. 9 See Lenel, *E.P.* 202. It can be saved by supposing a case in which it was agreed that the whole, being indivisible, should be allotted to *T*, the other party or parties being compensated. There is also the possibility that each party had a separate *formula*, all being identical, except as to the name in the *adiudicatio*. 10 *Post*, § CCXXXVIII. 11 Cornil, *Aperçu historique*, 461 sqq. 12 *Ante*, § CCXIV. 13 *Post*, ch. XV. 14 See Hartmann-Ubbelohde, *Ordo Iudiciorum*, 416 sqq.

consent of the parties, a conception which governed the earlier systems, was also gone; the magistrate controlled the whole procedure. Hence it may be said[1] that civil procedure had been superseded by administrative action. But it was still judicial. The magistrate must abide by the law. The hearing was still a *iudicium*, though a *iudicium extraordinarium*. The main rules of procedure remained, from time to time modified by legislation. The system owed its origin and extension partly to the fact that it was simpler and more convenient, and partly to the fact that, consonantly with imperial ideas, the method tended to centralise authority and to transfer, to the Emperor's official, power which had been in part vested in a *iudex* not so directly under the Emperor's control. The assimilation to administrative and police action which undoubtedly occurred was a natural result of the change.

In the Republic it can hardly be said that the new system yet existed, for though the praetor issued many orders in judicial matters, *e.g.*, *restitutio in integrum*, *missio in possessionem*, interdicts, etc., the further proceedings under the order were usually[2] tried by the methods of the *ordo*. But the founding of the Empire brought a change. On the introduction of *fideicommissa*, though our account of the transaction shews that they were regarded as civilly valid[3], Augustus ordered that those submitted to him should be enforced by the consul, and this "*paullatim conversum est in adsiduam jurisdictionem*[4]," soon transferred to a new officer, the *praetor fideicommissarius*[5]. Similarly, *honoraria* in mandate, not recoverable by ordinary action, could, from an early date in the Empire, be recovered by process *extra ordinem* before the praetor[6]. The nomination of *tutores*, with the consideration of questions arising from it, excuses, etc., was vested in imperial officials from M. Aurelius onwards[7], and the removal of *tutores suspecti* was with the praetor[8]. The obligation to provide *alimenta* for poor connexions, which appeared under Pius, was in the hands of the consuls[9], as was the enforcement of the obligation to provide a *dos*[10]. The *praefectus urbi* dealt with complaints by slaves against masters[11], and the praetor with *fideicommissa* of liberty overdue[12].

In these cases there was no supersession of an existing jurisdiction,

1 Girard, *Manuel*, 1087, "Tout cela est une conséquence de l'idée qu'il n'y a pas là justice civile mais acte de police." See also Pernice, *Festgabe für Geo. Beseler*, 51 sqq. 2 *Denegatio actionis* and "*duci iubere*" (*ante*, §§ CCXIV, CCXVI) are however his own acts. As to a special case of *missio in possessionem*, *post*, § CCXLV. 3 *Ante*, § CXXIV. 4 Inst. 2. 23. 1. 5 *Ante*, § CXXIV. 6 *Ante*, § CLXXIX. 7 *Ante*, §§ LIII, LIV. But this was not a case of ordinary jurisdiction at all. 8 *Ante*, § LVII. 9 So Girard, *Manuel*, 648, arguing from the source of the Digest texts in which it is considered. C. 5. 25. 2–4 speaks of "*competens iudex*." 10 23. 2. 19. But it is possible that this obligation is of later origin, see *ante*, § XL. 11 G. 1. 53; Coll. 3. 3. 1. 12 *Ante*, § XXXI. *Causae fiscales* are hardly an instance: the State is doing justice in its own case.

but that process appeared in the second century. The first step seems to have been transfer to, or usurpation by, officials charged with functions affecting public order (*praefecti annonae, vigilum*) of jurisdiction in private suits arising out of matters within their field of authority[1]. *Causae liberales* were tried by *cognitio* at least from Pius onwards, and probably the same is true of questions of *ingenuitas*[2]. It seems clear that in imperial provinces, and regions, like Egypt, which were specially appanages of the Emperor, the system of *cognitio* was generalised early in the Empire[3]. And in the provinces generally it superseded the *formula*, on one view, by the beginning of the third century, or thereabouts, the surviving and, in part, doubtful cases being regarded as exceptional, and, on another, somewhat later, in view of these cases[4].

How and when the supersession occurred in Rome is not clear. No legislation abolishing the *ordo* for Rome is extant, and it is commonly supposed to have disappeared not long after the provincial supersession, a generation before the famous constitution of Diocletian (A.D. 294[5]), by which he ordered *praesides* of provinces not to give *iudices*, as they had been doing, but to try cases themselves, providing that, if their business was too pressing, they might, except in some important cases[6], appoint *iudices* as deputies. It must be remembered that it was just at this time that the system of *provinciae* was made to cover Italy also[7], the new system being probably in full operation before this enactment. The *iudices* to whom the enactment notes that *praesides* had been in the habit of sending cases, are called *iudices pedanei*, an obscure word which probably does not refer to the *unus iudex* of the *ordo iudiciorum*, but to delegates of the new type[8]. Thus the provision seems merely to mean that magistrates were not to regard jurisdiction as a function to be handed over as of course to someone else, but to treat it as their own duty and not to delegate it except when overburdened with work, and then not in all cases[9]. Naturally the pressure on the *praeses* of the new

1 Girard points out (*Manuel*, 1088) that this explains why these offices are occupied by jurisconsults. See *Textes*, 903. 2 35. 1. 50; 40. 12. 27. 1. *Addictio bonorum libertatis causa* and similar matters (*ante*, § CXLII) are handled in this way, but they are later than this instance. 3 It seems clear for Egypt. Girard, *Textes*, 893. 4 Mitteis, *Reichsr. und Volksr.* 132; Partsch, *Schriftformel*, 111 sqq. Wlassak, *Zum Römischen Provinzialprozess*, holds that the *formula* was used in imperial provinces, though not in "procuratorian" districts, but that, by Hadrian's time, the *praeses* may choose between *cognitio* and reference to a *iudex*, the *iudex* being however chosen by him, *iudex pedaneus*. Even here the *formula* has changed its character and becomes rather an official statement of the issue than an agreed issue between the parties. In this form it lasted, on this view, in the provinces to the time of Diocletian (C. 4. 49. 4; 4. 52. 3; 8. 38. 3; Cons. 5. 7) and apparently till Constantius abolished the *formulae* altogether (*post*, § CCXXVI). Mitteis (*Z.S.S.* 40. 360 sqq.) is not quite satisfied as to the change in character of the *formula*. 5 C. 3. 3. 2. 6 As to what cases, Hartmann-Ubbelohde, *Ordo Iudiciorum*, 604. 7 *Ante*, § XIX. 8 Hartmann-Ubbelohde, *op. cit.* 602 sqq. 9 C. 3. 3. 2. 1.

style of province, a relatively small region, would be less than that of the old. As to Rome itself we have the negative evidence that there is no trace of the *ordo* there, after about the middle of the third century[1].

CCXXVI. Course of proceedings in a *cognitio*. Proceedings were begun, not by *in ius vocatio* or *vadimonium*, but till, at earliest, the middle of the fifth century by *litis denuntiatio*[2], issued under the authority of the magistrate[3], apparently in writing, without formal *impetratio* or *postulatio actionis*. This must be followed up by a statement of the case within four months[4], another four months being obtainable for cause[5]. But under Justinian and apparently earlier[6] this had been superseded by a summons issued by the magistrate on a statement of claim submitted by the plaintiff (*libellus conventionis*[7]) and communicated to the defendant by an official, the claim fixing a day for appearance, not less than 10 (under Justinian 20) days later[8]. The official took security for appearance, before which the defendant must submit his statement of defence (*libellus contradictionis, responsionis*[9]). These new methods were of gradual introduction. The *libellus conventionis* was much later than the change of system; the case was stated in a *formula* of the old type till 342[10], when the *formula* was abolished, and the formal *impetratio actionis* existed till 428[11]. The administrative character of the process only gradually reflected itself in the details of the procedure.

If the plaintiff did not appear on the day fixed, the case was dismissed[12], but as there had been no *litis contestatio* it could be renewed. Under Justinian there was an elaborate machinery for this case, the results of absence differing with the cause[13]. If the defendant failed to appear the sureties might be proceeded against, and, in the last resort, the magistrate, apart from his power of fining ("*multare*"), could compel

1 Mommsen, *Staatsr.* 3. 539; *D.P.R.* 6. 2. 144. 2 C. Th. 2. 4. 2 and *passim*. 3 As to the magistrate having jurisdiction, *post*, p. 663. At first *denuntiatio* may have been a private act, like *in ius vocatio*, but early in the fourth century the intervention of authority was required, C. Th. 2. 4. 2. See Costa, *Profilo storico*, 151. Protection for minors, C. Th. 2. 4. 1. Some cases in which *denuntiatio* not needed, C. Th. 2. 4. 3; h. t. 6. The question whether *litis denuntiatio* was ever used in the formulary system is disputed, Kipp, *Litis Denuntiatio*. Wlassak, *Röm. Provinzialprozess*, thinks it essentially provincial, a measure to unify the varying provincial practices. Aur. Victor, *ad Caes.* 16. He also holds, p. 58, that it was never absolutely private: though at first the act of the party, there was always magisterial authorisation. As to hypotheses on the source of this method and for the view that it began with the *praetor peregrinus*, see Eisele, *Beiträge*, 168 sqq. 4 Mitteis, *Grundzüge der Papyrusf.* 2. 1. 40; *Z.S.S.* 27. 351, shews the four months to be a maximum. No procedure *in contumaciam* (see below) till the time has expired, but nothing to bar earlier action if parties and magistrate are ready. 5 C. Th. 2. 6. 1. Automatic extension of time in certain cases, h. t. 3 and 4; C. Th. 2. 7. 3; C. 3. 11. 1. Further postponement for not more than two months by consent, C. Th. 11. 33. 1. 6 See Nov. 53. 3. 7 Inst. 4. 6. 24. 8 Nov. 53. 3. 2. 9 C. Th. 2. 15. 1; Nov. 53. 3. 10 C. 2. 57. 1. See however Partsch, *Schriftformel*, 120. 11 C. Th. 2. 3. 1; C. 2. 57. 2. 12 Arg. C. Th. 2. 6. 1. 13 Novv. 112. 3, 115. 2.

appearance by force[1]. If the defendant evaded service of summons or other preliminary steps, there was a procedure *in contumaciam*, an elaborate system, of notices to be served on him if he could be reached, and proclamations if he could not[2]. The effect of this varied in different cases and from time to time; Justinian legislated repeatedly on the matter[3].

On the appointed day there was a *cognitio*. The parties appeared and stated their cases and the facts on which they relied. The close of this stage was apparently *litis contestatio*[4], which remained the critical point of time, but with effects much modified[5]. A time so defined was unsatisfactory and Justinian provided, in effect, that *litis contestatio* was to occur when the parties had taken the oath against *calumnia*[6]. *Confessio* now led to immediate judgment whatever the nature of the claim[7]. The class of *actiones interrogatoriae* no longer existed, but interrogations became in a sense more important. In any action, and on any point, either party might submit an *interrogatio* to the other, by leave of, and through, the *iudex*, and, as it seems, at any stage. The answer was evidence against the person who gave it[8], but it does not seem certain that it had any other effect. It is clear that it could not be used against the asker, and there seems no satisfactory evidence that refusal to answer was penalised, as it was in the *actiones interrogatoriae*[9]. The *iusiurandum necessarium* had a much wider scope. Instead of being confined to a small group of actions[10] it could be offered in any action with the same right of "*relatio*" and the same results of taking and of refusal as in the formulary system, and, at least under Justinian, after *litis contestatio*[11].

Much of the terminology of the old procedure remained. We still hear of *exceptio*, *replicatio*, *litis contestatio*, interdict, but the terms have

1 D. 2. 5. 2. 1; 2. 8. 2. 5. 2 C. Th. 12. 1. 23; C. 7. 43. 9, and h. t. *passim*. Bethmann-Hollweg, *Civ. proc.* 3. 302 sqq. For earlier legislation, *Appendix legis Rom. Wisig.* 2. 2 (*Coll. libror. iuris anteiust.* 2. 260 sqq.). 3 Details and reliefs, C. 7. 43 *passim*. See generally, Koschaker, *Z.S.S.* 36. 444, reviewing Steinwenter, *Studien zum Röm. Versäumnissverfahren*. Judgment without these final steps, if the defendant, warned by the *iudex*, wilfully abstains. C. 7. 43. 2. According to Wlassak, *Röm. Provinzialpr.* 36 sqq., the contumacy procedure is of provincial origin: it is there that first appears the conception essential to it that non-appearance is disobedience to the magistrate. 4 C. Th. 2. 4. 4; C. 3. 1. 14. 4; 3. 9. 1. *Preces* to the Emperor, followed by rescript, amounted to *l. c*, C. Th. 1. 2. 10 = C. 1. 26. 1. As to effects of *l. c.*, *post*, § CCXXXV. See also C. 3. 1. 16. 5 These changes do not depend on the change of procedure or coincide in time with it. 6 C. 2. 58. 1, 2. Refusal of this oath is ground for judgment, *ib.*; Nov. 53. 3 makes *l. c.* occur at signature of the *libelli*, with rules for the case of failure to sign. On *litis contestatio* and "*mota controversia*" under Justinian, Albertario, *Z.S.S.* 35. 305 sqq. 7 C. 7. 59. 1. Gradually reached, Cuq, *Manuel*, 876. 8 11. 1. 1. 1 (interp.); h. t. 21; h. t. 7. 9 Texts in D. 11. 1 which seem to apply the old system (*e.g.* 8. 1, 9. 3, 9. 7, 11. 4) actually refer only to cases of the old *actiones interrogatoriae* and may be anachronisms. 10 *Ante*, § CCXV. 11 Different forms of oath are confused in D. 12. 2. See C. 4. 1. 1; h. t. 8, and *post*, p. 662.

changed significance. When Justinian said that an *exceptio doli* was available he meant that *dolus* might be pleaded and would (in general) bar the claim; he did not mean that it was pleaded in the old way. A possessory interdict was, for him, a possessory action, for the actual issue of an interdict was a thing of the past. But some *exceptiones* were handled in a new way; they were disposed of before *litis contestatio*. Such were those dealing with capacity of parties, or representatives, or the court[1], and also, perhaps, the *exceptio praeiudicialis*, and those alleging previous judgment or *transactio*, or bar by lapse of time[2]. Others were dealt with in the old way with two modifications. *Exceptiones peremptoriae* not originally claimed could be brought in at a later stage, without any *restitutio in integrum*[3], and, as an indirect result of express legislation, some *exceptiones* no longer destroyed the action[4].

After *litis contestatio* the action proceeded, the principal changes to note being the following. *Exceptiones* might be gone into, and an interlocutory judgment given on them, before the final decision[5]. There was much legislation on the burden of proof. The evidence of witnesses was distrusted, and there were many enactments affecting capacity to give evidence, and on the weight to be attached to such evidence[6]. "*Testis unus, testis nullus*" was laid down as a general rule[7], and, apart from this, a minimum of evidence was required in some cases[8]. An outside witness was not to be heard in opposition to a document duly authenticated and witnessed[9]. Justinian excluded evidence by *humiles* not vouched for by persons of higher rank, unless under torture[10]. Hearsay was in general excluded[11]. Witnesses were summoned by the court, and could be compelled to give surety for their appearance, distinguished persons being exempt[12]. The questions were asked by the *iudex* and the answers recorded[13]. There was much legislation on the mode of proof of documents[14].

The distinction between *iusiurandum necessarium* and *voluntarium in iudicio* is much obscured under Justinian. He seems to have put any oath offered at any stage, by a party with approval of the *iudex*, or by the *iudex*, on the same level[15]. If it was refused in first instance judgment went against the offeree on the point, subject to appeal, and the *iudex*

1 Cons. 6. 2; C. 2. 12. 13; C. 8. 35. 13. 2 Bethmann-Hollweg, *C.P.* 3. 265. 3 C. 8. 35. 8. 4 *Compensatio, post*, § CCXXXVIII; *plus petitio, post*, § CCXXXVII. 5 C. Th. 11. 30. 37. 6 Bethmann-Hollweg, *C.P.* 3. 274. 7 C. Th. 11. 39. 3. 1; C. 4. 20. 9. 8 *E.g.* C. 4. 20. 15. 6; h. t. 18. 9 C. 4. 20. 1. Paul (S. 5. 15. 4) lays down a similar rule, but only "*si de fide tabularum nihil dicitur.*" 10 Nov. 90. 1, a comprehensive enactment on these matters. 11 Nov. 90. 2. 12 C. 4. 20. 16; h. t. 19. 13 Bethmann-Hollweg, *C.P.* 3. 277. 14 *Ib.* 279 sqq. 15 C. 4. 1. 12. 1 a. As to Justinian's legislation, Demelius, *Scheidseid und Beweiseid*, 123 sqq.

in appeal might either confirm the judgment or, if he thought the oath should not have been offered, and was reasonably refused, disregard it and go into the merits[1]. If it was taken when offered, or taken or refused on *relatio*, judgment went accordingly on the point, which of course was not necessarily the whole issue[2], with no appeal. Thus the party originally offering the oath had no appeal[3].

The case proceeded from day to day, adjournment being to a day fixed by the *iudex*[4]. Non-appearance was treated as above stated for non-appearance before *litis contestatio*. The administrative character of the process led to decreased publicity. *Cognitiones* were always under cover, and in later law the public, except privileged persons, had no access but by leave of the *iudex*[5]. The old calendar of *dies fasti*, etc., disappeared in the Christian regime; the available days were changed from time to time, being the same for all stages of the process, and about the same in number as in the old system[6].

CCXXVII. Jurisdiction was vested in a variety of officials[7]. In Rome, and later in Constantinople, the *praefectus urbi*, the *vicarius urbis*, and the *praefecti annonae* and *vigilum* had civil jurisdiction, in some cases limited to particular affairs, the old praetor having lost jurisdiction long before his name disappeared[8]. In a province the *praeses* sitting in his chief town was the ordinary judge[9]. Municipal magistrates had a limited jurisdiction, and, in the later Empire, many towns had also a *defensor civitatis*, with similar jurisdiction, concurrent with that of local magistrates[10]. All these were accustomed to act with an assessor or assessors who gave opinions but had no share in the decision, and in the more important courts the best available legal learning was used for this purpose[11].

In the *cognitiones* which in the third century were superseding the *ordo iudiciorum*, it was a common practice to delegate the jurisdiction from initiation to decision to a deputy to whom the name *iudex pedaneus* was applied; the magistrates seem indeed to have tended to shift off the whole burden of civil jurisdiction. Diocletian, as we have seen, provided[12] against this, except under pressure of work. The Emperor Julian en-

1 C. 4. 1. 12. 2. **2** C. 4. 1. 12. 1 a. **3** C. 4. 1. 12. 3. **4** C. 3. 11. 1; h. t. 3; h. t. 4. **5** Bethmann-Hollweg, *C.P.* 3. 189. **6** Bethmann-Hollweg, *ib.* There was a temporary revival of the old system under Julian the Apostate. **7** See Bethmann-Hollweg, *C.P.* 3. 35 sqq. **8** Boethius, *de Consol.* 3. 4, "*praetura, magna olim potestas, nunc inane nomen est.*" **9** Bethmann-Hollweg, *C.P.* 3. 45. **10** C. Th. 1. 29. 1, 6, 7. See C. 1. 55. Special officials for cases affecting State finance, and for *milites*; a jurisdiction in the Bishop resting on consent (except in case of *clerici*), not appealable. C. Th. 1. 27. 2; Nov. Val. 35; C. 1. 4. 7, 8. Cornil, *Aperçu historique*, 463. As to the Emperor's jurisdiction, which has various forms, *post*, p. 665. **11** 1. 22. 1; C. 1. 51. 11. *Actor sequitur rei forum*, C. Th. 2. 1. 4; Nov. Marc. 1. 6; C. 3. 13. 2. But an *actio in rem* may now be tried where the thing is. C. 3. 19. 3. **12** C. 3. 3. 2; *ante*, § CCXXV.

acted, in A.D. 362, that there might be a similar delegation apart from pressure of work in matters of small importance[1]. The *iudices* so "*dati*" were not those of the old *album iudicum*, to try an issue submitted by the magistrate; the *album* was extinct, and they tried the whole matter as deputies. They seem to have been chosen from the advocates practising in the magistrates' courts[2]; in later law there were regular lists of them[3]. The growth of this system brought with it a certain share of the parties themselves in the selection of the *iudex*[4]. He was, under Justinian, expressly appointed for each case[5], and could exercise the magisterial power of compulsion, *e.g.*, *missio in possessionem*, in case of contumacy[6]. His function ceased at judgment[7]; he had nothing to do with execution of it.

The judgment was recited publicly at a formal sitting of the court[8], but like all other proceedings, it was also set out in writing, from which it was read[9]. It was no longer necessary for the judgment to be for a sum of money, though whether it was for this or for the thing in dispute itself[10], it must still be certain and unconditional[11]. We have seen that there might be interim judgments, *e.g.* on the admissibility of an *exceptio*[12], and these were issued in the same way. There would also be *pronuntiationes*[13] in *actiones praeiudiciales* and in *actiones arbitrariae*, and *adiudicationes* in the appropriate cases. So too while of *taxatio* in the old strict sense there was now no question, since that was an instruction to the *iudex*, who now heard the matter from the beginning, the various rules imposing a limit on the *condemnatio* must still be observed[14]. Justinian added another, restricting damages in some cases to double the price[15].

In an enactment of A.D. 529[16] Justinian laid down the rule that a *iudex* where he absolved the defendant could condemn the plaintiff for anything which proved to be due from him in the same transaction, observing that Papinian in his *Quaestiones* had held this admissible. Papinian may have held that *mutuae petitiones* could be implied in *bonae fidei iudicia*, but more probably was speaking of *cognitiones*[17].

1 C. Th. 1. 16. 8; C. 3. 3. 5. 2 Bethmann-Hollweg, *C.P.* 3. 121 sqq. 3 C. 2. 6. 6. pr.; C. 2. 12. 27. 4 C. 3. 1. 14. 1. 5 Bethmann-Hollweg, *C.P.* 3. 125. 6 Nov. 53. 4. 1. 7 42. 1. 55. 8 C. 7. 45. 6. 9 C. 7. 44. 1–3; C. Th. 4. 17. 1. It must be both, h. t. 2 and 4. 10 Inst. 4. 6. 32. This is enforcement of the actual render, specific performance. It applies to legacy (C. 6. 43. 1). There may perhaps even be enforcement of a promise to serve (C. 7. 45. 14) but here money *condemnatio* was usual (42. 1. 13. 1). No trace of specific performance in Sale. In English law specific performance began under Wills. 11 49. 4. 1. 5. Cond. to "*whole debt with interest*," "*what you have received*," are invalid. The Inst. say there must be such certainty as is possible, an obscure utterance. 12 *Ante*, § CCXXVI. 13 *Ante*, § CCXVIII. 14 *Beneficium competentiae*, *de peculio*, etc. 15 C. 7. 47. 1. 1. As to costs, Costa, *Profilo storico*, 176. 16 C. 7. 45. 14. 17 System further elaborated in the Novels. Nov. 1; Nov. 96. 2. As to the possible operation of the same idea in a narrow field (*iudicia contraria*), *ante*, § CCXVIII. As to still wider application in classical law, *post*, § CCXXXIV.

If the defendant satisfied the judgment, the matter ended, but if he did not, there was, apart from execution, a new institution, *i.e.* appeal[1]. The appeal was to a higher court which varied according to the nature of the court of first instance[2], from the *iudex* to the magistrate who named him, from municipal magistrates to the praetor at Rome, so long as his functions were real, or in some few cases to the *iuridicus*, later to the *praeses*, from the *praeses* to the *praefectus praetorio*, and finally to the Emperor, except where the case had gone before the *praefectus praetorio*, who was unappealable except by an act of grace[3]. And there was no appeal to the Emperor except in matters of importance. In the late Empire a special appeal court of two delegates of the Emperor was appointed to try appeals to him[4]. Under Justinian there might not be more than two appeals on any one decision[5].

Notice of appeal must be given within very few days[6], and the appeal proceeded also with little delay, rules somewhat relaxed by Justinian. It might be on the final judgment or on one of the interlocutory judgments, though some of these latter were unappealable in late law and practically all under Justinian[7]. The court either confirmed the decision, in which case the appellant incurred penalties to the court, and to the other party, or altered it; interlocutory judgments apart, it was not remitted for judgment to the court below[8].

The Emperor, as magistrate, might sit in first instance or appeal, but his intervention was more usually in other ways. The most important was *consultatio* or *relatio*[9], the latter term seeming to mean the letter of reference and the former the accompanying *dossier*[10]. The process was used where an official, in doubt, before deciding, sent a *relatio* to the Emperor, the parties being informed, and any document they wished to send being included[11]. Enactments from time to time restricted his right to relieve himself of difficulty in this way. The answer, which was

1 C. Th. 11. 36. 18; Nov. Th. 17. 2; C. 7. 4. 15. It may have been applied to *formula* in its last days, as a slight circumstance might decide the mode of trial, but there is no proof of this. Appeal must be distinguished from *relatio*. 2 Details, Bethmann-Hollweg, *C.P.* 3. 89. 325 sqq. Costa, *Profilo storico*, 178 sqq. 3 C. Th. 11. 30. 16; C. 7. 62. 19; Nov. Th. 13; C. 7. 42. 1. There may be *supplicatio* after they have become *privati*. 4 C. 7. 62. 32. 5 C. 7. 70. 1. 6 Bethmann-Hollweg, *C.P.* 3. 328. 7 C. Th. 11. 36. 18; Nov. Th. 17. 2. 2; C. 7. 45. 16. Bethmann-Hollweg, *C.P.* 3. 327. Justinian, having excluded such appeals generally, strikes out the relative provisions in the Theodosian code while reproducing the enactments so far as they deal with other matter. Gradenwitz, *Z.S.S.* 38. 35 sqq., thinks such appeals excluded much earlier. 8 Bethmann-Hollweg, *C.P.* 337. 9 See Bethmann-Hollweg, *C.P.* 3. 90. 332–41. Andt, *La Procédure par Rescrit*, was not available when the text was printed. 10 C. Th. 11. 29. 3 and 4; C. Th. 11. 30. 1. 11 A party to a dispute who sought to remove the matter from the ordinary procedure by seeking a *relatio* without bringing the other party into the matter by ordinary litigation lost his case and his right. C. Th. 11. 29. 6.

in the form of a rescript, sometimes gave a judgment and sometimes stated a principle and remitted the matter for actual judgment[1]. In later law the *relatio* went, sometimes, not to the Emperor himself but to his principal minister. All this refers to *consultatio ante sententiam*, and officials were warned that it was to be so used, and not after judgment, to prevent suitors from appealing[2]. But *consultatio post sententiam* was common after Constantine. The method was the same. It was mainly used in case of judgments of high officials not ordinarily appealable.

Another method was *supplicatio*. This was petition to the Emperor by a private person. It was not allowed when the question was already before a court or had been decided and not properly appealed[3]. It was mainly used to bring matters before the Emperor or his delegate, in first instance, where for any reason it was unlikely that justice would be done, *e.g.* where the claimant was humble and the opponent a "*potentior*," or where the claimant was of too high rank to go before the ordinary court, or the decision was of an unappealable magistrate. It was decided by rescript, but if no reason appeared why it was not tried in the ordinary way, it was remitted. It was allowed if a *iudex* put obstacles in the way of appeal, and this seems to have paved the way to application of it by way of appeal from decisions not properly appealable.

If the final judgment was *absolutio* the matter ended, subject to *calumnia*. If it was *condemnatio*, no longer appealable or confirmed on appeal, there might be execution of judgment. There must be a delay to give the defendant an opportunity of satisfying it[4]. When this had expired execution proceeded. Whether personal seizure lasted at all into this system is not certain, but the system of *bonorum venditio* to satisfy a judgment was certainly gone. The judgment being no longer a result reached by agreement between the parties the obligation to satisfy it was not enforced by *actio iudicati*. Appeals provided against the evils met by allowing defence to *actio iudicati*, and the penalties of unsuccessful appeal replaced the double liability. If the judgment was for a specific thing the *officiales* seized the thing and gave it to the plaintiff[5]. If it was for money there was a delay, after which the *officiales* seized some part of the debtor's property (*pignus ex causa iudicati*) to satisfy the claim and charges. After two months, if the claims were not paid, the *pignus* was sold at auction by the *officiales*[6]. Creditors might bid. If the sale produced too little, there might be further seizure[7]. The creditor,

1 See *ante*, §§ VII, VIII, as to the importance of this rescript procedure. Andt, *op. cit.*, shews that under *consultatio* there was normally a definite decision. The cases of remission are *supplicationes*, and the reply a *rescriptum ad preces*, a special way of beginning a suit. 2 C. Th. 11. 29. 2. 3 C. 1. 21 *passim*; h. t. 3 makes one, who brings a forbidden *supplicatio*, *infamis*. 4 42. 1. 31. J. makes it four months. C. 7. 54. 2, 3. 5 25. 5. 1. 2; 43. 4. 3. pr.; 6. 1. 68. 6 42. 1. 31; C. 8. 22. 2. 7 42. 1. 15. 2.

if there was no buyer, might, if he would, take the goods in payment of the debt[1].

Though the sale of a man's estate was no longer the effect of an unsatisfied judgment, it might still occur in any case of insolvency. This was *distractio bonorum*, already mentioned as a mode of execution of judgment against one of high rank[2]. In later law it was used only where there were several unsatisfied judgments or clear and undisputed claims, or the insolvency was undisputed. There was *missio in possessionem*, and a person was appointed to conduct the sale, after a delay which under Justinian was very long[3]. He was called *curator bonorum*, and, though he seized the whole, he did not sell in mass but in detail[4], and for a price, not a dividend. Thus there was no question of any person taking the place of the debtor, or of rights and liabilities in the buyer. The resulting money was divided with the same privileges and priorities as in *bonorum venditio*, and where a debtor made a voluntary *cessio* to his creditors the old rules of *cessio bonorum* for the protection of the debtor still applied[5].

1 42. 1. 15. 3. 2 *Ante*, § CCXIX. 3 C. 7. 72. 10. 4 See, *e.g.*, 42. 5. 9. 5. The whole story of the various *curationes bonorum* is obscure and controverted. See Degenkolb, *Magister und Curator*, 18 sqq. The *curator* appears to be normally appointed by the magistrate though with consent of the creditors (42. 7. 2. pr.), but there are texts which speak of him as appointed by the creditors themselves. See, *e.g.*, 17. 1. 22. 10; 42. 7. 5. These texts which treat the *curator* as a simple mandatary of the appointing creditors may refer to a private, extra-judicial arrangement. But see Degenkolb, *cit.* D. 17. 1. 22. 10 seems to deal with two hypotheses; where the *curator* having sold has not handed over the money, he is liable *ex mandato* to those who took part in the appointment, and *ex negotio gestio* to those who did not. But where he has completed his mandate he is under no further liability to anybody, but the absent creditors may have a claim against the creditors under whose mandate the property was sold and who have received the price. 5 42. 3 *passim*; *ante*, § CCXIX.

CHAPTER XIV

THE LAW OF PROCEDURE (*cont.*). INCIDENTAL RULES OF PROCEDURE

CCXXVIII. Actions *in rem, in personam*, p. 668; formulation, 670; CCXXIX. *Iudicia stricta, iudicia bonae fidei*, 672; CCXXX. *Condictio*, 675; varieties of *condictio*, 676; CCXXXI. *Actio civilis, actio honoraria*, 678; *Fictitia, ib.*; Rutilian, 679; *in factum, ib.*; *Actio utilis*, 680; CCXXXII. *Iudicia Legitima, I. quae imperio continentur*, 681; CCXXXIII. *Actiones Perpetuae, Temporales*, 683; *Actiones ad rem persequendam, ad poenam persequendam*, 684; Actions transmissible or not, to or against *heres*, 685; CCXXXIV. *Actio directa, adiectitiae qualitatis*, 686; *Actio in simplum, duplum*, etc., *ib.*; *Actiones in quibus in solidum, non semper in solidum persequimur*, 687; *Actio popularis, privata*, 688; CCXXXV. *Litis contestatio*, 689; *Exceptio rei iudicatae vel in iudicium deductae, ib.*; CCXXXVI. *Exceptio rei iud.* in later law, 693; Other effects of *litis contestatio*, 694; CCXXXVII. *Plus petitio, minus petitio, ib.*; CCXXXVIII. *Compensatio*, 696; in later law, 699; CCXXXIX. Representation in litigation, 700; CCXL. Security in litigation, 704; in case of representation, 705; CCXLI. *Translatio Iudicii*, 706; CCXLII. Cumulation of actions, 709.

CCXXVIII. Classification of actions. Actions can be classified[1] from many points of view, of which the more significant are now to be considered.

Actions *in rem, in personam*. This distinction, which corresponds to our modern distinction between rights *in rem* and *in personam*, was based not on what seems to us the primary distinction, that between the rights, but on what was to the Romans the primary distinction, when the expressions were framed—that between the remedies. It dates, indeed, from days when men did not readily face abstractions. The *actio in rem* was an action for a physical thing, rather than the assertion of a right available against everyone, and it has been already noted that an *actio in personam* in its origin was thought of rather as a claim to a person[2]. But for classical and later law the two types may be regarded as means for the enforcement of, respectively, rights *in rem* and *in personam*.

The typical *actio in rem* was *vindicatio rei*, with its claim "*rem Auli Agerii esse ex iure Quiritium.*" This is the "*formula petitoria.*" The other possible *formula*, "*per sponsionem,*" was tried as a personal action on the *sponsio*[3], though the operation of the securities gave it such similar effects that it is spoken of as a form of real action[4]. No doubt the *formula petitoria* gradually superseded the other[5]. The action covered all

1 Inst. 4. 6. 1–31. 2 See *ante*, § cxcv, "*se solvere.*" 3 See *ante*, § ccxiv. See however Cuq, *Manuel*, 296, for a different view. 4 *E.g.* G. 4. 91. 5 Though one in possession does not need to vindicate, Justinian tells us (Inst. 4. 6. 2) that there is

accessories and fruits from *litis contestatio*[1], but not earlier fruits, which so far as recoverable at all must be claimed by independent action[2]. On the other hand the defendant was entitled from the time of Hadrian onwards, to claim by *exceptio, ius retentionis*, but not by action, an allowance for expenses to an extent which varied from time to time and according to his good or bad faith[3].

Ownership was not the only subject of actions *in rem*. The *hereditatis petitio*, though the right to a *hereditas* cannot strictly be called *dominium*, seems to have followed the same form: "*hereditatem* (or "*partem hereditatis*") *Titii Auli Agerii ex iure Quiritium esse*[4]." The actions for civil rights *in rem* less than ownership, *e.g.* usufruct or praedial servitude, are in the form "*ius ususfructus Ai. Ai. esse*," "*ius eundi, in fundum Cornelianum, Ai. Ai. esse*[5]." The scheme of remedies on such rights set forth in the Sources provided an *actio confessoria*[6], the action claiming the right, and an *actio negatoria*, the action denying the right: "*ius illi non esse eundi*[7]," etc. It may not at first sight be clear what was the need for this action. But it would not suffice to interfere with the enjoyment, leaving the claimant to bring action for enforcement of the right, since if he had been in actual enjoyment an interdict would be at his service by which he would usually be restored to his enjoyment without proof of right, so that the owner of the land would be no better off[8]. The same thing might of course be said if the dispute were one of ownership, and yet there was no *actio negatoria* in that case; the plaintiff never put his case in the form of denial of the other party's right, but asserted his own. In fact the principle was the same here; the plaintiff asserted his ownership free of this right. But, his ownership not being disputed, the mere allegation that the thing was his would be of no use to him. What he had to shew was that the alleged servitude did not exist. The negative form was a mere cloak to the fact that the owner was asserting his right as strictly as in *vindicatio*[9].

"*unus casus*" in which a possessor "*actoris partes obtinet.*" Of this the oldest and simplest explanation is this of action by *dominus* against, *e.g.*, depositee, but many others are offered. See Moyle, ad l. and Girard, *Manuel*, 347, and literature there cited. See *ante*, § XCI in f.

1 6. 1. 16; h. t. 17; h. t. 20. 2 13. 7. 22. 2. See Pernice, *Labeo*, 2. 1. 350 sq.; as to *b. f. possessor, ante*, § LXXXII. 3 6. 1. 37; h. t. 48; h. t. 65; C. 3. 32. 5. As to a liability in classical law, extinct under Justinian, to pay twice their value in certain events, Petot, *Ét. Girard*, 1. 211 sqq.; *fructus duplio*. 4 See Lenel, *E.P.* 174. 5 *Ib.* 188. 6 8. 5. 2; h. t. 4. 2. 7 8. 5. 2. pr. 8 See, *e.g.*, D. 43. 19 *passim*. 9 7. 6. 5. 6; 8. 5. 2. pr. The former text contemplates *actio negatoria* in usufruct by an owner in possession, which looks like a voluntary acceptance of the burden of proof; see 22. 3. 2, "*ei incumbit probatio qui dicit non qui negat.*" But the question of the burden of proof in this case is much disputed. See Girard, *Manuel*, 356; Windscheid, *Lehrbuch*, § 198, nn. 15, 16. The natural thing would be to leave the fructuary to bring his claim. But many circumstances might make it desirable to "quiet the title," *e.g.* an alleged fructuary might be claiming from former tenants. The case of usufruct suggests another point. An

These remedies give rise to two questions. The name *actio confessoria* was applied in classical law to the Aquilian action for damage where the defendant had admitted the act; the adjective expresses the fact of *confessio*[1]. In the present case where the word denotes assertion of right it is found only in the Digest, and in extracts from only one *liber* of Ulpian's treatise "*ad edictum*[2]." It is possible therefore that the name is Byzantine[3] and that the classical law spoke of *vindicatio ususfructus*, *actio de itinere*, and the like, though the name of the other *actio, negatoria*, is probably classical. There are also traces of an *actio prohibitoria* in which the owner alleges "*ius sibi esse prohibendi Nm. Nm. ire*," etc.[4] This seems to fill the same function and its purpose has been variously explained, in fact it is quite uncertain[5].

Modelled on the civil *vindicatio* there were also praetorian actions *in rem*. Such were the *actio Publiciana*[6], the *hereditatis petitio possessoria*[7], and certain *vindicationes utiles* already mentioned[8], all of which are stated as *actiones fictitiae*.

Actions *in rem* had the general characteristic that the *intentio* alleged a right in the plaintiff and did not mention the defendant; it was not a question of a person, but of a *res*. This came to be regarded as the mark of an *actio in rem*, so that we get certain actions called "*actiones in personam in rem scriptae*." Justinian[9] so describes the divisory actions, which were clearly *in personam*. The same may be true of *ad exhibendum*[10], which as we know it was certainly a civil action, but its formulation is very uncertain[11]. Conversely, the *actio negatoria*[12] mentioned the name of the defendant. But it will be noticed that this

owner claiming possession will bring a *vindicatio*. If the defence is not that he is not owner, but that deft. has a usufruct, what is the defence? It is not a *plus petitio*, as, for this purpose at least, usufruct is not a part (at least where the usufruct is in a third party, 50. 16. 25). The answer is said to be an *exceptio ususfructus*, but in fact this is not well evidenced. A text sometimes cited, 7. 9. 7. pr. (Keller-Wach, *C.P.* 185), deals with usufruct not validly created and is analogous to *exceptio rei venditae et traditae*. This *exceptio* would not serve the purpose if, *e.g.*, the usufruct was derived, as it might be, from one from whom *vindicans* did not derive title, *e.g.* the present *vindicans* having usucapted since it was created. For the more general *exceptio* the *exceptio pignoris* or *hypothecae* gives no analogy, for these are not civil law rights.

1 *Ante*, § CC. **2** 8. 5. 2; h. t. 4; 7. 6. 5; Ulp. ad Ed. 17. **3** Segré, *Mél. Girard*, 2. 511 sqq. **4** 7. 6. 5. pr.; 8. 5. 11. For other reff. see Segré, *cit.* 527 sqq. **5** For Lenel (*E.P.* 186) it applies to praetorian servitudes, but as to these, *ante*, § XCIV. For Karlowa, it is for the case where an infringement is in progress, but not complete, *e.g.* a building (*R.Rg.* 2. 469). For Segré (*op. cit.* 527) the two actions are mere alternatives, but as we learn that both were stated in the edict (*Bas. Supp.* ed. Zachariae, 112; Lenel, *E.P.* 185) this seems improbable. For Beseler, *Beiträge*, 1. 79, it is Byzantine. **6** *Ante*, § LXXI. **7** *Ante*, § CXXXVII. **8** *Ante*, § XCI; as to *vindicatio* for provincial land, *ante*, § LXIX. **9** Inst. 4. 6. 20. There are no doubt others. *Metus* is said to be one, but this is an *actio in factum*. **10** Girard, *Manuel*, 1035. **11** Lenel, *E.P.* 213. **12** *Ante*, p. 669.

was not as defendant; it was as defining the extent of the right actually claimed; the claim was of ownership, free of a certain right *in rem*, *i.e.* a servitude vested in *B*. There might be other persons having such rights, but this was not in question.

Actions *in personam* were very numerous. Each type of obligation had its own action. The *formula* stated the matter as an obligation in the defendant, the word expressing obligation being usually "*oportere*." The nature of the obligation was expressed by technical words which varied in the different cases. In contractual or quasi-contractual obligation for a certain sum or thing or quantity it was "*dare oportere*[1]." For an *incertum* it was "*dare facere oportere*[2]." In *condictio incerti* it may have been "*facere oportere*[3]." In the *actio furti* it was "*damnum decidere oportere*[4]." For the Aquilian action the form is disputed[5]. In some actions it seems to have been "*praestare oportere*," or "*dare facere praestare oportere*." Lenel[6] finds this in the divisory actions and in *pro socio*. Others find it in *de peculio* and others of that group. But the formulation of all these various actions is uncertain[7]. Of the divisory actions Justinian makes the odd statement that they seem to be both *in rem* and *in personam*[8]. This is due to the fact that he confuses the claim with the ownership which it implied; in fact they were quasi-contractual actions *in personam*, to which the *adiudicatio* gave an air of being *in rem*. They were double in the sense that each party was plaintiff and defendant. The formulation has been much discussed. In their original form they dealt only with division, and the later incorporation of provision for allowances for expenses and equalising payments led to a specially complex formulation. It has been suggested that a separate *formula* was issued to each of the parties[9].

The foregoing propositions assume the classification into actions *in rem* and *in personam* to be confined to actions formulated *in ius*, whether as civil law, or as praetorian, actions, the latter having a fiction or other device (*formula Rutiliana*[10], *diei repetitio*[11]). This is clearly the point of view of Gaius[12], but Justinian, while retaining the language of Gaius[13], brings in actions *in factum*, adding a great number of actions *in personam* and some *in rem*. Thus the *actio Serviana* and *actio hypothecaria* of the secured creditor[14] are called actions *in rem*, for though, as we have seen[15], *possessio* was not habitually thought of as a *ius in rem*, the pledge creditor

1 G. 4. 4; 4. 18. We have seen that the *actio operarum* claimed the services as "*danda*," not "*facienda*" (*ante*, § CLX). 2 G. 4. 5; 4. 41. As to *actio rei uxoriae*, *post*, p. 672. 3 Lenel, *E.P.* 153. 4 G. 4. 37. 5 See Lenel, *E.P.* 194. 6 *E.P.* 202, 205, 287; G. 4. 2; Aut. G. 108. 7 See Lenel, *E.P.* 260. 8 Inst. 4. 6. 20. 9 See for the principal literature on the matter, the reff. in Lenel, *E.P.* 202; Girard, *Manuel*, 639. 10 G. 4. 35. *Ante*, § CXLII; *post*, § CCXXXI. 11 *Post*, § CCXLI. 12 See G. 4. 3. 13 Inst. 4. 6. 2, 15. 14 Inst. 4. 6. 31. 15 *Ante*, § LXXII.

had something more than a mere possessory right, since his right was enforceable against a *vindicatio*. Lenel gives other instances[1].

CCXXIX. *Iudicia stricta* (*actiones stricti iuris*) and *iudicia bonae fidei*. The name *actio stricti iuris* seems to be due to Justinian[2]. The classical name[3] expresses the important fact that the distinction is found in the *formula* and in the proceedings *in iudicio* founded thereon. As we shall see, nearly all the results of the distinction were matter for the *iudex*[4]. It was expressed by the insertion, in the *intentio*, in *bonae fidei iudicia*, of the words *ex fide bona*—"*quidquid paret ob eam rem Nm. Nm. Ao. Ao. ex fide bona dare facere oportere*[5]." It is clear that the name *bonae fidei iudicia* applied only to certain contractual and quasi-contractual actions formulated *in ius*. This is shewn by the various lists we possess which come from different dates, a fact reflected in the appearance of new, and disappearance of obsolete, cases[6]. They were the actions on consensual contracts, on *commodatum*, *pignus* and deposit (when formulated *in ius*), *fiducia*, *rei uxoriae*, *negotiorum gestorum*, *tutelae*, *familiae erciscundae*, *communi dividundo*[7], and the *actio praescriptis verbis*[8]. Justinian also gives *hereditatis petitio*, but this is a hasty analogy. By his time there had been so much legislation, on points affected by the distinction, that his proposition means in effect merely, that in this action allowances for expenses and so forth might be claimed without an *exceptio doli*, a characteristic which, as his language shews, had suggested the same view to earlier lawyers[9]. Further he abolished the *actio rei uxoriae* and replaced it by an *actio ex stipulatu*, for restoration of *dos*[10], to which he gives the *bonae fidei* character of the old *actio rei uxoriae*, quite out of place in an *actio ex stipulatu*.

Although it seems clear that *iudicia bonae fidei*, in classical law, were always contractual, or quasi[11], we have no corresponding lists of *iudicia*

1 *E.g.*, *actio prohibitoria*, *ante*, p. 670; *actio vectigalis*, *E.P.* 183, etc. 2 Inst. 4. 6. 28. 3 G. 4. 62. 4 It is possible that *stricta iudicia* descend from *sacramentum*, where the sole issue was whether the party had sworn falsely or not. This would explain the origin of the rule in *stricta iudicia* on the point, *omnia iudicia absolutoria*, *ante*, § CCXVII. 5 G. 4. 47. 6 Cicero, *de Off.* 3. 15. 61; 3. 17. 70; *de N. Deor.* 3. 30. 74; G. 4. 62; Inst. 4. 6. 28. 7 No information as to *finium regundorum*. 8 This list, based on that in the Institutes, does not necessarily represent classical law. Thus Biondi, *Iudicia bonae fidei*, 176 sqq., excludes the *actio rei uxoriae* as having no "*ex f. b.*" in the *intentio*, its equitable character being due to the words "*aequius melius*" in the *condemnatio*, the divisory actions, the *actio pigneraticia*, as having in classical law only a *formula in factum* (see also Levy, *Z.S.S.* 36. 1 sqq.), and the *actio praescriptis verbis*, as not then existing. His list is *empti venditi*, *locati conducti*, *negotiorum gestorum*, *mandati*, *depositi*, *fiduciae*, *pro socio*, *tutelae* and *commodati*. This is the list of Gaius with the addition of *commodati*, which he considers, not without probability, to have appeared in that list at a point now illegible (G. 4. 62). 9 Inst. 4. 6. 28; cp. C. 3. 31. 12. 3. The dispute probably was only whether allowances could be claimed without *exceptio doli*. 10 Inst. 4. 6. 29; cp. C. 5. 13. 1. 11 As to delictal actions, *post*, p. 675.

stricta and it may be that all *formulae in ius*, in actions other than penal, were *strictae* or *bonae fidei*. This might be suggested by the question, above mentioned, in *hereditatis petitio*, and also by the fact that in the material points the rules of *rei vindicatio*, the typical real action, closely resembled those of *stricta iudicia*. But the important practical rule was that all actions on unilateral obligations on contract, or quasi, gave *stricta iudicia*, all other actions, formulated *in ius*, on contract or quasi, *bonae fidei*[1].

The following were the main practical differences:

(i) In *stricta iudicia* nothing could be considered which was not in the *formula*. It was this which made it difficult to admit that any event subsequent to *litis contestatio* could entitle the defendant to *absolutio—omnia iudicia absolutoria*[2]. But the most important result was that in *stricta iudicia* all collateral defences must be expressly stated by *exceptio*, otherwise they could not be considered. In the others, by virtue of the words "*ex fide bona*" the *iudex* could take them, or some of them, into account[3], though they were not expressly raised. How far this went is not clear. Facts which would have given rise to *exceptio doli*, *metus*, *pacti conventi*[4] could certainly be proved; in such actions they were within the *officium iudicis*. There are indeed texts which speak of *exceptio doli*, *transactionis* and the like in *bonae fidei iudicia*, but these do not, mostly, imply express *exceptio* and those which do are commonly thought interpolated[5]. We are not told of other *exceptiones* that "*bonae fidei iudiciis insunt*"; on the other hand they are nowhere said to be necessary. In view of the large use of *exceptio doli* to introduce other defences[6], and of the fact that *exceptio doli* could be used as alternative to other *exceptiones*, *e.g.*, *rei venditae et traditae*, it would seem that the principle was true of all equitable *exceptiones*[7]. In Ulpian's time, if the text is genuine, the *exceptio doli* could replace any *exceptio in factum*[8], and we know that such *exceptiones* as that *e lege Cincia* could be replaced by an *exceptio in factum*[9], so that it is possible that almost any *exceptio* could be understood in *iudicia bonae fidei* if the plaintiff was aware of the existence of the defence. Indeed Ulpian's language seems to go beyond this. It is *dolus* to continue a claim even though it was begun in good faith, on discovering the facts which exclude it[10]. But apparently

1 See Monro, *de furtis*, App. II, as to *condictio furtiva*. 2 *Ante*, § CCXVII. 3 Vat. Fr. 94; D. 2. 14. 7. 5, 6; 10. 3. 14. 1. 4 *Ib.* See 50. 17. 116. 5 *E.g.* 24. 3. 49. 1, compared with Vat. Fr. 94; Bethmann-Hollweg, *C.P.* 2. 284. 6 *Compensatio*, *post*, § CCXXXVIII; in the law of *accessio*, *ante*, § LXXVIII; more widely under Justinian, Beseler, *Beiträge*, 1. 108. 7 See for a number of instances, Accarias, *Précis*, 2. 1074. 8 44. 4. 2. 5; Beseler (*Beiträge*, 1. 107) thinks it due to Justinian. See also Biondi, *Iudicia Bonae fidei*, 3 sqq., who holds that only *doli*, *pacti*, *metus* and *rei iudicatae* were so implied. 9 Vat. Fr. 310. 10 44. 4. 2. 5. The limitation at the end of the text is supposed by Pernice, *Labeo*, 2. 1. 250, to be interpolated. But it is not safe

the *exceptio rei iudicatae* had always to be pleaded[1]. On these points *rei vindicatio* was on the same footing as *stricta iudicia*[2].

(ii) In *stricta iudicia* the literal meaning of words must be taken, while in *iudicia bonae fidei* account might be taken of terms usually implied, of customary interpretation of words, and so forth[3].

(iii) The rules of *compensatio* were different[4].

(iv) The rules of *pacta adiecta* were different[5].

(v) In *bonae fidei iudicia* interest was due from *mora*[6]. In *stricta iudicia* it could not be recovered at all, even from *litis contestatio*[7]. If it had been agreed for, this was a separate contract[8]. The case of legacy was an exception[9]. Gaius says that Julian held, and others were coming to his view, that in *sinendi modo*, interest was due from *mora*[10]. Paul applies this to all legacies[11]. They were certainly claimed by a *strictum iudicium*[12]. As the action on *l. sinendi modo* was for an *incertum*, "*quidquid dare facere oportet*[13]," there was no formal difficulty in including interest. It was no doubt a question of the testator's presumed intent, but, though Paul is quite general, it is difficult to apply the notion to a legacy of a certain sum, where the *intentio* would be for that sum. Under Justinian when the *formula* was gone there was no procedural difficulty. In *rei vindicatio* there was no question of interest.

(vi) In *bonae fidei iudicia*, *fructus* were due from *mora*; in *stricta iudicia* from *litis contestatio*. This was laid down on equitable grounds by the Sabinians and accepted by the later classics[14]. As this could not apply to claims of *certa pecunia*, there was no procedural difficulty. In legacy[15] the history is as in the case of interest[16]. In *rei vindicatio* fruits were always due from *litis contestatio*[17]. In *hereditatis petitio*, however, all existing fruits could be recovered in the same action, under the *sc. Iuventianum*[18], and the *mala fide possessor* of the *hereditas* must account for all fruits[19].

(vii) The distinction in reference to the rule "*omnia iudicia absolutoria*" has already been considered[20].

(viii) The mode of estimation of damages varied so much in different cases and circumstances that this has been most conveniently dealt with

to infer from interchangeability in *iudicia stricta*, which in any case involves raising *in iure*, to equal treatment in *iudicia bonae fidei* which does not.

1 *E.g.* 44. 2. 22. Biondi, *op. cit.* 38 sqq., holds that *rei iudicatae* was implied and that this text refers to the *formula in factum*. 2 *E.g.* 44. 4. 4. 7. 3 21. 1. 31. 20. 4 *Post*, § CCXXXVIII. 5 *Ante*, § CLXXXII. 6 *Ante*, § CLXXXVIII. 7 *Ib.* 8 19. 5. 24. 9 In *fideicommissa* interest was due from *mora*, but these cases were not tried by *formula*, *ante*, § CCXXV. 10 G. 2. 280. 11 P. 3. 8. 4. 12 G. 2. 204. 13 G. 2. 213. 14 22. 1. 38. 1, 7, etc. 15 And *fideicommissum*. 16 G. 2. 280; P. 3. 8. 4. 17 *Ante*, § CCXXVIII. A *mala fide possessor* was liable for all fruits, but in a different action, *i.e.* a *vindicatio* of the fruits. 18 5. 3. 20. 6, 6 a. 19 5. 3. 20. 6 c. 20 *Ante*, p. 673.

under the obligations themselves. But Ulpian tells us that in *stricta iudicia* the *interesse* was to be valued as at *litis contestatio*, in *bonae fidei iudicia* as at judgment[1]. This is said in connexion with *iuramentum in litem*. The plaintiff in swearing the value might include considerations which did not exist at *litis contestatio*, and no doubt the *iudex* might do the same. If in such cases the thing was less in value at time of judgment, from a cause not imputable to the debtor under the rules of his liability, this would benefit him. But this was applied, in later law at least, in *stricta iudicia* also[2], and in *rei vindicatio*[3].

Delictal actions do not seem to have been regarded as *stricta iudicia*. In the case of *furtum* it must be remembered that there was an independent *actio ad rem persequendam*. If *vindicatio* was brought, the thief, a *mala fide* holder, was always in *mora*. If *condictio* was brought, this was quasi-contractual; its special rules have already been dealt with[4]. But in *rapina* there was no other action. It was however *in factum*, and the rules making the *interesse* cover *lucrum cessans* and *damnum emergens* cover the principal points. The same is true of the Aquilian action, which was *in ius*. There could hardly be a question of equitable *exceptiones* and pact was a complete defence. The *actio iniuriarum* was *in factum* and "*ex bono et aequo*," a class to be considered later[5].

CCXXX. *Condictio*. Most *stricta iudicia* (confining the term to actions *in personam*), but not all, were *condictiones*. The name *condictio* seems to be primarily used to denote an action of which the fundamental notion was readjustment of relations where one man was unjustly enriched at the expense of another, as in *condictio indebiti*[6]. The action on *stipulatio* for an *incertum* was not *condictio*; it was *actio ex stipulatu*[7]; that on legacy *per damnationem* or *sinendi modo* was not *condictio*; it was the *actio ex testamento*[8]. Both these set forth the "*causa*" of the *obligatio* in the *intentio*, but it was the characteristic of *condictio* that it did not[9]. Thus the *intentio* of an action on a money loan runs: "*si paret Nm. Nm. Ao. Ao. HS.* 10 *dare oportere*." It is not clear how the *iudex* was informed of the exact issue; it can hardly have been by a *praescriptio* or *demonstratio*, for the language of Cicero shews[10] that the plaintiff could prove any *stricti iuris obligatio* of the amount claimed[11].

There was only one action called *condictio*; it was a general action with many applications. There is little doubt that in the formulary

1 13. 6. 3. 2. 2 16. 3. 12. 3; h. t. 14. 1. 3 6. 1. 16. pr. As to actions *in factum* (*post*, § CCXXXI) which do not appear to be under either of these heads, the damage was sometimes estimated as at *l. c.*, *quanti ea res est* (*e.g.*, *constitutum*, Lenel, *E.P.* 245), and sometimes at judgment, *quanti ea res erit* (*e.g.*, *metus* and *dolus*, Lenel, *E.P.* 110 sq.). 4 *Ante*, §§ CLXXXVII sq., CXCVIII. 5 *Post*, § CCXXXI. 6 Not a general principle, *ante*, § CLXXXVII. 7 Lenel, *E.P.* 147. 8 *Ib.* 355. 9 *Ib.* 230, *actio certae pecuniae creditae*. 10 *Pro Rosc. com.* 4, 5. 13–15. 11 See *ante*, § CCXXI.

system the name *condictio* was first applied to claims of a certain sum under a *iure civili* obligation, *i.e.* in just the field of *condictio e lege Silia*. Indeed the fact that in the later action there was or might be a *sponsio* of one-third of the sum in dispute is the chief evidence that this existed in the old *condictio*[1]. But this action is called *actio certae pecuniae creditae*[2], the name *condictio* for it cannot be found before the great jurists[3]. This suggests that *legis actio per condictionem* did not disappear till the *ll. Iuliae*, when the new use became possible without confusion[4].

The texts distinguish different cases of *condictio* by different names. One set of names turns on the "*causa*," the facts which gave rise to the action, *e.g.*, *C. furtiva, indebiti*, etc. This grouping is of little importance from the present point of view; as the *intentio* said nothing about the *causa*, the names are no more than convenient labels for use in treating the substantive law. The names *C. furtiva* and *indebiti* are no doubt classical[5]. *C. ex lege*[6], *ex poenitentia*[7] and the oddly-named *C. causa data causa non secuta*[8] are not classical. *C. ob rem* (or *causam*) *dati*[9] (or *datorum*) and *C. sine causa*[10] are probably classical. Though this multiplicity of names has its uses it obscures the fact that in all its applications *condictio* was one action.

The other distinctions, according to the nature of what was claimed, are more important. From this point of view we get *C. certi, certae pecuniae, triticaria, incerti*. But of this terminology the surviving classical texts shew no trace. The names are rare even in the Digest, and it is maintained that all the texts shew signs of interpolation[11]. It is thus uncertain what the classical terminology really was. Some texts appear to confine the name *C. certi* to actions for *certa pecunia*[12], the *actio certae pecuniae creditae*. This fact, coupled with the language of Gaius[13], has led to the view that when the name *condictio* was first applied to these claims for a *certum* there were the two names, *c. certae pecuniae* and *c. certae rei*, which last acquired in later law the name *c. triticaria*[14]. On the other hand it is now generally agreed that the rubric in the Edict, "*si certum petetur*," covered both *certa res* and *certa pecunia*, which would thus both be varieties of *c. certi*. But it is uncertain whether any of these names was in use in classical law. The *condictio* for *certa res* had two forms, that for a specific thing and that for a specific quantity, to

1 *Ante*, § CCX. **2** G. 4. 13. **3** Cicero knows nothing of it. As to the terminology, see Lenel, *E.P.* 227 sqq. **4** See Wlassak, *Röm. Processg.* §§ 10 sqq. **5** They are not found in classical texts independent of Justinian. **6** 13. 2, rub. **7** Gradenwitz, *Interpolationen*, 146. **8** D. 12. 4. The name is not easy to translate. It seems of little use in view of the *cond. ob rem* (or *causam*) *dati* which may be classical. **9** 12. 6. 65. pr. **10** 12. 7. As to the narrow and wide significances of this name and on the scope of these *condictiones* generally, see *ante*, § CLXXXVII. **11** See Girard, *Manuel*, 502. **12** 12. 1. 9. 3; 46. 2. 12, both probably interpolated. Pernice, *Labeo*, 3. 211, n. 2. **13** G. 4. 50. **14** D. 13. 3.

which last alone the expression *triticaria* can properly apply. But this name is almost certainly post-classical. The *formulae* for these cases were set out in the Edict[1]. The inevitable differences, "*dare, dare facere* (*facere*?) *oportere*," would require a model for each. Hence specific labels due either to the compilers or more probably to earlier post-classical writers; terminology did not necessarily stand still in the fourth and fifth centuries.

The so-called *C. incerti* presents difficulties. The action is of late introduction, though not post-classical; the name is probably much later[2]. As a *stipulatio* for an *incertum* or a service gave *actio ex stipulatu*, stating its *causa*, and not a *condictio*, the field of this *condictio* was narrow. But the texts provide many illustrations[3]. A vendor transferring land omitted by error to reserve a servitude agreed on. *C. incerti* lay to have it created[4]. It lay for release from an *obligatio* undertaken in mistaken belief that there was a legal duty to undertake it[5], and to recover what had been given in *precario*[6]. Where by oversight a legacy had been paid without security for the possibility of a Falcidian reduction, *c. incerti* lay to have this given[7]. As to the formulation of this action, Lenel holds[8] that, owing to its late introduction, no model of it appeared in the Edict. He thinks that, like *c. triticaria*, it stated in the *intentio* the specific render claimed; in the particular case of right to release he puts it as "*acceptum facere oportere*," not of course stating the *causa*. On another view the render was stated in a *praescriptio*, the *intentio* being in "*dare facere oportere*[9]." The former view is most widely held.

Gaius appears to speak of the name *condictio* as applicable to all actions *in personam* with an *intentio* "*dari fierive oportere*[10]." This would cover all *iudicia stricta in personam*. A famous text attributed to Ulpian, but mainly compilers' work[11], speaks of *condictio certi* as available wherever a *certum* is due on any kind of *obligatio*, and instances, *inter alia*, legacy, contracts *re*, and even *actio e lege Aquilia*. To this action the name *condictio generalis* has been given[12]. A text in the Institutes[13] makes a *condictio* available as a substitute for any of the actions in *solidum* on a contract by slave or *filiusfamilias*. This has been supposed to refer to the same *condictio*, but it is wider, for, here, the claim would often be for an *incertum*. These texts involve a great widening of the notion of *condictio*. The *obligatio* might be civil or praetorian, certain or

1 Lenel, *E.P.* 225 sqq.; Pernice, *Labeo*, 3. 1. 203. 2 See Lenel, *E.P.* 151 sqq. 3 For the following and others, Girard, *Manuel*, 627. 4 12. 6. 22. 1. 5 19. 1. 5. 1. 6 43. 26. 19. 2. 7 35. 3. 3. 10. 8 *E.P.* 151. 9 Bethmann-Hollweg, *C.P.* 2. 272. 10 G. 4. 5. 11 12. 1. 9. pr., 1. 12 See Von Mayr, *Condictio*, 246, 276. He holds, with Pernice and Mitteis, against Baron, that it is due to Justinian. 13 Inst. 4. 7. 8. Pflueger, *Z.S.S.* 31. 168 sqq., shews Justinian giving *condictio* where *vindicatio* is possible, apart from *furtum*.

uncertain, on a claim *stricti iuris* or *bonae fidei* and even on delict. It is a single remedy under the name *condictio* for nearly all obligations, and the language of the Institutes does not suggest open innovation. But the nature and scope of the action, and even its existence, are the subject of much controversy[1].

The name *iudicium* applied to the classes "*stricta*" and "*bonae fidei*" must not be held to exclude *arbitria*, for the two most characteristic *arbitria*, *communi dividundo* and *familiae erciscundae*, are in the list of *iudicia bonae fidei*. It has been suggested that all *actiones arbitrariae in personam* and *in ius* were *bonae fidei iudicia*, but the better view is that the insertion of the *arbitrium* clause had no bearing on the point, though it is quite likely that in later classical law the *arbitrium* clause might be added in appropriate cases in a number of *bonae fidei iudicia*[2].

The whole classification may be left with the remark that while it is clear that in classical law the distinction was merely one of formulation, equitable defences being as admissible in the one group as in the other, subject to their being expressly raised, the disappearance of the *formula* with its strict rules of pleading rather confused this, but there seems to have been no real change in principle.

CCXXXI. *ACTIO CIVILIS, ACTIO HONORARIA*. The former gave effect to a civil law claim, the latter to a right created by the magistrate[3]. Of the first class many were based on express legislation, the XII Tables, *ll. Plaetoria, Silia, Calpurnia* and so forth, but many were juristic creations. Thus the *formulae in ius* on *commodatum* and deposit, the *actio praescriptis verbis* and others, were purely juristic. Of *actiones honorariae* the great majority were praetorian[4], but there were others; the *actiones redhibitoria* and *quanto minoris* were established by the Aediles[5].

The very numerous *actiones honorariae* are found in all branches of the law. They were of three types:

Actiones fictitiae[6]. These were actions in which some existing action was extended to cases not within its rules, by a direction in the *intentio* that the *iudex* was to proceed as if a certain state of facts existed, which, if it did exist, would give the right. The *actio Publiciana* is a familiar instance. The *iudex* was directed to give judgment for the plaintiff if he would have been owner "*si anno* (*biennio*) *possedisset*[7]." Here the

1 See for discussion, Girard, *Manuel*, 623, 683. So far as Inst. 4. 7. 8 is concerned, it appears to express a tendency already existing in classical times to give a *condictio* where a contract had been made with slave or *ff. iussu patrisfamilias*, the *iussum* being understood to cover general authorisation to trade, *i.e.* the field of *actio institoria*. 12. 1. 29; 14. 3. 17. 5; 17. 2. 84 (interp.). The *iussum* is thought of as a civil source of obligation.
2 *Ante*, § CCXXIV. 3 P. 5. 6. 10; Vat. Fr. 47 a; Coll. 2. 5. 5. 4 G. 4. 110–12.
5 *Ante*, § CLXXII. 6 G. 4. 32 sqq. 7 See G. 4. 36, where however the words

iudex had to assume a certain event whether it had occurred or not. In others an event which had happened was to be assumed not to have happened, *e.g.* where an action was allowed as if a party had not suffered *capitis deminutio*[1]. In some cases a *legis actio* was to be assumed as having occurred, *e.g.* in the *formula* given to the *publicanus*[2], where the fiction was in an unusual form[3]. In some cases the party was feigned to have some characteristic which in fact he had not, *e.g.* the actions to or against *bonorum possessor* with the fiction "*si heres esset*[4]," and the *actio furti nec manifesti* against a peregrine with a fiction "*si civis*[5] *Romanus esset*," needed because statutes did not apply to peregrines unless so expressed. More than one of these fictions might appear in a *formula*, *e.g.* where a *bonorum possessor* of a deceased pledgee brought the *actio utilis e lege Aquilia*. In some cases a *formula* was given "*die repetita*," *i.e.* referred back to an earlier date than the actual. Thus where in an *actio ad exhibendum* the *res* was usucapted during the action, and produced, the defendant was absolved only if he was prepared to accept a *vindicatio* dated back to a time before *usucapio* was complete[6]. We do not know the formulation, but it was probably by fiction.

Rutilian *formulae*, in which one person was mentioned in the *intentio* and another in the *condemnatio*. The simplest instance is the *formula Rutiliana* in which a *bonorum emptor*[7] alleged in the *intentio* a right of the debtor and the *condemnatio* directed condemnation to the *emptor*, or the claimant alleged a claim against the debtor and the *condemnatio* was of the *emptor*. Another possible case is that of action against a *paterfamilias* on contract by a subordinate, in which, on the dominant view[8], the *intentio* stated an obligation in the subordinate (with, if he was a slave, the fiction, "*si liber esset*") and the *condemnatio* was against the *paterfamilias*. But this formulation is disputed. A third case, needing separate consideration, is that in which a party proceeded by a representative[9].

Actions formulated *in factum*. All the foregoing were formulated *in ius*; their *intentio* stated, either directly, or with help of a fiction, a legal claim "*oportere*," "*ius ei esse*," etc. But in the present group the *intentio* merely alleged certain facts and the *iudex* was directed to condemn if he found those facts, and otherwise to absolve. These actions placed a great power in the hands of the praetor and clearly needed

"*fingitur usucepisse*" state the matter inaccurately. If *usucapio* were presumed there would be nothing to try. All that is feigned is a certain lapse of time: the other requirements of *usucapio* must be proved.

1 *E.g.*, *ante*, § CXLI (*adrogatio*). 2 G. 4. 32. It is possible that *manus iniectio* was feigned in some cases. 3 As to possible inferences from the exceptional form, *ante*, § CCXIII. 4 G. 4. 34. 5 G. 4. 37. 6 See *post*, § CCXLI. 7 *Ante*, § CXLII; G. 4. 35. 8 Lenel, *E.P.* 269 sqq. 9 *Post*, § CCXXXIX.

very careful and exact formulation. We have dealt with numbers of them, *e.g.* actions on praetorian delicts[1], actions on deposit, *commodatum* and *pignus*[2], on *pacta praetoria*[3], the *actio Serviana* of the landlord[4]. The most important question in regard to these actions is that of their position in respect of the points which differentiate *bonae fidei* and *stricta iudicia*. Since the *iudex* had to decide on certain facts and no other it seems that *exceptiones* would have to be inserted expressly. But there is a small group of actions *in factum* in which the *iudex* is directed to condemn in "*quantum bonum aequum videbitur*[5]." There do not seem to be many of them[6], and some no doubt became *bonae fidei iudicia* early in classical law[7]. It is likely that in the matter of equitable *exceptiones* they were on the same footing as *bonae fidei iudicia*.

All these types of action were designed by the magistrate and in this sense were *actiones honorariae*. But legislation is not always particular about such distinctions. We have seen that, while nothing could be more praetorian than *bonorum possessio*, the *l. Papia Poppaea* gave *bonorum possessio* in certain cases[8]. The resulting actions while praetorian in form were based on a statute. So too, in at least one case, a statute gave an *actio fictitia*[9]. The statute adopted the praetorian remedy, but it is difficult to call the action an *actio honoraria*[10].

It must be noted that the expression *actio in factum* was not always used in the technical sense. We have seen[11] that it is by the assumption that the name was used untechnically, to cover any action which specified the material facts, however formulated, that the texts dealing with praetorian extensions of the Aquilian action have been more or less harmonised, and also that among the bewildering variety of names given to the *actio praescriptis verbis*, several incorporated the element "*in factum*," though the action was formulated *in ius*[12].

In connexion with *actiones honorariae* the expression *actio utilis* gives rise to some difficulty. The only proposition which can safely be laid down by way of definition of such an action is that every *actio utilis*

1 *Ante*, § CCIII. **2** G. 4. 47. **3** *Ante*, § CLXXXII. **4** *Ante*, § CLXVII. **5** See Lenel, *E.P.* 163, 168, etc. **6** We have no list. The recorded cases seem to be injury to freeman by *res deiectae* (9. 3. 1. pr.), *actio funeraria* (11. 7. 14. 6), *rei uxoriae* (4. 5. 8), damage by wild animal (21. 1. 42), *iniuriarum* (47. 10. 17. 2), *sepulchri violati* (47. 12. 3. pr.), *iudex qui litem suam facit* (50. 13. 6, ? interp.). Other possible cases, Girard, *Manuel*, 1037. **7** *E.g.*, *rei uxoriae*, G. 4. 62. **8** *Ante*, § CXXXIV. **9** *L. Rubria*, XX; Girard, *Textes*, 75. **10** An action might be in more than one of these classes, *e.g.* Rutilian action by *bonorum emptor* on a claim giving an *actio fictitia*. **11** *Ante*, § CCI. Monro, *l. Aquilia*, App. 4. **12** *Ante*, § CLXXXI. It has indeed been contended, but with little acceptance, that this is a mistake, that the expression *actio in factum* has nothing to do with formulation but means any praetorian action, however formulated. But this notion cannot be reconciled with the texts. Pokrowski, *Z.S.S.* 16. 7; 20. 99. See Erman, *Mél. Appleton*, 203. G. 4. 45 sqq.

was an extension, on grounds of utility, of an existing action, and it is probably true that it ordinarily contained in its *formula* some reference to the parent action. It was usually *honoraria* in the strict sense, *i.e.* it was praetorian both in form and origin. But this was not always so. The later jurists no doubt applied the name to an extended action created by juristic activity without the Edict, after the praetor had ceased to be a source of law. An *actio utilis* might be of any of the three types of *actio honoraria*, and probably most *actiones fictitiae* might have been called *actiones utiles*, though there are many to which the name was not in fact applied. On the other hand there was nothing *utilis*, nothing like extension of an existing action, in many *actiones in factum*. There were indeed cases in which an *actio in factum* was itself extended as *utilis* to new cases[1]. Thus the name does not fall in with the above scheme of *actiones honorariae* and *civiles*, but cuts across it in nearly all possible ways.

CCXXXII. *IUDICIA LEGITIMA. I. QUAE IMPERIO CONTINENTUR* (*IMPERIO CONTINENTIA*). *Iudicia legitima*, in classical law, were, according to Gaius, those brought within a mile of Rome before "*unus iudex*," all parties being *cives*[2]. All others were *imperio continentia*. This had nothing to do with other characteristics of the action. A purely praetorian action *in factum* would give a *iudicium legitimum* if it satisfied these requirements; an *actio ex stipulatu* would not, if it did not satisfy them. The word *iudicium* has been here used as meaning the procedure before the *iudex*; the language of Gaius in the above defining text cannot apply to the whole hearing. It is however sometimes used to denote the whole procedure, and it is maintained by Wlassak[3] that this was its original and proper meaning, that *iudicium* was the name of the proceedings *per formulam*, as opposed to *legis actio*. As "*legitimus*" means statutory he concludes that *iudicia legitima* were those in which the *formula* was issued under the directions of a *lex*[4], so that *imperium* played no part in it, from the Roman point of view, and that *legis actio* had nothing to do with the conception[5]. Thus, for the first introduction of *iudicia legitima*, the *lex* in question was the *l. Aebutia*, which authorised *formulae* generally, but did not command them in any case[6]. The limitation to *cives*, he holds, followed from the principle that a *lex* was essentially between *cives*, and the restriction to *unus iudex* merely expressed the fact that *unus iudex* was the normal civil tribunal; the collegiate courts being later and exceptional. The limitation to Rome was a mere result of the fact that the only tribunal, that of the praetor, sat at Rome. The *ll. Iuliae* substituting *formula* for *legis actio* were nearly contemporary

1 13. 5. 19. 1. 2 G. 4. 104. 3 *Röm. Processgesetze*, 1. ch. I. 4 *Ib.* 37 sqq. 5 *Ib.* 54 sqq. 6 *Ib.* ch. II, 103 sqq.

with the *l. Iulia municipalis*, by which a uniform system of procedure was laid down for municipalities, and Wlassak holds that thereafter a *iudicium* in a municipality might be *legitimum* if it satisfied the other requirements. Gaius' limitation[1] to Rome is to be explained by the fact that he was writing of Rome and disregarded the municipalities altogether.

Whatever be thought of this historical explanation[2] the distinction is clear and important, since the effects differed in many ways. Thus *adiudicationes* in *iudicia imperio continentia* gave only praetorian rights[3]. A woman needed *auctoritas tutoris* to be a party to a *iudicium legitimum*[4]. A *tutor praetorius* was needed if such a *iudicium* arose between *tutor* and ward[5]. A *iudicium legitimum* was at once ended if a party suffered *capitis deminutio*[6]. The old obligation being destroyed this was tantamount to destruction of his right, to the advantage of the other; presumably there might be *restitutio in integrum* in appropriate cases. *Iudicia imperio continentia*, owing their force to the *imperium* of the magistrate, ended at once if that *imperium* ended[7]. *Iudicia legitima* were not so determined. How they stood in this matter at first is not clear, but by the *l. Iulia iudiciaria* they were extinguished by the expiration of 18 months from *litis contestatio*[8]. This extinction of the remedy destroyed the right of the plaintiff, which had been novated by the *litis contestatio*, either *ipso iure* or by the *exceptio rei iudicatae vel in iudicium deductae*[9]. It is disputed whether a *naturalis obligatio* survived, but this is probable, since it survived judgment[10]. It does not appear that there was any *restitutio in integrum* unless it was obtainable on one of the recognised grounds[11]. In later classical law the rule in the provinces was perhaps different. Paul, citing Cervidius Scaevola, says that expiry of the magistrate's *imperium* did not destroy the *iudicium*[12]. But the text says "*iudices a praeside dati*"; the reference may be to the practice of delegation and to *cognitio extraordinaria*, which had then practically superseded the *formula* in the provinces[13].

1 Wlassak, *op. cit.* § 33; G. 4. 104. 2 It seems unlikely that Gaius should have made so misleading a statement, especially in view of the fact that the frequency of his references to provincial law has led to the view that he was a provincial. Probably the conception had become fixed before the *ll. Iuliae*; proceedings in a municipality might have been thought of as *iudicia legitima*, but in fact were not. 3 *Ante*, § XC. 4 *Ante*, § LX. 5 *Ante*, § LVI. 6 G. 3. 83. 7 G. 4. 104. 8 *Ib.* This rule has nothing to do with the limitation of actions: it is not a rule as to the maximum time which may elapse between the wrong and the proceedings. *Post*, § CCXXXIII. 9 *Post*, § CCXXXV. 10 *Ante*, § CLXXXIX. 11 There might be *actio doli* in appropriate cases, 4. 3. 18. 4. 12 5. 1. 49. 1. 13 *Ante*, § CCXXV. An enactment of Carus (A.D. 282–3), C. 7. 64. 6, allows the *praeses* to fix a time within which judgment must be given: if not so given it is void.

The distinction between *iudicia legitima* and others belongs entirely to the *ordo*; there is no trace of it in later law. As to the time which ended a *iudicium* in the later system, we learn that Theodosius laid down the rule that it must end within 30 years[1], not the 30 years which limit the right itself, but 30 years from *litis contestatio*. Justinian substituted three years from commencement of proceedings[2], with the proviso that all that was destroyed was the action; there was nothing to bar a new action on the facts[3].

CCXXXIII. *ACTIO PERPETUA, ACTIO TEMPORALIS.* In principle the civil law had no statute of limitations; a right of action once accrued was not affected by lapse of time. There were a few exceptions. Under the XII Tables[4] the action usually called the *actio auctoritatis*[5] was barred by lapse of the period of *usucapio*. By the *l. Furia de Sponsu, sponsores* and *fidepromissores* were released, at any rate in Italy, by lapse of two years[6]. The complaint that the details required by the *l. Cicereia* had not been given must be raised within 30 days[7]. The *querela inofficiosi testamenti* had to be brought within a limit of time which varied historically[8]. But praetorian actions break into two groups: some were *perpetuae*, some were *temporales* (*temporariae*[9]). The limit for temporary actions was nearly always an *annus utilis*, though the *actio redhibitoria* was limited to six months[10]. Whether this means an *annus* of *dies utiles* or an *annus continuus* beginning with the first *dies utilis* is disputed[11].

It is not easy to lay down a rule to determine what praetorian actions were *perpetuae* and what *temporales*. In general, those purely for compensation, or restoration, *actiones ad rem persequendam*, were *perpetuae*. But it cannot be safely said that other actions were temporary, though Paul adopts from Cassius this basis, making penal actions temporary[12]. But in the same text he states and also adopts another criterion, *i.e.* the question whether the action was in furtherance or in opposition to the civil law, and Gaius expresses a similar view, observing that *furti manifesti*, though praetorian and penal, was *perpetua*, as it only replaced a civil law action[13]. The same is said of *arborum furtim caesarum*[14]. A difficulty in applying the first of these criteria is that it is not easy to say what was a penal action. The *actio doli* was penal,

1 C. Th. 4. 14. 1. 2 C. 3. 1. 13. This is of March 530: the Code contains enactments of slightly earlier dates which seem to refer to the system of Theodosius, C. 7. 39. 9; C. 7. 40. 1 e. Shorter periods, varied from time to time, for causes affecting the *fiscus*. C. Th. 10. 1. 4, 13; C. 3. 1. 13. 1; C. 10. 1. 11. 3 Apart from *contumacia*: a final decision may be made against the contumacious party. 4 6. 3. Girard, *Textes*, 15. 5 *Ante*, § CLXXI. 6 G. 3. 121. 7 G. 3. 123. 8 *Ante*, § CXV. 9 G. 4. 110, 111. 10 *Ante*, § CLXXII. This is aedilician. 11 *Ante*, § CXCII. 12 44. 7. 35. 13 G. 4. 111. 14 47. 7. 7. 6.

though only for restitution[1]. The *actio ex testamento* was not, though it might involve double liability[2]. The fact that *condemnatio* may exceed the defendant's profit is not decisive; this might happen in most actions. It has been said that the jurists declared an action penal or not according to the need of the moment without regard for consistency. Perhaps as near as we can get is the proposition that an action was penal if its primary object was the repressing of a wrong and the stigmatising of the wrongdoer rather than a mere adjustment of property relations[3]. Thus the *actio doli*, though only for restitution, made the defendant *infamis*[4]. But no test explains the cases. The *actio iniuriarum* was praetorian, penal and *annua*[5], though it could not be said to be, as Paul puts it, "*contra ius civile*[6]." *Sepulchri violati* was praetorian and penal, but apparently *perpetua*[7]. So was the *actio in duplum* for *res effusae*[8]. The *actio de peculio annalis* was praetorian and not penal[9]. In fact the matter was one of express legislation in which it is not clear that any particular principle was always followed. There is the further complication that in some *actiones annuae* there survived an *actio in factum* to the extent of enrichment[10], and in some, the penalty being recoverable by an *actio annua*, there survived an *actio in simplum*[11].

In later law these principles were modified. Theodosius provided that all the so-called *actiones perpetuae* should be subject to a time limit, fixed at 30 years in ordinary cases, except for *pupilli*[12]. Further legislation fixed longer terms for specially privileged cases[13], and no limit applied to claims of the *fiscus* for taxes, from the collectors[14]. Further, Justinian provided that the time limit where it was less than 30 years was not to apply to minors[15].

ACTIO AD REM PERSEQUENDAM, AD POENAM PERSEQUENDAM[16]. This distinction has been incidentally considered above. A few supplementary remarks are needed. There was a class of actions both for a penalty and for the "*res*"—Justinian calls them "*mixtae*." Such were the *actio vi bonorum raptorum*, *depositi miserabilis*, the Aquilian action, etc. Justinian adds as an example the *actio in duplum* for a legacy to a religious house[17], but this is a mere extension, and limitation, of the rule for some legacies[18] *per damnationem*, and in classical law *actiones in duplum contra infitiantem* were not on account of that alone treated as penal. These

1 Not available against *heres*, 4. 3. 26. 2 *Ante*, § CXXII. 3 It is not helpful to say that it is penal if *ex delicto*—the question is: what is delictal? 4 4. 3. 11. 1. 5 G. 3. 224; Inst. 4. 4. 7; D. 47. 10. 13; C. 4. 35. 5. 6 44. 7. 35. 7 47. 12. 3. pr. 8 9. 3. 5. 5. 9 *Ante*, § CLXXXIV. 10 *E.g.* 42. 8. 10. 24, fraud on creditors. 11 *E.g.* 3. 6. 4, *calumniae*; 39. 4. 1. pr., *publicanus qui vi ademit*; Inst. 4. 2. pr., *vi bonorum raptorum*. 12 C. Th. 4. 14. 1; C. 7. 39. 3. 13 *E.g.* 7. 39. 6, 7; Nov. 111. 14 C. 7. 39. 6. 15 C. 2. 40. 5. 1. As to interruption and suspension of praescription, *ante*, § CXCII. 16 Inst. 4. 6. 16 sqq. 17 Inst. 4. 6. 19. See Mitteis, *Z.S.S.* 37. 328 sqq. 18 *Ante*, § CXXII.

actiones mixtae were penal for ordinary purposes; they were not available against the *heres*, though there was usually, at least in later law, an action to the extent of enrichment[1].

In general where several were liable to a penal action each was liable in full; if *A* and *B* had stolen, it was no defence to *A* that *B* had paid fourfold. We have seen a modification of this where a man was liable on delict of his subordinates[2]. But there were cases in which, apart from vicarious responsibility, payment of the penal damages by one released all, *e.g.*, *metus*[3], *res deiectae et effusae*[4], *servi corrupti*[5], *de rationibus distrahendis*[6], *dolus*[7], and no doubt others, though in some of the cases the restriction seems to be due to Justinian[8]. These are all what Justinian calls "*mixtae*," and the rule represents a hesitation and perhaps changes of view as to their character as penal or not[9]. These cases must be distinguished from *condictio furtiva* subject to the same rule[10]: this was probably correal in classical law, since it was civil and *ad rem persequendam*, while these were praetorian and penal.

Actions transmissible or not to or against the *heres*. The general principle was that actions *rei persequendae causa* were available both ways, while penal actions were available to the *heres*, but not against the *heres* of the wrongdoer (unless they had reached *litis contestatio*) except to the extent of enrichment[11]. But there were many exceptional cases. The right of action of the *adstipulator* did not pass to the *heres*[12], nor did the *querela inofficiosi testamenti*[13] or the wife's claim in *actio rei uxoriae*[14]. Conversely the liability of *sponsor* and *fideipromissor* did not pass to their *heredes*[15].

As to penal actions, there is no case in which the *heres* was liable for the delict of the ancestor, though there was a gradual extension of the principle that he could be sued to the extent of his enrichment by an action the nature of which is disputed[16]. The action against the *heres*

1 4. 2. 16. 2; 44. 7. 35, etc. **2** *Ante*, § ccv. **3** 4. 2. 14. 15. **4** 9. 3. 1. 10–3. **5** 11. 3. 14. 2 (? interp.). **6** 26. 7. 55. 1. **7** 4. 3. 17. **8** *E.g.* 11. 3. 14. 2. The rule makes them solidary. The case in 9. 3. 1. 10–3 looks as if it was correal in classical law; there is not necessarily any personal delict. But as to *dolus* and *metus*, see *ante*, § ccciii. **9** See Girard, *Manuel*, 408, n. 1. **10** C. 4. 8. 1. **11** Inst. 4. 12. 1. **12** G. 3. 114. **13** *Ante*, § cxiv. **14** Ulp. 6. 7. The fact that *heres* of fructuary could not sue for the usufruct does not turn on this principle: it is *interitus rei*. *Ad exhibendum* was not available either way though *heres* might be liable or entitled to it personally, 10. 4. 12. 6. **15** G. 3. 120. **16** Logically it would be *c. sine causa*, 47. 8. 2. 27. See Girard, *Manuel*, 407, n. 3. The notion is classical, its applications gradually widened, see Francisci, cited Girard. It is a settled general rule under Diocletian, *Hermog. Wisig.* 2. 1. Albertario (*Bull.* 26. 112) seems to hold it nearly always due to Justinian, but is very ready to see interpolations. The introduction of the principle by Cassius is asserted by Venuleius (42. 8. 11), and though Pernice thinks this unlikely (*Labeo*, 2. 1. 199) there is much evidence of his activity as a magistrate apart from this. 29. 2. 99; 44. 4. 4. 33; C. 4. 6. 26. 7. It is not clear why the whole story should be supposed untrue.

of a municipal magistrate who had failed by *dolus* or gross negligence to take proper security from a *tutor*[1] was no exception; it was a quasi-contractual action, available against the *heres* on ordinary principle. Conversely there were a few actions in which the *heres* could not sue on delict to his predecessor, *e.g.*, *iniuriarum*[2], *de mortuo inferendo*[3], the action for unauthorised *in ius vocatio* of a *parens* or patron[4], and in a case of fraud, *calumniae causa*[5]. The rule applied to bringing the action, not to continuing one which had reached *litis contestatio*.

CCXXXIV. *ACTIO DIRECTA, ADIECTITIAE QUALITATIS.* The latter name is a modern invention to mark off a group of actions in which a *paterfamilias* or employer was made responsible for acts of subordinates. Such were *de peculio et in rem verso*, *tributoria*, *quod iussu*, *institoria*, *exercitoria*, the *actio ad exemplum institoriae* in mandate, in all of which it seems that the name of the subordinate appeared in the *intentio* and that of the principal in the *condemnatio*. Such also were the various noxal actions, in which the name of the *paterfamilias* appeared in the *intentio*[6]. The classification not being expressly stated by the Romans, views differ as to the cases properly coming under the class of *actiones adiectitiae qualitatis*. The *actio de pauperie* and the analogous aedilician action do not correspond to any direct action, but the former at least resembled a noxal action in some points. Probably the class ought to cover the liabilities for employees of *nautae caupones* and *stabularii*[7], and the special liabilities of *publicani* for their servants[8], but the classification has little importance[9].

ACTIO IN SIMPLUM, DUPLUM, TRIPLUM, QUADRUPLUM. There was no

1 *Ante*, § LIX. **2** 47. 10. 28. **3** 11. 7. 9. **4** 2. 4. 24. **5** 3. 6. 4; *ante*, § CCXVIII. **6** Lenel, *E.P.* 102, 319. **7** *Ante*, § CCIV. **8** *Ante*, § CCV.

9 The expression *actio directa* used in this connexion to denote proceeding against the actual wrongdoer (G. 4. 77) is also used in other senses. Thus we have *actio directa* as opposed to *actio utilis*, *e.g.* under the *l. Aquilia*, Inst. 4. 3. 16; the *actio directa* as opposed to *actio fictitia*, G. 4. 34; the *actio directa* as opposed to the *actio ad exhibendum* which is a preparation for it, 10. 4. 3. 13; an *actio directa* as opposed to one resulting from *restitutio in integrum*, 16. 1. 8. 13 (cp. C. 3. 32. 24), and no doubt others. *Directa* as opposed to *contraria* does not seem to be usual. We find *principalis* (13. 6. 17. 1) and *recta* (h. t. 18. 4). It must be noted that there are indications in classical times of *formulae* in which the *intentio* was for mutual obligations (*alterum alteri d. f. oportere, ex f. b.*). See Cicero, *de Officiis*, 3. 17. 70; *Top.* 17. 66; G. 3. 155. These have been usually held to be distinct *formulae*, perhaps issued together, but it is maintained by Partsch (*Negotiorum Gestio*, 50 sqq.) that in classical law *iudicium contrarium* means a *formula* in which the *intentio* states the mutual obligation and that this was the method employed in *tutela* (*ante*, § LIX), *commodatum*, deposit, *pignus fiducia*, but not it would seem mandate. The independent *actio contraria* is on this view a Byzantine institution. P. also holds that it is only where the *formula* is of this independent type that *condemnatio* in the *iud. contrarium* does not involve infamy. For some critical observations, Bortolucci, *Bull.* 28. 192, n. 4. For a view accepting the *intentio* expressing mutual obligations in a somewhat different list of cases, including mandate, and excluding the name *iudicium contrarium* in such cases for classical law, see Biondi, *Iudicia bonae fidei*, 59 sqq.

action for more than fourfold, though the Aquilian action, since it gave the highest value of the *res* within a year before, might give damages of more than four times the real *interesse*. *Actiones ad rem persequendam* were normally *in simplum*, though sometimes *in duplum contra infitiantem*, *e.g.*, *actio ex testamento*[1]. Many penal actions were *in simplum*, *e.g.*, *doli*. Many were *in duplum*, *e.g.*, *furti nec manifesti*, *servi corrupti*, and the Aquilian action *contra infitiantem*. *Actiones in triplum* were few. Justinian mentions only a new one introduced by him for a case of *plus petitio*[2]. The cases of *furti concepti* and *oblati* were obsolete. Fourfold actions were numerous, but the *actio metus* differed from the others, *e.g.*, *furti manifesti*, in that it was *arbitraria*; the penalty was incurred only if restitution was refused in the action[3].

ACTIONES QUIBUS IN SOLIDUM PERSEQUIMUR[4], *QUIBUS NON SEMPER IN SOLIDUM PERSEQUIMUR*. The latter class were of various types. In some the *condemnatio* was confined within a certain fund, *e.g.*, *de peculio et in rem verso*[5]. In the actions in which a *heres* was liable to the extent of enrichment there may have been a restrictive clause in the *condemnatio*, such as "*dumtaxat in id quod ad eum pervenit*[6]." Justinian includes in the class those actions in which there was a set off[7], but this would include, potentially, nearly all actions. The cases in which an *actio in factum* to the extent of enrichment survived an *actio annua* would be another example[8]. A type distinct from all these is found in the actions in which the *condemnatio* was limited to the defendant's means: "*in id quod facere potest*," the so-called *beneficium competentiae*[9]. The chief cases of this were, the debtor who had suffered *bonorum venditio*, in any case for one year[10], but with previous *cessio bonorum*, perpetual[11], action against a patron or ascendant[12], actions against one who made a contract while *in potestate* and not *heres* to his *paterfamilias*[13], *pro socio*[14], action against a *miles*[15], action for *dos* against the wife or her *paterfamilias*, or for recovery of *dos* from the husband[16] (in later classical law any action between husband and wife[17]), and action against donor for the gift[18]. The principle applied only to contract and quasi-contract. In estimating the estate there was in general no deduction for debt to other persons (*occupantis potior est causa*)[19], though there were cases in which some debts were deducted[20], and in that of donor sued for the gift, all debts

1 *Ante*, § CXXII. **2** Inst. 4. 6. 24. **3** *Ante*, § CCIII. **4** Inst. 4. 6. 36. **5** *Ante*, § CCXXIV. **6** If the action was *c. sine causa*, the limit would be probably in the *intentio*: if on the delict, as is suggested by some texts (4. 2. 16. 2), some such *taxatio* as this would be needed. **7** Inst. 4. 6. 39. **8** *Ante*, § CCXXXIII. **9** Zanzucchi, *Bull.* 1918, 61 sqq. **10** *Ante*, § CCXIX. **11** Inst. 4. 6. 40; D. 42. 3. 4. pr. **12** Even mother of children *volgo concepti*, 42. 1. 16; Inst. 4. 6. 38. **13** 14. 5. 2. pr. **14** Inst. 4. 6. 38; D. 42. 1. 16; cp. h. t. 22. 1. **15** 42. 1. 18. **16** 24. 3. 15. 2–17; 42. 1. 20. **17** 42. 1. 20. **18** 42. 1. 19. 1; Inst. 4. 6. 38. **19** 42. 1. 19. 1, other than judgment debts. **20** *Socii*, 17. 2. 63. 3; *emancipatus*, 14. 5. 3.

were deducted[1], except those also due as gifts. "*Quod facere potest*" was not the same in all cases; in general it was literally taken, but a donor was allowed to retain the necessaries of life[2], and this may have been generalised under Justinian[3]. In the case of *cessio bonorum* it is probable that the same rule applied in classical law.

The whole debt having been brought into issue, it was destroyed by *litis contestatio*. Accordingly, to protect the creditor, the *iudex* required the debtor to give security by verbal contract to pay the rest when he was able. We are told this of *pro socio*[4], and, for Justinian's law, of action for recovery of *dos*[5]. The language of these texts does not indicate a universal principle, and it may be that in some cases, *e.g.* in that of *donatio*, the rule did not apply, and the right was exhausted.

We have seen that this defence is said in some texts to have been raised by *exceptio*[6], but it is generally held that it was in effect a *taxatio*, raised by some such words as "*dumtaxat in id quod facere potest*," in the *condemnatio*[7]. There is however evidence that it was not expressed in the *formula* at all in the *actio rei uxoriae*[8], which Lenel considers to have had an exceptional *formula in ius* expressing the duty as "*dotem reddere oportere*," the direction to condemn being subject to "*quod aequius melius erit*," which he thinks to cover this point[9].

Actiones Populares, Privatae. In ordinary cases there are, even before the litigation, an assignable plaintiff and defendant. But the Roman Law, like other systems, recognised cases in which, the facts being such as to affect public interests more or less, any member of the public might bring the action, in some cases keeping the damages or penalty[10], in others keeping none, or only a small part as a reward[11]. The former class, which was small, was the most important in private law. It included *sepulchri violati*[12], some cases of *res deiectae*[13], *res suspensae*[14], and *albi corruptio*[15]. The latter, a numerous class, is mostly concerned with local by-laws and the like.

These actions were all penal, and those specifically mentioned above were all praetorian, and, like most other praetorian penal actions, *annuae*. But since no one had in general any special right to the action (though in *res deiectae* and *sepulchri violati* there were preferences in

1 42. 1. 19. 1. **2** *Ib.* **3** 50. 17. 173. pr., Paul, which is a generalisation by Justinian of 42. 1. 19. 1, also of Paul. **4** 17. 2. 63. 4. **5** C. 5. 13. 1. 7. **6** *Ante*, § CCXXIII. **7** *Ib.* **8** 24. 3. 12. **9** *E.P.* 298. **10** See nn. 12–15. **11** Karlowa, *R.Rg.* 2. 979. Instances *l. mun. Tarent.* 4; Girard, *Textes*, 65; *l. Col. Genetivae*, 73; *ib.* 94. Cases in which it is fairly divided, as in our "*qui tam*" actions, occur. The penalty for breach of the edictal rules as to the opening of wills is divided, 29. 5. 25. 2. The cases in which the penalty goes to the State are mostly statutory, and to those in which the action is really *pro populo*, the name *actio popularis* is not expressly given. Sometimes only a local magistrate can bring the action; see Karlowa, *R.Rg.* 2. 980 sqq. **12** 47. 12. 3. pr. **13** 9. 3. 5. 5. **14** 9. 3. 5. 13. **15** 2. 1. 7. pr.

case of competition[1]) they could not be said to exist as assets till *litis contestatio*. Thus there was no question of transmission to *heredes*, and, as penal, they were not available against *heredes*[2]. There could be no representation on the part of plaintiff, and thus no *cessio actionis*[3]. They could not be brought by *infames*[4], nor, except in cases where relatives were preferred, by women or *pupilli*[5].

CCXXXV. We have now to consider in more detail some important points in the course of an action which have as yet had only incidental mention.

LITIS CONTESTATIO. The point at which this critical stage in the proceedings occurred, and the conception of it as a contract between the parties, have already been considered[6]. We have now to state its main effects.

(i) Destruction of the old obligation. Here there is an important distinction to be drawn. In one class of actions, *legitima iudicia in personam*, formulated *in ius*, the old *obligatio* was destroyed "*ipso iure*," *i.e.* it no longer existed, so that if the action was renewed the *intentio* could not be proved; there was no *obligatio*[7]. In other actions of any kind, real or personal, *in factum* or *in ius*, *legitima* or *imperio continentia*, though the prae-existing right or obligation was destroyed, this was only *iure praetorio*, by the help of an *exceptio rei iudicatae vel in iudicium deductae*[8]. Gaius tells us[9] that in the *legis actio* the destruction was always *ipso iure*, *exceptiones* not having been in use as under the *formula*. In the older system there is no reason to suppose that the bar had any relation to the theory of *novatio necessaria*, a notion of a developed jurisprudence. It rested on the simpler notion, *non bis in idem*[10]—an issue once decided must not be raised again, a principle common to most systems of law. This must have been the governing principle in real actions, where there was no *obligatio*, and in actions *in factum*, in which no *obligatio* was expressly brought into issue. The question arises why in real actions the bar was only praetorian. The view, in itself not very probable, that there was no bar in these cases in the *legis actio*, seems excluded by the general language of Gaius[11]. The system of *ipso iure* destruction was in fact applied only where the notion of *novatio* was possible, *i.e.* in *formulae in personam* and *in ius*, and of these, only

1 47. 12. 6; 9. 3. 5. 5; cp. 47. 23. 2, 3. 2 47. 23. 8. 3 47. 23. 5. 4 47. 23. 4. 5 47. 23. 6. 6 *Ante*, § CCXV. 7 G. 3. 180 sq.; 4. 106, 107. 8 *Ib.* 9 4. 108. 10 Eisele, *Abhandlungen*, 113. 11 It has also been suggested (see *ante*, § CCXIV) that the *l. Aebutia* did not allow the *formula* in real actions, so that these would be on a different footing. But this is not generally accepted. If, as is sometimes held, *litis contestatio* in the *legis actio* was at its beginning, it is clear that the barring effect could not bear any relation to novatory effect, but must have been due to the independent rule *non bis in idem*, which barred repetition of a *legis actio*. See also on the question, Gradenwitz, *Aus Röm. und Bürg. R.* 392 sqq., 402 sqq.

to those to which it could have been thought of as applicable in early law, *i.e.*, *legitima iudicia*. It is probable that in all cases in the early *formula* there was a *praescriptio*, and that it was only with the appearance of the *exceptio*, as we know it, that the sharp line appeared between *consumptio ipso iure* and *ope exceptionis*.

The *exceptio rei iudicatae vel in iudicium deductae* appears as one in Gaius[1], and it is widely[2] held that they were in fact but one. But since every case decided must have been *in iudicium deducta* the purpose of the "*rei iudicatae*" element is not plain. On the view that they were distinct *exceptiones* it has been maintained[3] that, before the *l. Iulia*, since a *iudicium legitimum* was not barred by lapse of time, only the *exceptio rei in i. ded.* was here available, as a judgment was the inevitable result. But in others there might be no judgment, as the expiry of the magistrate's *imperium* might destroy the *iudicium*. Here justice required that further action should be barred only by judgment. Hence the *exceptio rei iudicatae*; the two *exceptiones* thus referred to distinct classes of action, and one class of *iudicia legitima* supplied a third type, in which the bar was *ipso iure*, *i.e.* those *in personam*, *in ius*. When the *l. Iulia* introduced the risk of expiry by time (18 months) for *iudicia legitima*[4], it seems on this view that the *exceptio rei iudicatae* ought to have applied to both the types, and the other to have disappeared, but in fact we find both *exceptiones* (or both halves) applied in both cases. If we accept Lenel's formulation for the time of Julian, it does not follow that it was originally the same, and Eisele's view might explain the evolution, though the positive evidence is not strong. Of the retention of both halves and the placing of *rei iudicatae* first, though it is included in the other, Lenel's explanation[5] is that the parties used only the portion relevant to the case, and as in most cases the previous litigation would have reached judgment, *rei iudicatae* was most common[6].

Modern writers have distinguished from this, which may be called the normal function of the *exceptio rei iudicatae*, a "positive" function, *i.e.* not merely a bar to the same action between the same parties, playing the same parts, but as enforcing the principle, as between parties bound by the judgment, that the content of the judgment must be assumed to be true. This is based[7] on texts giving *exceptio rei iudicatae*, *e.g.* where a defendant *B* in *rei vindicatio* was defeated by *A* and afterwards vindi-

1 G. 4. 106, 107. 2 Lenel, *E.P.* 486 sqq. 3 Eisele, *Abhandlungen*, 1 sqq. 4 G. 4. 104. 5 *E.P.*, *loc. cit.* 6 If the case is decided for the plaintiff, in real actions, there is a *pronuntiatio* rather than a judgment: it has been suggested that here the *exceptio* would be "*rei secundum se pronuntiatae*," the texts which speak here of *res iudicata* being on this view interpolated. Little evidence is offered. Beseler, *Beiträge zur Kritik*, 2. 139. See hereon Mitteis, *Z.S.S.* 33. 206 sqq. 7 Keller-Wach, *C.P.* 363. See, against the "positive" function, Eisele, *Z.S.S.* 35. 326.

cated[1], though the issue was not here the same. In the first case the question was whether the thing was *A*'s; in the second it was whether it was *B*'s. As Julian says, the decision that it was *A*'s negatived the view that it was *B*'s and thus *A* could plead *res iudicata*[2]. Gaius uses similar language[3], observing that if in the first case judgment went for the defendant and he afterwards sued for some of the property in the hands of the plaintiff, the first suit proved nothing for the second; proof that it was not *A*'s was no proof that it was *B*'s. This merely expresses the true principle of the *exceptio*, as stated below. But where the *exceptio rei iudicatae* was used by the loser in the previous litigation there was a *replicatio* "*rei secundum se* (plaintiff) *iudicatae*[4]."

We are told that there must be identity of *Res*, *Causa* and Person[5] but this needs defining. *Eadem res* means the same object[6]. It need not be the same *formula—actio in factum* on deposit would bar *actio in ius* on the same facts. It need not be the same action, if the point was the same[7]. But the point must be the same; thus, *vindicatio* would not formally bar *condictio furtiva*[8]. The language twice quoted by Ulpian, from Julian[9], requires "*eadem quaestio*[10]," *i.e.* the question which it is now proposed to submit to the *iudex* must have been in substance already submitted to a *iudex*, so that a decision in the second case would necessarily be a decision on a point already decided. As Paul put it[11]: "*singulis controversiis singulas actiones sufficere.*" The *causa*, *i.e.* the basis of claim, must be the same, but here a distinction is to be drawn. Real actions brought in and barred future action on all possible *causae* of the claim[12], except where the claim was expressly limited to a specific basis[13]. This did not of course bar action on a title accruing subsequently to the first action[14], or action against the same defendant on a subsequently accruing basis of liability[15]. But Paul, in a corrupt text, says that personal actions are different; each *causa* has its action[16]. This seems however to mean little more than that a claim for a debt will not bar a claim for another debt of the same amount. A claim misdescribed in the *demonstratio* can be brought again, for the real claim has not been in issue[17], and the practical result is the same if in the *intentio* a *causa* is stated which is not the real one. But there are difficulties in the case of *condictio*, where the *causa* is not stated[18]. The parties must be the same.

1 44. 2. 30. 1. **2** 3. 3. 40. 2. **3** 44. 2. 15. **4** 44. 2. 9. 1. **5** 44. 2. 27. Cp. h. t. 12–14. **6** In 44. 2. 12, 13 this appears as *idem corpus, idem ius, eadem quantitas*, but this last is not necessary, h. t. 7. pr. **7** 44. 2. 3, 5, 8, 25. 1. **8** 44. 2. 31; cp. 5. 3. 47; C. 3. 31. 3. **9** 44. 2. 3; h. t. 7. 4. **10** Perhaps the word is interpolated, Beseler, *Beiträge*, 2. 144; 4. 266. **11** 44. 2. 6. **12** 44. 2. 11. 1; h. t. 14. 2. **13** 44. 2. 11. 2; h. t. 14. 2. **14** 44. 2. 11. 4, 5; h. t. 25. pr. **15** 44. 2. 9. pr.; h. t. 17; h. t. 18. **16** 44. 2. 14. 2. **17** *Ante*, § CCXXI. **18** *Ante*, § CCXXX. The question if, and, if so, how, the issue submitted to the *iudex* was limited in these cases, is very obscure.

This means juristic identity[1]. The *exceptio* affected a successor in title, but not a predecessor in title[2]. It covered a representative where the case had already been brought by or against the principal, and, subject to what will be said later, *vice versa*[3]. It covered the cases of principal and surety[4] (apart from *fideiussio indemnitatis*, where it was clearly not *eadem res*[5]), and that of *correi*[6]. In later classical law there was an equitable extension in which identity of party is difficult to see. If the person primarily interested stood by and let judgment proceed when he could have intervened to protect his own right, he was bound by the judgment, *e.g.* pledgee who knew that the debtor was being sued for the thing, vendee in possession allowing vendor to be sued for the thing, husband allowing the wife or her father to be sued for a *res dotalis*[7]. Further it appears that if a will was upset at civil law, as *inofficiosum* or as *ruptum* or *irritum*, so that legacies, etc., failed, the decision was binding on legatees, etc., though not on other persons claiming the *hereditas* either independently of the will concerned, or not themselves joining in the suit[8]. A more remarkable extension existed in some questions of status. In claims for or against liberty, or *ingenuitas*, and some others, a decision was good not only against the actual party but against everyone[9], not in the sense that the man was conclusively held to be slave or free, or so forth, at the time of the judgment, but that any claim to the contrary must be independent of those then set up. This enlarged force of the judgment affected other rules. It applied only where there was a *iustus contradictor*[10]. There was special machinery to deal with collusion[11], and the obscure rule as to repetition of *causae liberales*[12] was probably in some way connected with it.

The language of Gaius puts *rei in iudicium deductae* and *rei iudicatae* on the same footing, as applying over the same field and, in general, this was so, at least in his time. The law of *compensatio* provided an exception. A *iudex* need not take *compensatio* into account. If he did, and allowed it, or rejected it as not properly due, future claim of it would be met by *exceptio rei iudicatae*. If he refused to consider it at all, it had

1 Thus a claim by or against a man as *tutor* would have no effect on his rights or liabilities in his personal capacity. 2 44. 2. 4; h. t. 9. 2; h. t. 11. 9; h. t. 28. See 44. 2. 1; h. t. 3; h. t. 7. 4, etc. 3 44. 2. 11. 7. *Post*, § CCXXXIX. 4 *Ante*, § CLVI sq. 5 *Ante*, § CLVII. 6 *Ante*, § CLVIII. In the typical form of this there is a sort of identity of person, they are a joint unity, but this is hardly so in surety. 7 42. 1. 63; 44. 2. 29. 1. 8 5. 2. 8. 16; 30. 50. 1. 9 1. 5. 25; 25. 3. 1. 16. It is in this connexion that we get the expression: *res iudicata pro veritate accipitur*, which is not of general application, Gradenwitz, *Aus Röm. und Bürg. R.* 410. Esmein, *Mél. Gérardin*, 229 sqq., holds that in early law the effect of judgment was not relative but absolute and thus explains the rules of *cessio in iure*. 10 40. 16. 3; C. 7. 14. 1. 11 40. 16 *passim*. 12 Buckland, *Slavery*, 668.

not been in issue, so that there would be no *exceptio rei in iudicium deductae*[1].

CCXXXVI. The question how far the extinctive effect of *litis contestatio* was carried into the later system is much disputed. There was no *ipso iure* destruction, since *legitima iudicia* had disappeared. Apart from this it is frequently held to have survived to Justinian, since he abolished it for joint debtors[2], but it is not impossible that this choice among debtors equally liable had already become an independent principle. Justinian calls it *electio*[3]. No known enactment abolishes the novatory effect for single debtors, and the *exceptio rei in iud. deductae* is not found in the *Corpus Iuris Civilis*, though there are traces of the old doctrine[4]. The introduction of procedure *in contumaciam* and the fact that a *iudicium* no longer perished in a short time had done away with the main cases of application of this *exceptio*. An enactment of uncertain date, restored from the *Basilica*, but not later than Justinian, penalised the bringing of an action in one court if it was already pending in another[5], which suggests that, apart from penalty, such a thing was possible. The better view seems to be that under Justinian the extinctive effect of *litis contestatio* was practically gone[6]. It survived indeed as the basis of the law of *cessio actionum* by *procuratio*[7], but this had become a standing institution, independent of its theoretical basis.

The destructive effect of *litis contestatio* was not, even in classical law, so complete in practice as might appear. The Edict contained rules for *restitutio* where through error in procedure, not involving great carelessness, an action had been lost[8]. There were various cases in which an *actio de peculio* which had resulted in less than complete satisfaction could be renewed "*rescisso superiore iudicio*[9]." The law of *restitutio in integrum*[10] is indeed in great part a set of reliefs against the operation of this principle. Where the loss was due to excessive claim there was some relief in the Edict and a full measure in later law[11]. Though there could be no change of parties, and no alienation after the novation, the magistrate could relieve even here in appropriate cases[12]. The rule *omnia iudicia absolutoria* is on the same lines. It is sometimes said that where an action was barred by *exceptio praeiudicii*

1 16. 2. 7. 1. It is held by Beseler, *Beiträge*, 4. 199, that rejection of the counterclaim as non-existent did not, in classical law, prevent it from being raised independently, the text being interpolated. *Post*, § CCXXXVIII. 2 C. 8. 40. 28. 3 C. 8. 40. 28. 1. 4 *E.g.* 46. 2. 29. 5 C. 3. 1. 12. 2. See also C. 2. 2. 4. 6 No inference can be drawn from C. 3. 10. 1 (*post*, § CCXXXVII), which seems to imply a power of renewing a claim, for the point is no doubt raised, in the time of Zeno, before *litis contestatio*. 7 *Ante*, §§ CLXXX, CLXXXIX. 8 Lenel, *E.P.* 119 sqq. 9 15. 1. 30. 4; h. t. 32. pr.; h. t. 47. 3; 15. 2. 1. 10. 10 *Post*, § CCXLIII. 11 *Post*, § CCXXXVII. But see n. 6. 12 5. 1. 57; Vat. Fr. 341.

(or the like[1]) there was relief on account of the injustice, but opinions differ[2].

(ii) Creation of a new obligation. The nature and content of this have been sufficiently indicated in dealing with judgment.

(iii) Any action which had reached *litis contestatio* was transmissible. Thus an *actio ex delicto* could be continued against the *heres*, or an *actio iniuriarum* continued by the *heres*[3].

(iv) Paul tells us that it made *actiones temporariae* perpetual, which means only that if, *e.g.*, an *actio annua* had reached *litis contestatio* it could continue to judgment though the year had expired[4].

(v) There could be no change either in parties or *iudex*, subject to *translatio iudicii*[5].

(vi) The *res* became a *res litigiosa* incapable of alienation[6].

(vii) *Usucapio* was not formally interrupted, but the practical effect was much the same[7]. *Praescriptio* seems to have been interrupted under Justinian by protest to an official, without litigation[8].

(viii) It fixed the subject-matter of the claim. This rule had many aspects and modifications. The rule *omnia iudicia absolutoria*[9] modified the principle that the duty was to be referred to the time of *litis contestatio*. The value was ordinarily to be taken as at that time, but *stricta iudicia* and others differed as to inclusion of fruits and interest from that date[10]. If the object lessened in value by deterioration, or through a change in the market value of such things, this did not in strictness affect the liability. But this strict rule applied in classical law only in cases of bad faith; a defendant in good faith was liable only if the deterioration was due to his fault[11]. Conversely, if the thing increased in value, this did not increase the liability unless the defendant was in bad faith, as in *condictio furtiva* where the liability was for the highest value of the thing since the theft[12]. The effect of total destruction by *casus* was matter of school dispute; the view ultimately reached was that apart from *dolus*, *culpa* or *mora* it released the defendant[13]. But these rules can be applied safely only to real actions and *stricta iudicia*; in *bonae fidei iudicia* and actions *in factum* there was a multiplicity of distinctions according to circumstances, as to what could be recovered.

CCXXXVII. *PLUS PETITIO. MINUS PETITIO.* The rules on this topic express the logic of the *formula*. The *iudex* was to condemn only if the claim in the *intentio* was proved; in all other cases he was to absolve. If 10 were claimed and a debt of 9 was proved, *absolutio* followed. *Plus*

1 *Ante*, § CCXXI. 2 See Pissard, *Questions Préjudicielles*, 133. 3 *Ante*, § CCXXXIII. 4 27. 7. 8. 1; 50. 17. 139. pr. 5 Vat. Fr. 341; C. 3. 1. 16. *Post*, § CCXLI. 6 *Post*, § CCXLIV. 7 *Ante*, § LXXXVII. 8 *Ante*, § LXXXIX. 9 *Ante*, § CCXVII. 10 *Ante*, § CCXXIX. 11 See Girard, *Manuel*, 352, n. 1. 12 13. 1. 8. 1. 13 5. 3. 40. pr.; 6. 1. 15. 3.

petitio might occur in many ways[1]; *re*, claiming too much, *tempore*, claiming before it was due or while a condition was unsatisfied, *loco*, claiming at one place what was due at another, or *causa*, ignoring any alternative or option in the debtor[2]. In any case of *plus petitio* the action was lost in classical law, and, in general, finally lost, except for relief by praetorian *restitutio*, which Gaius mentions[3], and which Justinian tells us had been given to minors and in certain cases of error[4]. In an action for an *incertum*, since the *intentio* said "*quidquid paret...dare facere oportere*," Gaius tells us there could be no *plus petitio*[5]. But this seems not quite clear except for excess in amount. If a claim was made before it was due or before a condition was satisfied the action was lost, certainly in the case of condition, and perhaps in the case of *dies*, though here it is possible that the words "*quidquid*" and "*ex fide bona*" allowed the *iudex* to condemn for the present value of the claim. If it was lost, in the case of *dies*, it was finally lost, apart from relief, but, in the case of condition, the obligation was considered as a new one arising only on occurrence of the condition, so that the action could be renewed[6]. If *A* or *B* was due at the defendant's choice, and *A* was claimed, this was a *plus petitio*[7] and might certainly occur in an action for an *incertum*, and the same is true if what was due in one place was claimed in another[8]. There was a special *actio* "*de eo quod certo loco*[9]," to avoid the difficulty in this case, and the title in the Digest mentions cases which would seem to have an *intentio* in "*quidquid*[10]." But these can be explained away[11] and this action was excluded in *bonae fidei* cases[12], so that it seems likely that the *iudex* could make the necessary allowance in these cases.

An overstatement in the *demonstratio* was fatal to the action, but Gaius says "*nihil in iudicium deducitur*[13]" and the action could therefore be renewed, subject to the opinion of some jurists, that in infaming actions overclaim in the *demonstratio* was as fatal as in the *intentio*[14]. This comes to saying that if the *demonstratio* is not true there was no action; its truth is a condition not on *condemnatio* but on submission to the *iudex*. In actions *in factum* with an *intentio* "*si paret*," Gaius, in a defective text[15], seems to say that overstatement in it was a *plus petitio*, but this probably does not apply to the actions "*ex bono et aequo*." An overstatement in the *condemnatio* led only to *restitutio* as a matter of course[16].

1 In a rescript of Diocletian (Cons. 5. 7) it is said that it may be either *summa, loco, tempore, causa, qualitate, aestimatione.* 2 G. 4. 53 d; Inst. 4. 6. 33 d. 3 G. 4. 53. 4 Inst. 4. 6. 33. 5 G. 4. 54. 6 44. 7. 42. pr.; 21. 1. 43. 9; *ante*, § CXLVIII. 7 G. 4. 53 d; Inst. 4. 6. 33 d. 8 G. 4. 53 c; Inst. 4. 6. 33 c. 9 *Ante*, § CCXXIV. 10 *E.g.* 13. 7. 4. 1. 11 An *intentio* in "*si paret*" is possible. 12 13. 4. 7. 13 G. 4. 58. 14 G. 4. 60. As to the use of this text in support of hypotheses on the origin of the *formula*, see Huvelin, *Mél. Gérardin*, 337; Audibert, *Mél. Girard*, 1. 62, and *ante*, § CCXIV. 15 G. 4. 60. 16 G. 4. 57.

It should be said that it was not *plus petitio* to claim the wrong thing. The action was lost, but the real matter had not been in issue[1].

Minus petitio was claiming too little. This, in the *intentio*, bound the plaintiff in that action, but did not prevent him from suing again, subject to the *exceptio litis dividuae*[2]. If it was in the *demonstratio*, Gaius holds, as in *plus petitio*, that "*nihil in iudicium deducitur*," but adds that others, including Labeo, held the (more reasonable) view that it was lawful so to divide the claim, subject to the above *exceptio*[3]. *Minus petitio* in the *condemnatio* bound the plaintiff with no *restitutio* except for minority[4].

These rules of classical law lost their force with the disappearance of the *formula* and were much changed in later law. There was no longer any question of different parts of the statement, and Zeno provided that in *plus petitio tempore* the plaintiff must wait twice the time by which he anticipated the true date, getting no interest for this time and paying all costs due to his wrongful claim. The *iudex* was to pay no attention to *minus petitio* but to condemn for what was due[5]. For other forms of *plus petitio* Justinian provided that the *iudex* was to ignore them and condemn for what was due, the plaintiff paying threefold the excess costs[6].

CCXXXVIII. *COMPENSATIO.* Set off. If *A* sued *B* on a promise of 10, the fact that *A* owed *B* something on some other transaction was irrelevant to the issue before the *iudex*. This liability could not be joined to the first, so as to permit the *iudex* to try both on one issue and strike a balance. The Roman habit and the structure of the *formula* did not admit of the fusion of two issues. No doubt both might be submitted to the same judge, even at the same time, but they were distinct issues, *mutuae petitiones*[7]. To this exclusion there were even in early classical law some exceptions. Where a banker sued his customer he was required to allow what was called "*compensatio*" in the *intentio* of his action, claiming only the nett balance due, after deducting anything actually due from him to the defendant, provided the debt was of the same kind as that for which he was suing, which would commonly be money[8]. If he failed to make this allowance in his *intentio*, he lost his action for *plus petitio*. The two debts being treated as one, he had claimed more than

1 G. 4. 55; Inst. 4. 6. 35. 2 G. 4. 66; *ante*, § CCXXIII. 3 G. 4. 58, 59. This view would seem to have prevailed, 13. 6. 17. 4. 4 G. 4. 57. 5 C. 3. 10. 1. 6 C. 3. 10. 2. He adds (h. t. 3) that a plaintiff who has fraudulently got an acknowledgment from the debtor for more than is due, and submits this at the hearing, shall lose his action altogether. But this is a punishment for fraud, not a rule of procedure. 7 2. 1. 11. 1; 17. 1. 38. pr.; C. 4. 31. 6. See Accarias, *Précis*, 2. 1104, and *ante*, § CCXXXIV. 8 G. 4. 64, 68.

was due. This edictal rule[1] did not turn on any logical distinction; it was a rule of convenience, resting on the almost fiduciary position of *argentarii* in commercial Rome. Most business was done through them. When the practice of private bookkeeping went out, the bankers were in fact their customers' bookkeepers[2], a fact reflected in another edictal rule[3]: in any litigation the banker's books might be called for, though he was not a party to the litigation. The present rule safeguarded illiterate persons against concealment by a banker who knew more of their affairs than they did themselves.

Another exceptional case was that of *bonorum emptor* in bankruptcy. If the *bonorum emptor* sued a debtor to the bankrupt or deceased insolvent, he was required by the Edict[4] to allow for any debt due from the estate to the defendant. It need not be of the same kind or now payable; a debt due *in diem* must be allowed for at its present value. But as the *emptor* had no special knowledge of the relations between these parties he was not compelled to run the risk of *plus petitio*; the allowance was not by "*compensatio*" in the *intentio*, but by "*deductio*" in the *condemnatio*, where, as Gaius says, "*periculum non intervenit.*" Thus even though the claim was for a *certum*, "*incerti tamen condemnationem concipit*[5]." Apparently the *deductio* was inserted only on the defendant's request[6], but if it was omitted the omission could be set right by *restitutio in integrum*, as in any other case of excessive *condemnatio*. This *deductio* did not rest on logical considerations, but on convenience and fairness. Apart from some such rule the debtor to the insolvent would have had to pay in full what he owed, getting only a dividend on what was due to him. Accordingly he was allowed to recover, if he paid without taking account of the counterclaim[7].

Another exception was more important, as it was general and rested on the logic of the *formula*. In all *bonae fidei iudicia* the *iudex* might, if he thought fit, allow, on grounds of good faith, any set off arising out of the same transaction, condemning only for the balance. This rested on the words "*ex fide bona.*" As the *intentio* claimed only what was due *ex fide bona*, there was no question of *plus petitio*, or any express reference to the set off[8].

The rule of exclusion of all such matters in *stricta iudicia* remained till a certain rescript of Marcus Aurelius of which Justinian tells us[9] that, by it, "*opposita doli mali exceptione, compensatio inducebatur,*" in *stricta iudicia*. We know little of the system, since it was superseded

1 Lenel, *E.P.* 248. 2 See, *e.g.*, 2. 13. 10. 1; h. t. 4. 1. 3 2. 13. 4 sqq. 4 Lenel, *E.P.* 411. 5 G. 4. 66 sqq. 6 See G., *loc. cit.* The *argentarius* "*cogitur cum compensatione agere*" the *deductio* "*obicitur*" to the *emptor*. 7 *I.e.* claiming under his original right, 12. 6. 30, written originally of this case, Lenel, *E.P.* 412. 8 G. 4. 47, 61–63. 9 Inst. 4. 6. 30.

under Justinian and unknown to Gaius. Since such *iudicia* were on unilateral transactions, the debt must have been in another transaction. It was perhaps confined to debts of the same kind[1], but different views are held, as also on the question whether the rule extended in practice to *bonae fidei iudicia*. It seems probable that these remained under the old rule, as Justinian states the rule for them and then that for *stricta iudicia* after M. Aurelius without suggesting any reaction on the other case[2]. It is true that the *exceptio doli* was always implied in *bonae fidei iudicia*, but precisely because it was not expressed, it seems incredible that the defendant should have been able by reason of the existence of such a counterclaim to decide at any stage to upset the action, or not, without notice to the plaintiff. In *stricta iudicia* the difficulty did not arise; the *exceptio* would have to be demanded, and this would warn the plaintiff.

The ground on which the action was lost was not *plus petitio*. If it had been there would have been no need of the *exceptio doli*; the mere failure to allow for the counterclaim would destroy the action, *ipso iure*. Moreover the right to sue later on the counterclaim was not affected by the fact that no account of it had been taken in this action[3], which could hardly be the case if it had been *ipso iure* in issue in the earlier action; there would have been an *exceptio rei iudicatae*.

It has been assumed above that failure to allow for the counterclaim, after insertion of the *exceptio*, involved loss of the action, but it has been maintained that the effect was merely to cause reduction of the *condemnatio* by the amount of the counterclaim[4]. The former solution is alone consistent with the general theory of the *exceptio*. The *iudex* was bound to absolve if an *exceptio* was proved[5], and this is the view most usually held in the present case. But the view that the effect was merely reduction is supported on various grounds. It is said that it is unfair that a plaintiff should lose his action for not taking account of a set off of which he might not know the amount. But the claim of the *exceptio* was notice to him of the set off and the form for *argentarius*[6] was presumably available. Before allowing the *exceptio* the praetor would require details of the counterclaim. It is said that Justinian does not shew any difference between the rules under the rescript of M. Aurelius and the old rules in *bonae fidei iudicia*[7], and Theophilus implies that there was none and that the action was not lost[8]. But in historical matters in which Gaius does not help, Theophilus is of little weight, and Justinian says that he is making a change and that in his system claims "*ipso iure*

1 P. 2. 5. 3. 2 Inst. 4. 6. 30, 39. 3 16. 2. 7. 1. See Girard, *Manuel*, 721, n. 4. 4 *E.g.* Accarias, *Précis*, 2. 1108; Salkowski, *Inst.* (8), 441. 5 Apart from *replicatio*, which is not here in question. 6 G. 4. 64. 7 Inst. *loc. cit.* 8 Theoph. *ad Inst.* 4. 6. 30.

minuunt," which suggests that this was not the case before in *stricta iudicia*, to which the passage refers, though, of course, the novelty might be only in the words "*ipso iure*." Again it is said that an *exceptio* did not necessarily upset an action in the *formulary system*. Several texts in the Digest say this, for the *exceptio doli* amongst others. But the *formula* had long been extinct and different rules were applied in the *cognitio*, so that the word *exceptio* and the rules stated for it in texts handled by the compilers are of little weight[1]. The case of the so-called *beneficium competentiae* is *prima facie* a strong one, but it has already been pointed out that this was in all probability a *taxatio* in classical law[2]. But neither view is absolutely proved, and it has been doubted whether the rescript was as general as Justinian's words suggest[3].

How the matter stood in *cognitiones* is not clear, but it is possible that reduction became the rule there, in some cases, in view of the great power of the magistrate, and thus became the model for Justinian. He reorganised the matter. He allowed *compensatio* of the same or different kinds (if it was so far "liquid" that it could be conveniently estimated in that suit) in all actions but deposit, and for recovery of land wrongfully occupied[4]. The rule was to apply to real as well as to personal actions, and under it "*actiones ipso iure minuunt*." Thus the effect was reduction, but, for the rest, his rule is not easy to understand. In real actions the judgment was for the *res* itself, and it is not clear how the allowance was made, possibly by way of *retentio* as in the case of chargeable expenses[5], or by set off against *fructus*. In some cases indeed the *condemnatio* would have to be in money, *e.g.* where the defendant had destroyed the thing, or had *dolo malo* ceased to possess[6].

1 The most general statement is 44. 1. 22. See also 16. 1. 17. 2, which is certainly interpolated, and 30. 85, which probably is. 2 *Ante*, § CCXXIV. 3 See Leonhard, *Mél. Girard*, 2. 85 sqq., for a somewhat speculative account of the history of *compensatio*. 4 Inst. 4. 6. 30; C. 4. 31. 14. A counterclaim might be of a *naturalis obligatio* (16. 2. 6), though not all such could be so used (*ante*, § CLXXXIX). It must not be conditional or *in diem* (16. 2. 7. pr.) apart from days of grace under a judgment (h. t. 16. 1). It must be the defendant's own claim in the same capacity (C. 4. 31. 9; D. 16. 2. 18. 1) and against the same person (16. 2. 16. pr.), except that a debt due to a *correus socius* of the deft. can be pleaded as there is regress between them (45. 2. 10). For the same reason a *fideiussor* can plead a set off of his principal (16. 2. 5). A *tutor* suing as such could not be met by a debt due from him personally (16. 2. 23). It might be pending in another suit (h. t. 8). It must be clear: an alternative *obligatio* could not be pleaded, if the creditor had the choice, until he had chosen (16. 2. 22), but a debt due at another place could be pleaded with proper allowances (16. 2. 15). It might be raised in *actio iudicati*, though it had not been mentioned in the original action (C. 4. 31. 2). It might be a claim *de peculio* and even here it was *in solidum* (16. 2. 9. pr.). The *iudex* need not take account of it: if he simply ignored it, it was not in issue and could still be sued on, but if the *iudex* examined and rejected it this was in effect a judgment, and any further claim would be barred by *exceptio rei iudicatae* (16. 2. 7. 1). 5 *Ante*, § CXLIV. 6 The rule of Justinian that a plaintiff might be condemned (C. 7. 45. 14) might be understood to cover this case.

The words "*ipso iure*" have been much discussed. They do not mean that the set off operated necessarily, as matter of course, for, as we have seen, the defendant need not use it and could sue on it independently, while if it had necessarily been in issue, there would have been an *exceptio rei iudicatae*. They seem to mean merely that it could come in without express mention in the *libellus conventionis*, with no question of *plus petitio* and its penalties[1].

Thus at no stage did Roman Law recognise a necessary *compensatio*, operating as matter of law, apart from act of the defendant. One case suggests an approach to this idea. In an action for recovery of *dos* we are told that "*necessariae impensae dotem ipso iure minuunt*" while *impensae utiles*, if approved by the wife, can be brought into account by *exceptio doli*[2]. It is held by Ihering[3] that this is very ancient, but there is little evidence of this[4]; it seems to result from the conception of *dos* as a *universitas*, and, even so, *impensae* were not necessarily in issue, since if the husband did not deduct in the action for *dos*, Marcellus held that he could condict afterwards[5], as could be done in other cases of counter-claim.[6] It must be remembered that the *actio rei uxoriae* was a *bonae fidei iudicium* in which no *exceptio doli* would need to be expressed. The case of *peculium*, which is *ipso iure* cut down by debts to *dominus*[7], is again a *pro tanto* recognition of it as a *universitas*. It no doubt originated as an interpretation of legacy of *peculium*[8].

CCXXXIX. Representation in Litigation[9]. In the *legis actio* system there was in general no representation: *nemo pro alio lege agere potest*. Justinian, who tells us this, mentions as exceptions, apparently as all the exceptions, a provision of the *l. Hostilia*, allowing *actio furti* on behalf of a captive or one absent on State affairs, or their ward, and three other cases which he calls *pro populo*, *pro libertate* and *pro tutela*[10]. The first is probably a reference to early *actiones populares* and has little real relation to representation; the second is *adsertio libertatis*[11], and the third is obscure. Perhaps the most probable opinions are that it refers to the *crimen suspecti tutoris* which was open to anyone, is very

1 Severus Alexander provided that where there was a liquid claim on each side there was "*ipso iure compensatio*" from the moment the two debts coexisted (C. 4. 31. 4). But it has been observed (Girard, *Manuel*, 721, n. 4) that this rule, probably laid down by Septimius for a specific case (16. 2. 11, 12), and afterwards generalised (C. 4. 31. 5; C. 8. 42. 7), was merely an equitable rule to simplify the final calculation. See also Leonhard, *Mél. Girard*, 2. 97 sqq. 2 23. 4. 5. 2; Ulp. 6. 14 sqq.; *ante*, § xl. 3 Geist (4), 3. 69; French transl. 4. 15. 4 See however Pernice, *Labeo*, 2. 1. 386, but he does not carry it far back. See also Ulpian in 25. 1. 5, who hesitates as to the exact meaning of the rule. 5 25. 1. 5. 2. 6 See *ante*, § xl, and Schulz, *Z.S.S.* 34. 57 sqq. 7 19. 1. 30. pr. 8 See, *e.g.*, 33. 8. 6. 1. *Argentarius* does not provide a case. If the debtor to him had not raised the point in the banker's action there does not seem to have been anything to prevent him from claiming independently. If the counterclaim had necessarily been in issue there would have been a *res iudicata*. 9 G. 4. 82. 10 Inst. 4. 10. pr. 11 *Ante*, § xxvi.

ancient and was heard by the magistrate[1], or to action on behalf of a ward, though this does not suit the name very well[2]. But the statement that representation was not possible in the *legis actio* does not prove impossibility in the actual hearing, which is no part of the *legis actio*, and a text in the *Ad Herennium*, quoting, apparently, an old *lex*, authorising aged and sick people to appoint *cognitores* to act for them, has led to the view that they were allowed at this stage in such exceptional cases[3]. It is also held, in view of, *inter alia*, the form of appointment of a *cognitor*[4], which is not only archaic, but follows closely the structure of other ancient forms, *e.g.* that of *manus iniectio*, that no restriction to special cases existed but that this *cognitor* was a recognised institution of the *legis actio*[5]. But this is not generally accepted[6]; in any case we know representation only in the later systems.

Apart from *tutores* and *curatores*[7], representatives were *cognitores* or *procuratores*. Not everyone could be a representative or appoint one. A *miles* could not be a representative, for disciplinary reasons[8], or a woman because it was a *virile munus*[9]. The Edict contained provisions, now imperfectly known[10], forbidding certain persons, notably *infames* and *ignominiosi*, to appoint, or to be themselves appointed, representatives for this purpose, in some cases absolutely, in others without consent of the other party. It is clear that the point might be decided by the praetor *in iure*[11]. But it might be settled *in iudicio*, and there were *exceptiones cognitoriae*[12], *procuratoriae*, by which such points were brought up. These are obviously suitable only for objections made by the defendant; it seems that plaintiff's objection to a *cognitor* of his opponent must have been disposed of *in iure*. After the decay of the *formula* these questions seem to have been settled early in the proceeding before *litis contestatio*[13]. Justinian abolished these *exceptiones*, at least so far as *infames* were concerned, as being not used[14], and in fact very little is said in the *Corpus Iuris Civilis* on this matter, though it seems clear that the disabilities or some of them still existed[15].

Representation appeared earlier in litigation than in other branches

1 But see Girard, *Org. Judic.* 1. 70 and 75, n. 1, who points out that this process was not a civil *legis actio* at all. 2 See however Bertolini, *Proc. Civ.* 1. 188, who compares "*pro socio*." For a variety of explanations, see Girard, *loc. cit.*; Bertolini, *loc. cit.*; Cuq, *Instit. Juridiques*, 1. 408 and reff.; Karlowa, *C.P.* 355. 3 *Rh. ad Her.* 2. 13. 20; Lenel, *Z.S.S.* 5. 149. 4 G. 4. 83. 5 Eisele, *Beiträge*, 91 sqq.; *Studien*, 51 sqq. 6 No direct evidence for this civil *cognitor*: the laxer characteristics of the formality (p. 702, n. 2) are against great antiquity, and formlessness is not an essential characteristic of praetorian institutions. 7 *Post*, p. 703. 8 Inst. 4. 13. 11; C. 2. 12. 7, 9. 9 Inst. 4. 13. 11; C. 2. 12. 18. 10 P. 1. 2. 1; Vat. Fr. 320–324. See Lenel, *E.P.* 88 sqq.; Debray, *N.R.H.* 1912, 371. 11 Vat. Fr. 322. 12 G. 4. 124; Inst. *cit.* 13 C. Th. 2. 12. 3=C. 2. 12. 24. 14 Inst. *cit.* The *exceptio procuratoria* appears in the Digest, 3. 3. 57. 1; 17. 1. 29. 4, etc. 15 C. 2. 12. 6, 7, 9.

of the private law, but in its earliest form it was short of what is called direct representation. The *cognitor* did not at first "represent" in the modern sense. He became the actual party. It was he who was condemned or absolved. It was he who had or was liable to the *actio iudicati*[1]. But this was altered at latest by the time of Cicero, and judgment for or against a formally appointed *cognitor* affected the principal. It is likely however that from the beginning he was regarded as bringing his principal's case into issue, so that, on the principle of "*non bis in idem*," further action was barred.

Cognitores were appointed in the presence of the other party by "*certa et quasi solemnia verba*" of which Gaius gives two forms, apparently as alternatives[2], but the difference between them ("*quod...peto, petis*," "*quod...agere volo, agere vis*"), while it may have to do with the nature of the action, or more probably with the place and time of appointment, has played a part in the controversy as to origin[3]. There could be no condition on the appointment[4]. The *cognitor* need not be present, but if he was not, the appointment was not effective until he had accepted[5]. *Procuratores* were appointed informally[6] (so much so that it was possible for one to act without appointment at all[7], *defensor*), but in any case the appointment must take effect by the time of *litis contestatio*. The *formula* shewed in what capacity the party was acting, since the true principal's name appeared in the *intentio*[8] and the representative's in the *condemnatio*[9]. The *formula* could not be altered; any further change must be by *translatio iudicii*[10].

These two kinds of agent did not in the earlier classical law represent their principal to the same extent. The *cognitor* for a plaintiff, formally appointed, with express declaration to the opponent, brought into issue the right of his principal, whose right of action was therefore consumed[11]. A *procurator* did not, so that the claim might possibly be renewed, a distinction reflected in the law as to the security which must be given. If the representative was on the defendant's side, since the plaintiff's right

1 On behalf of defendant he is more like a *vindex* than a representative. 2 G. 4. 83. The requirement of *certa verba* is not so strict that added words vitiated the appointment as in *legis actio*, and it might be in Greek (Vat. Fr. 318, 319). 3 *Peto* is held by Wlassak to denote the moment of *litis contestatio*. This he thinks the original form, obsolete in classical law, see Aut. Gai. 91 (*Cognitur*, 44; *Mél. Girard*, 2. 637). But there is textual evidence for *peto* in the sense of action after *litis contestatio*, and Eisele holds (*Beiträge*, 99) that this form was used where a *cognitor* was appointed *in iudicio*. But there is no evidence for such appointment, apart from *translatio iudicii*. 4 Vat. Fr. 329. 5 G. 4. 83. 6 G. 4. 84, even conditionally, D. 3. 3. 3. 7 See, *e.g.*, G. 4. 101. But certain near connexions who acted without express appointment were on the same level as if appointed, 46. 7. 3. 3. 8 In the *formula* of a real action the principal would not appear at all in the case of *cognitio* for the defence. 9 G. 4. 86, 87. 10 *Post*, § CCXLI. 11 G. 4. 97, 98.

was necessarily in issue, security was always needed[1]. The *actio iudicati* must *prima facie* go to or against the person named in the *condemnatio*. But the Edict seems to have given it to or against the principal in the case of a *cognitor*[2], though this may have required a *translatio iudicii*[3]. It is said to have been allowed "*causa cognita*[4]," but that means only that if it was a case of *cognitio in rem suam* it was not so given.

In the case of *procurator* the *actio iudicati* was available under the Edict only to or against him[5]. But the *procurator* was gradually assimilated to the *cognitor*, and at least in later classical law a *procurator* whose intervention was ratified, or whose principal was present, or who was appointed "*apud acta*," or had what Severus calls "*plena potestas agendi*," fully represented his principal, so that the latter's right was brought into issue, and the *actio iudicati*, with formal *translatio iudicii*, was available to and against him[6]. The *cognitor* had disappeared under Justinian, and the *procurator* whose powers were certain fully represented his principal[7]. It still remained true that a mere volunteer, a *defensor*, or one of uncertain authorisation, was in the old position and personally responsible.

The *tutor* could also act as representative[8] for his ward. We know little of his position in this matter in the *legis actio*. The rule of the *l. Hostilia* above mentioned[9] suggests that *tutores* could represent their wards at least in *furtum*, probably in all cases. It is likely in view of the early conception of *tutela*[10] that this was hardly thought of as representation; the rights were regarded to some extent as vested in the *tutor*. As to *curator* of *furiosus* or *prodigus*, the XII Tables describe his power as *potestas* over the man and his *pecunia*[11]; he could alienate for him[12] and probably acquire. Pomponius says that the *curator furiosi* could not manumit for him[13], and this was a *legis actio*, but he rests this on the fact that manumission is not administration, so that there was probably no formal difficulty. However these doubtful questions are answered the rules of classical law are fairly clear. Intervention by any of those guardians is treated as representation, and Gaius[14] shews that they were in most respects on the footing of an authorised *procurator*, and, in some[15], attained practical equality with *cognitor* before a *procurator* did.

The position of *curator minoris* in the matter is disputed. The Digest treats him as on the same footing as a *tutor*, but it is probable that

1 G. 4. 101. 2 Vat. Fr. 317, 331. 3 *Post*, § CCXLI. 4 Vat. Fr. *cit.* 5 No edict needed as his name is in the *condemnatio*, Lenel, *E.P.* 390. 6 C. 2. 12. 10; Vat. Fr. 317. 7 Inst. 4. 11. 4, 5. Differences of opinion on the question how far this is an advance on later classical law. See, *e.g.*, Costa, *Profilo storico*, 127. 8 G. 4. 99. Apparently any acting *tutor*, within his field of operations. 46. 7. 3. 5; *ante*, § LVIII. 9 *Ante*, p. 700. 10 *Ante*, § LI. 11 5. 7 a. Girard, *Textes*, 14. 12 *Ante*, § LXI. 13 40. 1. 13. 14 G. 4. 101. 15 *E.g.*, *de rato*, G. 4. 99.

there has been a good deal of alteration of the texts. It may be that, at any rate till the end of the classical age, he had no such power; he could indeed be appointed as *cognitor* or *procurator*, or act without appointment, as *defensor*, but that is a different matter[1].

Corporate bodies being incapable of acting for themselves had, of necessity, representatives to act for them, called *actores*[2], appointed *ad hoc* in classical law, but, later, permanent, these being also called *Syndici*[3]. There were elaborate rules as to the mode of appointment, applicable in all cases, and the appointment had also to be in accord with their statutes[4], but in the absence of appointment it was possible for a *procurator voluntarius* to act for them as in the case of ordinary persons[5].

CCXL. SECURITY IN LITIGATION. It is convenient to deal first with the case in which the principals were the parties, dealing afterwards with the complications which resulted from representation.

The plaintiff did not in general give security whether the action was *in rem* or *in personam*. The defendant, in classical law, gave, in real actions, security varying in form according as the action was *per formulam petitoriam* or *per sponsionem*. In the former case, which was a purely formulary creation, he gave security *iudicatum solvi*[6]. This was an undertaking by surety, *satisdatio*, having three branches embodied in one *stipulatio*[7], *i.e.* to satisfy the judgment if it was given against him, to defend the action, *i.e.* to take the necessary steps in order that the matter, which involves the cooperation of the parties, may proceed, and to commit (and to have committed in any earlier stage) no *dolus* in respect of the subject-matter of the suit[8]. In the case of action *per sponsionem*, the security is *satisdatio pro praede litis et vindiciarum*[9], modelled on the old *praedes* of the *legis actio* of which this procedure is the descendant. As this mode is wholly obsolete under Justinian we are ill informed as to its content. The view most widely held is that of Lenel[10], that it involved a promise of "*quanti ea res erit*" for practically the same hypotheses as in the other case, *i.e.* for the case of judgment (which, here, it must be remembered, was only indirect, for the amount of the *sponsio*, so that a *stipulatio* simply of the amount of the judgment would not have sufficed[11]), for the case of failure to defend, and against fraud, past or future.

1 See Solazzi, *Minore Età*, 202 sqq.; Lenel, *Z.S.S.* 35. 197 sqq.; *ante*, § LXII. 2 *E.g.* 2. 4. 10. 4. 3 3. 4. 1. 1. See Dirksen, *Manuale*, s.v. *Syndicus*. 4 3. 4. 3; 3. 3. 74. 5 3. 4. 1. 3. A duly appointed "*actor*" seems to have been in the position of a *cognitor*. On the whole matter, see Ramadier, *Études Girard*, 1. 259 sqq. 6 G. 4. 91. 7 46. 7. 6. 8 The exact formulation is disputed. For Lenel it contained a promise of the amount of the judgment under the first head and "*quanti ea res erit*" under the others, *E.P.* 509 sqq. See for other views, *ib.* 511, n. 4, and Duquesne, *Mél. Gérardin*, 197, *Mél. Fitting*, 1. 321, and Lenel's reply, *E.P.* xv. 9 G. 4. 91, 94. 10 *E.P.* 496 sqq. 11 "*si secundum me iudicatum erit, quanti ea res erit.*"

In actions *in personam* there was no general requirement of security, but Gaius tells us that it was required in certain actions, *i.e.*, *iudicati*, *depensi* and the old *actio de moribus*. He tells us that it was also required in some cases laid down by the praetor where the defendant was suspect, as one who "*decoxerit*" (fraudulent bankrupt), one whose goods had already been seized for debt, and a defendant *heres* whom the praetor thought suspect[1].

Under Justinian the system was much changed[2]. In real actions the judgment was normally for the thing itself, and it had become impossible for the defendant to transfer the *res litigiosa* in any way so as to bar the plaintiff's claim[3]. Moreover, the "real[4]" issue was involved with an increasing number of personal claims. The three actions *in personam* in which security was needed had disappeared[5]. Thus the need of security was gone in general where the parties were the principals, though Justinian's language suggests that the change had not been so great. He tells us that there was no longer need for security in respect of the subject of the suit, but that the defendant must always give security for appearance[6]. But this is merely the modernised form of *vadimonium*, *cautio iudicio sisti*. He tells us that this was sometimes by oath, *e.g.* for those "*in sacro scrinio militantes*[7]" or by mere promise, as in case of *illustres*, or, in ordinary cases, by *satisdatio*, varying in amount with the status of the parties[8].

The rules were more complex in the case of representation.

1. Representation on the side of the plaintiff. Here there was an important difference between *cognitor* and other representatives. In the time of Gaius the *cognitor* fully represented the principal and therefore gave no special security[9]. In the case of other representatives, procurators and guardians, as they did not directly represent the principal it was possible for him to renew the action, his right not being in issue, and thus the representative must give security that the principal would ratify his action, *cautio de rato*, *rem ratam habiturum dominum*[10]. But the complete representation was gradually extended to other representatives. In the case of *tutores* and *curatores* (*furiosi* and *prodigi*) the rule requiring *cautio de rato* was partially relaxed in the time of Gaius[11], and in the time

1 G. 4. 101, 102. 2 Inst. 4. 11. 2. 3 *Post*, § CCXLIV. 4 Girard, *Manuel*, 354. 5 But the cases of *heres suspectus* and defendant whose goods have been seized still remain, 42. 5. 31. pr.; h. t. 33. 1. The edictal rule about *decoctor* seems to have been replaced by a rule that security could be required from a *suspecta persona* sued for a *res mobilis*, but not for land, probably only in real actions. 2. 8. 7. 2; h. t. 15. 6 Inst. 4. 11. 2. 7 C. 12. 19. 12. 8 D. 2. 6; D. 2. 11. 9 G. 4. 97. 10 G. 4. 98. There was also a *stipulatio* "*amplius non peti*." It survived into Julian's edict (Lenel, *E.P.* 516; Debray, *N.R.H.* 1912, 1 sqq.), though it was of little value after the introduction of *de rato* with which it was usually coupled. 11 G. 4. 99.

of Severus this was required only from one whose powers were uncertain, *e.g.* one whose principal was not present and might have revoked the powers or one not authorised at all, *procurator voluntarius*[1]. This remained the law under Justinian apart from the change of position of *curator minoris* who was now treated as a *tutor*. The promise was that the principal would ratify and would not renew the action, and that there had been and should be no *dolus*, the liability being for "*quanti ea res erit*[2]." It required *satisdatio*[3]. It was discharged by ratification[4], and was broken by renewed action by anyone who would have been barred by *res iudicata*, if the original action had been by the principal[5].

2. Representation on the side of the defendant. The general rule for all cases was that security *iudicatum solvi* must be given, since the plaintiff's right, being brought into issue, was destroyed. The rule dates from the earliest state of things when representation even by *cognitor* was imperfect, and it applied in all cases, whether the right was brought into issue or not: *omnimodo satisdari debet, quia nemo alienae rei sine satisdatione defensor idoneus intellegitur*[6]. The only distinction was that if the representative was a *cognitor* the principal gave it, in other cases the representative[7]. The principle remained equally general under Justinian, though there were changes in detail. There were no *cognitores*. If the principal was present he gave security *iudicatum solvi*, or if he preferred, could become surety for his representative, for all the clauses of *iudicatum solvi*, having in both cases to give also a hypothec[8] over his property and security *iudicio sisti*[9]. If the representative was *procurator voluntarius*, or the principal was not present, the representative gave security *iudicatum solvi*[10].

CCXLI. *Translatio Iudicii.* If, as is most commonly held, *litis contestatio* was a *negotium* between the litigants[11], the terms of which were expressed in the *formula*, it follows, as is indeed clear, in fact, that no material change in the issue, *e.g.* insertion of an *exceptio*, or correction of *plus petitio*, could be made except by *restitutio in integrum*, involving a renewed *litis contestatio* and thus a new *negotium* and issue. Logically the same should be true of any change of persons. There are texts which deal with substitution of one person for another in the litigation, such a change being called *translatio iudicii*[12]. But as, under the libellary system, the strict rules of the *formula* no longer applied, the surviving

1 C. 2. 12. 10; Vat. Fr. 317, 333. 2 Lenel, *E.P.* 516. 3 46. 8. 4; h. t. 8. pr.; h. t. 23, etc. 4 46. 8. 12; h. t. 18. 5 46. 8. 1; h. t. 8. 1; h. t. 14; h. t. 22. 8. 6 G. 4. 101; Inst. 4. 11. 1. 7 G. 4. 101. 8 Inst. 4. 11. 4. The surety was meaningless as the representative was not now liable to proceedings under the judgment. 9 Inst. 4. 11. 4. 10 Inst. 4. 11. 5. 11 *Ante*, § CCXV. 12 3. 3. 27. pr.; 27. 7. 8. 1, etc.

traces of the institution are few and leave open many questions; the matter has been the subject of recent studies[1].

If the introduction of a new party called for a new *litis contestatio*, and *restitutio in integrum*, the question arises whether the transferred *iudicium* was a new one or the same transferred[2]. The texts do not enable us to decide this question, since the effects shewn in the texts are not those either of a wholly new *iudicium* or of a continuation of the old[3]; there is indeed no text which unequivocally says that a *restitutio* was necessary in any of these cases. And the rules applied do not help us much. Thus the question whether the procedural security given for the old *iudicium* was valid for the new[4] is not decisive, since we are not certainly informed as to the wording of these securities.

The principal cases suggested by the texts are three.

(*a*) Cases connected with representation. It is clear that the Edict contained a provision[5] that a principal who had appointed a *cognitor*, could, on cause shewn, have the *iudicium* transferred to himself or another *cognitor*, and that in practice a similar initiative was allowed to the *cognitor*[6]. No such rule applied to a *procurator*, but, here too, the *procurator* was assimilated to the *cognitor*, late in the classical age[7]. This *translatio iudicii cognitoria* is directly recorded, but we do not know the mechanism. In the case of *cognitor* of the plaintiff the security *iudicatum solvi* given by the defence was still valid[8], while in that of *procurator* it was not[9]. Hence Koschaker[10] holds that in the case of the *cognitor* the transfer was effected officially with no new *litis contestatio* and no effect on the position of the parties, while in the other case there was a new *litis contestatio*, with *restitutio in integrum*. The old issue was destroyed and a new one created. He holds that the destructive effect of the old *litis contestatio* was avoided by a fiction "*ac si de ea re actum non esset.*" It is shewn by Duquesne that this does not meet the difficulty in all cases. If the action was *annalis* and the year expired while the first action was pending, or if it was an action ended by death (*e.g.*, *ex delicto*) and the defendant whose *procurator* was defending had died, the above fiction would not suffice to prevent the operation of the rules barring the action. He takes a different view; for him there was *restitutio in integrum* in all *translatio iudicii*, and a new *litis contestatio*. The old *lis* was not necessarily completely destroyed. He suggests a fiction, evidenced in the texts, by means of which the new *litis contestatio* was dated the same day as the first, *litis contestatio repetita die*, which would

1 Koschaker, *Translatio Iudicii*; Duquesne, *Translatio Iudicii dans la procédure civile Romaine.* 2 Koschaker, 53 sqq.; Duquesne, 56 sqq. 3 Duquesne, *loc. cit.* 4 Koschaker, 72 sqq.; Duquesne, 59 sqq. 5 Vat. Fr. 341. 6 3. 3. 24. 7 See Duquesne, 161. 8 3. 3. 27, written of *cognitor*. 9 20. 6. 1. 2. 10 *Op. cit.* 57 sqq., 72 sqq.

avoid these inconveniences[1]. But all the cases of *litis contestatio repetita die* which he finds are between the same parties. In none of them is a *litis contestatio* in the same civil action set aside. In all but one of them it is in a purely praetorian procedure[2], so that his hypothesis is hardly proved[3].

(*b*) Cases of Succession. *Translatio iudicii successoria, i.e.* where a party dies *pendente lite*, and a *heres* takes his place. As a *heres* succeeds *ipso iure* to the rights and liabilities of the deceased at civil law and those under *litis contestatio* are not different from others, and the texts make it clear that the new *iudicium* was essentially the same as the old[4], all the incidents being retained, it might seem that there was here no *translatio* at all, though there are texts which call it a *iudicium translatum*[5] and others indicating that there was a new *editio* and *acceptio iudicii*[6]. Koschaker holds[7] that there was no new *litis contestatio*, but that the *accipere iudicium* which is evidenced was a procedural contract, *sui generis*, which had the positive effects of *litis contestatio* without destroying the old. Duquesne[8], pointing out that this is no more than a *litis contestatio* deprived arbitrarily of some of its effects, applies the same method as in the other case, but some further refinement seems to be needed[9].

(*c*) Case of change of *Iudex*. In this case everything is doubtful; it is not even certain that it was thought of as a *translatio*. If the *iudex* was a party to the procedural contract, or a term in it, any change of *iudex* involved *translatio iudicii*. If he was appointed after *litis contestatio* the difficulty would not arise[10]; his personality would be no part of the procedural contract. Duquesne holds that he was appointed at *litis contestatio*, and that *mutatio iudicis* involves a new *litis contestatio* to which he applies the conception of *repetitio diei*[11].

There are other cases of *translatio iudicii*, but they are not helpful, as the point is involved with other issues so complex as to make it difficult to deduce any rule from them for *translatio iudicii* itself. Duquesne mentions three types of such cases. (i) Where a party under-

1 *Op. cit.* 99 sqq. **2** 10. 4. 9. 6. *Absolutio* in *ad exhibendum* is refused in the circumstances unless deft. will accept a *vindicatio die repetita*. **3** The *intentio* is in the name of the principal, but if the new *cognitor* has been freed since *l. c.* in the first action, this requires him to have been appointed when he was *incapax*. **4** 3. 2. 14; 47. 10. 28; 50. 16. 12; Duquesne, 165. **5** 27. 7. 8; C. 5. 53. 4. **6** *E.g.* 10. 2. 48. **7** *Op. cit.* 254. **8** *Op. cit.* 167. **9** The formula suggested by D., who argues strongly for an *intentio* in the name of the deceased (p. 191), is not free from difficulties. It would require judgment even where it had already been given in a *iudicium legitimum*, or in a case in which the earlier *iudicium* had been extinguished by the expiration of 18 months. But it is possible on his framework to provide against this. **10** Lenel, *Z.S.S.* 24. 337, cited Duquesne, 225. See also Partsch, *Schriftformel*, 32. **11** Duquesne, *loc. cit.*

went *capitis deminutio*[1]; (ii) noxal cases, *e.g.* where a slave the subject of a noxal action became *heres*, the ordinary successoral *translatio* being complicated by the change from noxal to direct action[2], or where the slave, who was a *statuliber*, became free during the action[3], or where a supposed slave was proved, during the action, to be free[4]; (iii) cases of transfer between *pater* and *filius*, *e.g.* a *pater* was suing *nomine filii* for an *iniuria* to the son and it was transferred to the son[5], and a group of cases in which an action to which the son was a party was transferred to the *pater*[6].

CCXLII. CUMULATION OF ACTIONS. The same set of facts might give rise to more than one action. A defect in a thing sold might give the *actio ex empto* or the *actio redhibitoria*. A depositee who made away with the thing was liable *ex deposito*, and was also a *fur*. If a hirer of a slave wilfully killed him there might be action on the contract, the Aquilian action, and criminal proceedings. The same act might be two distinct delicts or a delict and a crime. Such a state of facts gave rise to questions as to the extent to which the possible actions were mutually exclusive or all available. The factors which create the difficulty in determining the rules may be roughly summarised. There were differences of opinion and changes of doctrine among the classical jurists on some points. Many of the texts have clearly been altered by Justinian, and cannot readily be reconstructed. The recorded differences of opinion do not usually shew on what difference of principle they turn. And the statement that one action barred another is ambiguous. It might mean that *litis contestatio* barred, or judgment, or satisfaction. The bar might be civil or praetorian. In some cases the bar was partial; the second action might be brought, but only for excess over what was recoverable in the first. The matter has been the subject of much discussion; it must suffice to outline the principal known rules and hypotheses[7].

Where the two actions were both *rei persequendae causa*, *i.e.* neither was penal, it is clear that they were not independent, but there is some confusion in the texts. The case might arise in many ways. Thus there might be a choice between *actio ex empto* and *actio redhibitoria*, between *actio commodati* and *vindicatio*, between *pro socio* and *communi dividundo*. In all cases one barred the other, but the nature of the bar was not always the same. Sometimes *litis contestatio* in one barred the other, *e.g.* in *pro socio* and *communi dividundo*[8]. It is maintained by

1 5. 2. 22. 3; Duquesne, 194 sqq. 2 3. 2. 14. 3 9. 4. 15. 4 40. 12. 24. 4. 5 47. 10. 17. 14, 22. 6 See Duquesne, 207 sqq. 7 As to the question from the point of view of *praeiudicium*, see Pissard, *Les questions préjudicielles*, and *ante*, § CCXXI. 8 17. 2. 38. 1. In h. t. 43 we are told that one does not bar the other, but the reason given shews that it is a case where *pro socio* will lie for matters that could not come into *communi dividundo*: it is wider in scope. See *ante*, § CLXXXVI.

Eisele[1] that where the *causa* and the aim were the same, as where both were *rei persequendae causa*[2] they usually would be, *litis contestatio* barred, but where the *causa* was different, only satisfaction; the case not being one of procedural consumption at all. Where the same facts gave an action on contract and one on delict, *e.g.*, *ex locato* and *e lege Aquilia*, where a thing hired was negligently damaged, the earlier law seems to have been that neither formally barred the other, but the plaintiff in the first action might be made to give security that he would not bring the other[3]. But the view also appears, and seems to represent the final attitude of classical law, that either barred the other: it is clear, however, that, at any rate under Justinian, the delictal action could be brought after the contractual for anything more that could be recovered by it[4].

Where the same act constituted two delicts, the law is obscure, not for lack of authority; the texts are numerous, and some of them shew that the law was unsettled in classical times[5]. There are many possibilities. The two might be entirely independent. Each might bar the other absolutely or by *exceptio*. Or the praetor might have power to refuse the *formula* unless such security was given as was mentioned in the last case. If to these points is added the fact that the jurists found it difficult to draw the lines, it is easy to see that it is not possible to state the law with certainty. According to Mommsen[6], if the two delicts were of distinct moral character one might be sued on after the other, but only as to the excess. If they were different remedies for the same evil, one barred the other. He illustrates the former rule by *damnum* and theft, *damnum* and *iniuria*, *damnum* and "*arboribus caedendis*." He does not illustrate the latter rule and remarks that it is easier to state than to apply. He seems to hold that by the later classical law they were never wholly independent if it was one act, and adverts to a *sc.* of Titus[7] which forbade the bringing of proceedings under different *leges* on the same facts[8]. He adds that the jurists have many differences of opinion and in cases of doubt allow concurrence.

According to Karlowa[9], they were originally quite independent if based on different statutes, *e.g.* the XII Tables and the *l. Aquilia*. If one or both were edictal the result depended on interpretation of the praetor's intent. But he seems to hold that in classical times, even where one survived the other, it was met by one of the devices above mentioned, or limited to any excess. Pernice[10] is of opinion, that the view made dominant by Paul and accepted by Justinian was that the

1 *Archiv für C.P.* 79. 327 sqq. 2 *Ante*, § CCXXXIII. 3 See the texts cited by Pernice, *Sachbeschädigungen*, 141. 4 44. 7. 34. 2, interp. 5 *E.g.* 44. 7. 32; 47. 10. 7. 1. 6 *Strafrecht*, 887 sqq. 7 Sueton. *Titus*, 8. 8 44. 7. 53; 48. 2. 14.
9 *R.Rg.* 2. 985 sqq. 10 *Op. cit.* 132 sqq.

second action always lay for any excess, but he considers that this restriction applied only where the two infringements of right were involved in one set of facts. If however a wrongful act produced two distinct states of fact both of which were delicts, *e.g.* *A*'s slave was so corrupted by *B* that he stole from *A*, *B* was liable both for *servi corruptio* and for complicity in theft.

On concurrence of delictal and criminal liability the texts are numerous and confusing[1]. It is not clear that the law of Justinian was the same as classical law, the mode of criminal prosecution having changed. It is not clear that the law was the same for all cases of concurrence. An obscure text[2] suggests that where the delictal action aimed merely at compensation, as opposed to punishment of the offender, which was the aim of criminal proceedings, they were quite distinct, and a post-classical text draws a similar distinction[3]. According to Mommsen[4], so long as the old system of criminal procedure subsisted, the private action could not be brought while a criminal proceeding was pending or possible, but where the injury consisted in damage to property rights, as in *damnum* and theft, this rule did not apply, and, whichever was brought first, the other could be brought nevertheless. For later law he holds that it is not possible to lay down a general rule. Sometimes the possibility of criminal proceedings barred the others, often there was a choice[5]. But one text[6] gives a list of cases, all affecting property, in which civil proceedings could be brought, though a crime had been committed. The text cites these, including *damnum* and *furtum*, as cases in which, by the civil proceedings, a *praeiudicium* was created for the subsequent criminal proceedings, so that they were cumulative. We are told elsewhere[7] that the Aquilian action could be brought before the criminal proceedings, but that no *praeiudicium* should result for the latter. The explanation seems to be that the earlier case would in fact have decided the point or part of the point which would be in issue in the criminal proceedings, but that in those proceedings no account was to be taken of the earlier decision[8].

1 See those cited by Monro, *l. Aquilia*, 5, and Coll. 12. 7. 2; D. 19. 5. 14. 1; 47. 2. 93; 47. 11. 5. 2 47. 10. 7. 1. 3 C. Th. 9. 20. 1 = C. 9. 31. 1. 4 *Loc. cit.* 5 47. 2. 57. 1. 6 48. 1. 4. 7 9. 2. 23. 9. 8 See C. 9. 31. 1. 2, "*per alteram quae supererit iudicatum liceat retractari.*"

CHAPTER XV

THE LAW OF PROCEDURE (*cont.*). PRAETORIAN REMEDIES

CCXLIII. *Restitutio in Integrum*, p. 712; CCXLIV. *Dolus*, 714; *Metus*, *ib.*; Minority, *ib.*; Absence, 715; Other cases, *ib.*; Scope of *Restitutio*, 716; CCXLV. *Missio in possessionem*, 717; Judgment and connected cases, *ib.*; Other cases affecting the whole estate of defendant, 718; Cases affecting a whole estate, not necessarily the whole estate of defendant, *ib.*; Cases affecting specific things, 720; CCXLVI. *Stipulationes praetoriae*, 721; CCXLVII. Interdicts, 723; CCXLVIII. Exhibitory, Restitutory, Prohibitory, 724; CCXLIX. Non-Possessory and Possessory, 726; *Adipiscendae*, *Retinendae Recuperandae Possessionis causa*, 727; CCL. Procedure under Single Interdicts, 730; CCLI. Procedure under Double Interdicts, 734; CCLII. Later history of Interdicts, 737.

CCXLIII. In dealing with substantive law it has been necessary to speak incidentally of various praetorian methods of remedy and constraint other than ordinary actions. Some account follows of these devices.

Restitutio in Integrum[1]. This was an exercise of the praetor's *imperium* by which he caused to be in effect revoked or treated as non-existent some event which had prejudiced the legal position of some person[2]. It was in certain respects the most significant of the specially praetorian remedies. *Missio in possessionem* was in general merely a way of putting pressure on a party and often had nothing final about it. *Stipulationes praetoriae* were mainly ancillary to the civil law, and Interdicts, though in origin they no doubt protected definite substantive and final rights, and in some cases still had that character in classical law, were nevertheless, in these cases, in furtherance of and not in opposition to the civil law, and in the most important field of their operation for private law, the protection of possession, they gave a provisional result[3]. But it was a characteristic of *restitutio in integrum* that it definitely destroyed rights existing at civil law, though they might be based on a statute, even the XII Tables[4].

Restitutio in integrum was given by a decree of the praetor, based on his *imperium*[5] and issued on application after enquiry[6]. The application had in general to be made within an *annus utilis*, *i.e.* within a year, as it seems of *dies utiles*, from the time when the disability ceased[7], except in

1 P. 1. 7; D. 4. 1. 2 4. 1. 1; h. t. 2; h. t. 7. 1. 3 *Post*, § CCXLVII. 4 See, *e.g.*, 4. 1. 6 in f. Of course *actiones honorariae* and *exceptiones* might do the same. 5 50. 1. 26. 6 4. 1. 3. 7 "*Ex quo annus utilis currebat*," C. 2. 52. 7, which seems to imply that it was not an *annus continuus* from that date, which also is difficult to reconcile with the four *annos continuos* which under Justinian was a limit intended to shorten the time

the case of *capitis minutio* in which it was perpetual[1]. There was post-classical legislation dealing with this time limit[2]: in some cases Justinian provided[3] that the limit should be four actual years from the beginning of the *annus utilis*, which in ordinary cases would be the cessation of the disability, though it seems that if a new disability supervened while the first existed the time did not begin to run while this endured, even for transactions affected only by the first disability[4].

To base a claim to *restitutio in integrum* there must be shewn an *interesse*, *i.e.* some injury to a man's property rights resulting from some transaction or from some event, such as lapse of time, which has had legal consequences[5]. There was no rule specifying exactly what injuries to property sufficed, but it is clear that there must have been such an injury. Thus there was no *restitutio* against a marriage, since this could be undone at will[6], but there might be against a conveyance of *dos* which had been made[7]. A gift of liberty was irrevocable, and thus there was no *restitutio*, even where it was given under a *fideicommissum* in a codicil afterwards proved to be a *falsum*[8]. Conversely there was no *restitutio* where a minor had sold himself or let himself be sold as a slave and had suffered the enslavement which resulted as a penalty, the reason assigned being that there was no *restitutio in integrum* from a *status mutatio*[9] (a proposition quite distinct from the rules we shall meet under which some of its effects could be set aside[10]). This implies that there was no *restitutio* from an *adrogatio* or *adoptio*, and this seems to have been the law. No text allows revocation of an *adoptio* in this way, and indeed no property right seems to have been affected in classical law, but there is a text in which Ulpian holds somewhat hesitatingly that a minor who, having been adrogated "*se circumventum dicat*," could get *restitutio*[11]. We have seen that an *adrogatus impubes* could for good reason get the *adrogatio* ended by *emancipatio*[12], but this was a civil process and did not annul it *ab initio*. There is no evidence that an adult could get it set aside for, *e.g.*, *dolus*, and from the way in which *adrogatio* of a *libertinus* "*per obreptionem*" was treated[13] it is likely that there was no such right.

Any property loss sufficed, either *damnum emergens* or *lucrum cessans*[14], and it might be either a realised loss, *e.g.* a transfer of property, or a liability incurred, an obligation undertaken or the like[15], a distinction reflected in the mode of relief.

1 4. 5. 2. 5. **2** C. Th. 2. 16. 2 = C. 2. 52. 5. **3** C. 2. 52. 7. **4** C. 2. 52. 3. **5** 4. 1. 1–4. **6** It has no effect on property. **7** 4. 4. 9. 1. **8** 40. 4. 47. pr.; 4. 4. 9. 6. Except by the Emperor, h. t. 10. See also C. 2. 30. 2, P. 1. 9. 5 a, and Buckland, *Slavery*, 566 sqq. **9** 4. 4. 9. 4. **10** See Buckland, *Slavery*, 428. **11** 4. 4. 3. 6. **12** *Ante*, § XLV. **13** *Ante*, § XLV. **14** 4. 4. 44; 4. 6. 27. **15** 4. 4. 41; h. t. 44.

Besides the *damnum* there must, however, be a *iusta causa*, some ground on which the relief was claimed. Of such grounds the Edict enumerates a considerable number.

CCXLIV. 1. *Dolus*[1]. The circumstances in which this was a ground of *restitutio* have already been considered under the head of delict[2]. The compilers have to a great extent suppressed the discussions of it[3].

2. *Metus*. Also dealt with in the law of delict[4].

3. Minority[5]. A minor was entitled to *restitutio* where he had suffered damage and there was no other remedy[6], provided he applied within an *annus utilis* from attaining the age of 25[7], but not if he had confirmed his action at any time after reaching that age[8], an act forced on him, by the legal position in which he was placed, being no confirmation[9]. *Restitutio* was not given as a matter of course; it must be shewn that the damage was due to his minority, *i.e.* to his inexperience[10], credulity or "*facilitas*," not merely where it turned out badly[11], or the contract was made by his predecessor in title[12]. It was not given to relieve a minor from consequences of his own wrongdoing[13], or, conversely, to enable him to enforce a penalty, as opposed[14] to damages, or where he pretended to be of full age[15]. It is to be observed that it was for his own defect, not for fraud in the other party, which was not essential[16], and further that the presence of guardians at the transaction, even where they carried it through themselves, did not necessarily bar the claim[17].

It might be given where he was a *filiusfamilias*, but only so far as he was interested, not, in general, for the benefit of the *paterfamilias*[18]. Thus, if he contracted at his father's order, the son, if sued after *emanci-*

1 The *actio doli* and *actio metus* are really ways of enforcing the *r. i. i.* This explains why they were not treated as penal; the restoration avoids any penalty. Hence too the purely subsidiary character of the action (4. 3. 1. 1, 4 sqq.). Whether there was a special edict giving *r. i. i.* for *dolus* as there was for *metus* (4. 2. 1) is not clear. Two texts cited to shew it are late (4. 1. 7; 42. 1. 33), and both rest on rescripts. See however Girard, *Manuel*, 430. 2 *Ante*, § CCIII. 3 See however 4. 1. 1; 4. 1. 7. 4 *Ante*, § CCIII. 5 For opinions as to difference of conditions giving rise to *exceptio* and *actio e lege Plaetoria*, and those for *exceptio doli* and *r. i. i.*, see Debray, *Mél. Girard*, 1. 265 sqq. It is held by Partsch, *Negotiorum gestio*, 83 sqq., that all texts giving *r. i. i.* to *pupilli*, on transactions by the *tutor*, are interpolated. *Contra*, Solazzi, *Bull.* 27. 296 sqq. 6 4. 4. 16. pr., 3; P. 1. 9. 7 4. 4. 1. 1; 4. 4. 19; C. 2. 24. 1; C. 2. 52. 7, by which Justinian limited it to four actual years. Events might make it impossible, see, *e.g.*, 4. 4. 24. 2. 8 4. 4. 3. 2. 9 C. 2. 45. 1; h. t. 2. This restriction applies only to his claim for minority: it does not follow that in an appropriate case he would not have an *exceptio doli* as an adult would. 10 A minor may be relieved against another where only one was *captus*, 4. 4. 11. 6, Ulp. against Pomponius: the text also deals with the case where both are *capti*. If a minor contracted and gave security he could be *restitutus* in respect of both, 4. 4. 13. pr. 11 4. 4. 11. 3, 4; h. t. 44. 12 4. 4. 1. 1. 13 4. 4. 9. 2. 14 4. 4. 37. pr. 15 C. 2. 42. 2. 16 4. 4. 7. 7. 17 4. 4. 39. 1; h. t. 47; C. 2. 24. 1–5. 18 4. 4. 3. 4.

patio, could apply for relief[1], though the father if sued *quod iussu* could not. A *filia* could get relief in a matter of *dos*, because of her interest[2]. If the son contracted not *iussu patris* and did not apply for relief, the father could do it for him on account of his liability *de peculio*[3], which, on principle, could not exceed that of the son.

4. Absence[4]. The Edict stated a number of cases of absence which had led to the loss of property or the barring of a right by lapse of time, or loss of an action for failure to appear, and promised *restitutio* within an *annus utilis* from the time when the difficulty ceased[5]. The cases mentioned are absence compelled by fear, or *bona fide* on State affairs, or imprisonment, *de facto* slavery, or *captivitas*, and some similar cases of absence of the other party, so that proceedings were impossible. It added some cases other than absence; a magistrate had been prevented by *intercessio* from acting, or had delayed matters so that the claim was time-barred, or the other party was one who could not be *in ius vocatus*. It added a proposition that the same relief would be given in other similar cases[6]. The normal remedy in these cases was an *actio rescissoria*.

5. Error. This was not in general a cause of *restitutio*, but the Edict allowed it in certain procedural cases, some cases of *plus petitio*[7], and omission of an *exceptio peremptoria*[8].

6. Alienation *mutandi iudicii causa*[9]. Where a person threatened with litigation transferred the subject-matter to another person, so as to change the conditions of the litigation, the praetor gave *restitutio in integrum* and an *actio annalis in factum*, for the *interesse*, not available against the *heres*. The cases in which this is known to have been applied are *vindicatio* of property or servitude, *e.g.* where the thing was transferred to a "*potentior*," *aquae pluviae arcendae* and *operis novi nuntiatio*[10]. The *restitutio* is suppressed in the Digest, no doubt because *vindicatio* now lay against one who had *dolo malo* ceased to possess. It is thus difficult to determine the field of each remedy[11].

1 4. 4. 3. 4. The reference to action before *emancipatio* is in part at least interpolated. **2** 4. 4. 3. 5. **3** 4. 4. 27. pr. **4** See Lenel, *E.P.* 117. **5** 4. 6. 28. 3, 4. **6** 4. 6. 26. 9–28. 1. **7** G. 4. 53; for adults only where the error was an entirely excusable one. Inst. 4. 6. 33. Another case, G. 4. 57. **8** G. 4. 125. See P. 1. 7. 2. Lenel (*E.P.* 120) points out in 44. 2. 2 similar relief in a "*dilatoria*" case, of which Gaius doubts the possibility. **9** D. 4. 7. **10** C. 2. 54; D. 4. 7. 3; h. t. 4. Cases coming under "*quod vi aut clam*" are also mentioned in h. t. 3. **11** The existence of this *r. i. i.* has been denied. See for discussion and statement of principal views, Pissard, *N.R.H.* 34. 377 sqq.; Lenel, *Z.S.S.* 37. 104; Beseler, *Beiträge*, 2. 153 sqq.; Kretschmar, *Z.S.S.* 40. 136 sqq. The machinery was independent of that dealing with alienation of a *res litigiosa*. By an edict of Augustus, no doubt a direction to the magistrates, any sale of property the subject of pending litigation, by the plaintiff, was forbidden, an *exceptio* being given in any action by the buyer, who was also liable to a penalty, presumably only if he acted knowing the state of things (G. 4. 117 a; *Fr. de i. fisci*, 8). The *exceptio*, which may have been in *factum* and stated in the Edict (Lenel, *E.P.* 493), did not prevent sale by a

There were other cases of *restitutio* of less importance. Such were the cases of one who had dealt in good faith with a *pupillus* under the *auctoritas* of one who was not in fact *tutor*[1], of creditors of one who had been adrogated or had passed into *manus*[2], and at least some cases of *translatio iudicii*[3].

The damage against which relief might be claimed being of many kinds, the relief itself varied. Thus, where a right of action, or of property, had been lost, the remedy was an *actio rescissoria*[4], in which there was a fiction that the disqualifying event had not occurred. Where an obligation had been incurred, the remedy might be an *exceptio*[5] or *denegatio actionis*[6]. Where the relief was against entry on a *hereditas*, it was by refusal of *actiones hereditariae*, both ways[7]. In some cases it was an *actio in factum* or *utilis* of some sort[8]. It is to be noted that all this is by ordinary procedural machinery. The praetor's enquiry resulted in a decree of *restitutio*, but the further steps under it, apart from *denegatio actionis*, were, in general, judicial, not praetorian *cognitiones*. In two texts, however, we are told that the praetor himself, in the case of sale by a minor, could order the acts needed to effect the *restitutio*[9]. This does not appear in any other case.

The questions remain: against whom and in favour of whom might *restitutio* be granted? On the first point we have seen that the rules in *dolus* differ from those in *metus*[10]. Apart from this, it was available against the wrongdoer or the immediate beneficiary from the act, or his universal successors, but not against ordinary acquirers from him[11], while minors could get *restitutio in rem*, *i.e.* against any holder, the defendant having a right to claim from his *auctor*[12]. On the other hand it was excluded against a patron or *pater* under Justinian[13] who says that the classics had doubted, and a decree of *restitutio* was of no avail against persons not summoned to the *cognitio* of the praetor: it was *res inter alios acta*[14].

On the second point, there is an express provision of the Edict that

defendant, in possession. An enactment of 380 (C. 8. 36. 3) dealt with gift by will of such things by either party and provided, in effect, that the bequest should not be operative till the litigation was over. In 532 Justinian declared void all transfers by either party, a buyer with knowledge being bound to restore the property and pay an equivalent penalty to the *fiscus*, a buyer in ignorance being entitled to recover the price and one-third more (C. 8. 36. 5).

1 27. 6. 1, etc. **2** *Ante*, § CXLI; Lenel, *E.P.* 113. **3** *Ante*, § CCXLI. **4** *E.g.* 4. 6. 28. 5. **5** *E.g.* 4. 2. 9. 3. **6** *E.g.* 4. 4. 27. 1. **7** See 4. 2. 21. 5. **8** *E.g.* 4. 5. 2. 1; 4. 7. 4. 5. **9** See Girard, *Manuel*, 1082, n. 4. D. 4. 4. 13. 1 is explicit; h. t. 24. 4 somewhat less so; h. t. 41, also cited *ib.*, has probably been altered. G. attributes the singularity to the word "*animadvertam*" in the edict. **10** *Ante*, § CCIII. **11** 4. 6. 21. 1. *Milites* have a special privilege, 4. 6. 17. **12** 4. 4. 13. 1; h. t. 15. **13** C. 2. 41. 2. **14** 4. 4. 29. 2.

the *heres* or other universal successor of one entitled to *restitutio in integrum* had the same right for the rest of the time which was left to the deceased, with a further provision that where the *heres* was himself a minor this time began to run only from the moment when his minority ceased[1]. *Restitutio* against *dolus* or *metus* released also sureties for the person affected[2], but *restitutio* of a minor did not necessarily release his sureties since it may well have been on account of his minority that sureties were taken[3]. They were, however, released if there was any *dolus* or the like[4], and where the *restitutio* was against acceptance of a *hereditas*, any sureties were released whose liability was undertaken not for the man affected, personally, but for him in his capacity as *heres*[5].

It should be noted finally that there were cases of *restitutio* not provided for in the Edict, but resulting from juristic *interpretatio*. Thus where one had brought an *actio de peculio* and had not obtained full satisfaction, he could get *restitutio in integrum* though the *litis contestatio* had consumed his right[6]. This was clearly classical. There are many other cases, though some of them are no doubt due to Justinian.

CCXLV. *Missio in Possessionem*[7]. This was ordered by *decretum* of a magistrate having the *imperium*, and thus was not within the powers of a municipal magistrate[8]. It may be described generally as giving to a party to a dispute, actual or potential, some amount of possessory right over property. Its purposes varied and thus its effects were not uniform. In some cases it covered the whole property of a person, in others a complex of property, *e.g.* a *hereditas*, not necessarily the whole property of the person affected, in others a specific thing. Essentially it was provisional, but it will be clear on examination of some of the cases that in the long run it might have the effect of destroying civil law rights. The chief cases were the following:

Missio in possessionem on a judgment, with the connected cases. In a certain sense, all *missio in possessionem* may be said to be "*rei servandae causa*," but the name is specially applied to cases in this group, that of *iudicatus* or *condemnatus*, *latitans*, *indefensus*, deceased insolvent without a *heres*, one who has made *cessio bonorum*, and *qui capitali crimine damnatus est*[9]. The ultimate effects of this *missio* have been considered; it might result in *bonorum venditio*, but in some cases the decree led to the appointment of a *curator* and to a limited right of sale or no such

1 4. 1. 6; 4. 4. 19; Lenel, *E.P.* 125. 2 4. 2. 14. 6; C. 2. 23. 2. 3 P. 1. 9. 6; D. 4. 4. 13. pr.; C. 2. 23. 1, 2. 4 C. 2. 23. 2. 5 29. 2. 89. 6 *Ante*, § CCXXXV for this and similar cases. 7 See Ramadier, *Missio in bona rei servandae causa*. Apart from the cases specially provided for by the Edict or legislature the magistrate might apparently give *m. i. p.* by virtue of his *imperium*, *causa cognita*, where circumstances required it. 8 2. 1. 4; 50. 1. 26. 9 As to this case, see Lenel, *E.P.* 405.

right at all, as in the case of persons of senatorian rank or *pupilli indefensi*[1].

The decree gave a right to take possession, but did not effect the actual transfer of possession of any physical thing, in fact or in law. The creditors might take possession for custody, but, under the first decree, might not expel the debtor[2]. They might proceed to all necessary acts of administration, such as letting the property, but if they had to bring an action they must appoint a *curator*[3]. They had an *actio in factum* against one who prevented them from getting control of items of the estate[4]. They were liable for *dolus*[5]. They had rights to contribution for proper expenses[6], the actions between the creditors being *in factum*[7]. It does not seem that the existence of a *curator* affected this except that where there was one, there was in general no obligation on the creditors themselves to administer[8].

Missio in bona in the case of *adrogatus* and woman *in manu*[9].

Missio in bona eius qui vindicem dedit[10].

Missio in possessionem of *pupillus* whose *tutor* has failed to provide sustenance. It was *rei servandae causa* giving the right to *possessio*. A *curator* was appointed with limited administration; he might sell what must be sold. It was post-edictal, having been created by Severus and Caracalla[11].

These are all cases covering the whole estate of the person affected; there was another group, mostly in connexion with succession, in which it was a whole estate, but not necessarily the whole estate of the other party.

Missio in possessionem dotis conservandae causa. Little is known of this as it was rendered obsolete by Justinian's provision of a right of hypothec[12]. It was a decree giving the widow, not *possessio* with interdicts, but merely custody of her deceased husband's property to secure her *dos*. She had a right of administration, could take rents, and sell "*moventia*," and must allow all receipts against *dos* and interest[13].

Missio in possessionem ex Edicto divi Hadriani[14]. Where there was a

1 *Ante*, § CCXIX. **2** 41. 2. 3. 23. **3** 42. 5. 14. pr. **4** 43. 4. 1. **5** 42. 5. 9. pr. **6** 42. 5. 9. 4. **7** 42. 5. 9. pr. **8** The *magister* had only to attend to the *venditio bonorum*. His appointment did not dispense the creditors from administering, G. 3. 79. A *curator* would be appointed if an action was to be brought or defended and probably in all cases in which the matter was likely to involve delay, as in the case of a pupil. Apparently also if it was necessary to sell individual assets (26. 10. 7. 2; 42. 5. 14. pr.). But there is much obscurity about the various cases of *curatio bonorum*. It does not seem clear that the *missi* themselves, apart from *curator*, had any power of selling fruits. Ramadier, *op. cit.* 98 sqq. **9** *Ante*, § CXLI. **10** *Ante*, § CCXV. This is distinct from the cases of *indefensus* and the like and is in a different part of the Edict, Lenel, *E.P.* 21. **11** 26. 10. 7. 2; Inst. 1. 26. 9. **12** *Ante*, § XL. **13** Lenel, *E.P.* 293, cites, as referring to it, 6. 1. 9; 44. 3. 15. 4; 46. 3. 48; 50. 1. 26. 1; C. 7. 72. 8. **14** C. 6. 33; Lenel, *E.P.* 350.

will formally valid but alleged to be *ruptum* or *irritum*, or a substitute claimed that he was entitled, the *scriptus heres* could claim within one year[1] to be given possession of what was possessed by the deceased, pending the decision, provided the will had been formally proved. Justinian tells us that the aim of this was to secure the tax on inheritances. Nothing is known of the position of the *heres*, but, as he paid the tax, he must have had a power of administration. Justinian abolished the system[2].

Missio in possessionem ventris nomine. The Edict provided that, where a woman was shewn to be pregnant of a child, who, if born, would be *suus heres* of the deceased, the "*venter*" could have *missio in possessionem*, a *curator* being appointed[3]. There was an interdict[4]. The *curator* might be simply to the "*venter*," in which case the creditors had custody of the estate, or to the *bona* also, with the ordinary powers of administration[5]. The woman was entitled to maintenance out of the estate, in any event[6], with no duty to account even though no successor was born alive; it was more important that the child should be secured than that the estate should reach the other person entitled without diminution[7]. This was a case of real *possessio*; it was in fact *bonorum possessio*, but "*decretalis*[8]."

Missio in possessionem ex Carboniano edicto. This also was *bonorum possessio decretalis*[9]. Where it was alleged that an *impubes* set up as *heres* was not really entitled, because he was, *e.g.*, a supposititious child, he was given *bonorum possessio* under this edict, with the ordinary results of *bonorum possessio* provided *satisdatio* was given, the decision being ordinarily deferred till he was *pubes*[10]. By juristic inference from the last case he was entitled to maintenance in any event out of the estate, without account[11].

Missio in possessionem curatoris furiosi heredis. Also a case of *b. p. decretalis*[12]. Where a *furiosus* was made *heres*, neither he nor his *curator* could claim ordinary *bonorum possessio*[13], but, on application, he or his *curator*, or if neither of them applied, those entitled in his absence, could get possession with ordinary powers[14], until he became *capax* or died, when normal *bonorum possessio* could be given accordingly. He was presumably entitled to maintenance in the meantime[15]. Justinian abolished the system, and provided that a *curator* could apply for ordinary

1 P. 3. 5. 16. **2** C. 6. 33. 3. **3** 37. 9. 1. 2; h. t. 5. Rescript of Hadrian in case of dispute, h. t. 1. 14. **4** 43. 4. 3. 2. **5** 37. 9. 1. 17. **6** 37. 9. 1. 19. **7** 37. 9. 1. 2, 3; h. t. 3. **8** 38. 15. 2. 2–4; *ante*, § CXL. **9** 37. 10. 1. pr.; *ante*, § CXL. **10** In the interest of the child the praetor might authorise immediate hearing, 37. 10. 3. 5. **11** 37. 10. 5. 2, 3. **12** 37. 3. 1. **13** *Ib.* **14** 37. 3. 1, med. **15** Arg. from preceding cases.

bonorum possessio for the *furiosus*, the grant becoming void if the *furiosus* died still insane or repudiated it on reaching sanity[1].

Missio in possessionem si heres suspectus non satisdabit. The rules of *bonorum separatio* contemplated a *heres* clearly insolvent[2], but apart from this if the creditors of the deceased could shew that the solvency of the *heres* was doubtful, they were entitled, *causa cognita*, to require security, and, failing this, to *missio in possessionem* of the *hereditas*, and to proceed in due course to *bonorum venditio*[3].

Missio in possessionem, in *hereditatis petitio*, if the possessor evaded process. It was of the *hereditas* and thus differed from the ordinary *missio in possessionem* of a defendant "*latitans*"—that was over all his goods. The present institution is due to Antoninus Pius[4]. The *missus* took the fruits and kept them, thus putting pressure on the other party.

Missio in possessionem where the question whether there would be a *heres* was "*diu incertum.*" The decree issued only "*causa cognita*" and if necessary it might authorise the appointment of a creditor as *curator*[5].

Missio in possessionem legatorum servandorum causa. If a legacy or *fideicommissum* was, by reason of condition, term or other cause, not immediately paid, the beneficiary was entitled to security from the *heres*, and if this was refused, to *possessio* of the *hereditas*[6]. The main rules have already been stated[7]. The chief effect was to impose on the legatee a duty to preserve the assets, and to give him a sort of pledge which prevented the *heres* from creating any rights which should take priority of his[8]. He had an interdict, and[9], at least in later law, the possession might be enforced by officers of court[10]. A further right created by Caracalla, under which one whose claim was clear and who had not received payment or security, could after six months' notice enter into possession of the goods of the *heres* applied, till Justinian, only to fideicommissaries.

There remain cases of *missio in possessionem* of specific things.

Missio in possessionem in rem of the fideicommissary. If the *heres* sold property of which there was a *fideicommissum* the fideicommissary could get *missio in possessionem* of it against a buyer with notice of the trust[11], and we are told that this would be enforced "*potestate praetoris*," an officer of court actually carrying out the order[12]. The text is not above suspicion; in any case this was exceptional. Justinian abolished the

1 C. 5. 70. 7. The change is slight in effect: no need of a *decretum*, Girard, *Manuel*, 888. An inventory must be made. Similar provisions are applied to other gifts by will, h. l. 7. 2 *Ante*, § CX. 3 42. 5. 31. pr.–3. 4 42. 4. 7. 19. 5 42. 4. 8; h. t. 9. pr. 6 36. 3. 1; h. t. 13; 36. 4 *passim*. 7 *Ante*, § CXXII. 8 36. 4. 5. 22; h. t. 11. 1. 9 43. 4. 3. pr.; Lenel, *E.P.* 438. 10 36. 4. 5. 27. 11 P. 4. 1. 15. 12 43. 4. 3. pr.

institution calling it a "*tenebrosissimus error*"; we know little of its working[1].

Missio in possessionem damni infecti causa. This is a case in which damage to a man's property was threatened by the ruinous state of that of his neighbour. The original remedy was by *legis actio*[2], but this was practically superseded by praetorian machinery[3]. On application to the praetor, notice and other formalities[4], he would order that security should be given against the damage (*stipulatio praetoria*[5]), and if this was not given a decree "*in possessionem ire*" would issue[6]. This merely entitled the aggrieved person to go on the land without ejecting the owner[7], and apparently it might, by delegation, be issued by a municipal magistrate[8]. It did not confer actual *possessio*, but there was an *actio in factum* if it was resisted[9]. If the owner of the ruinous tenement persisted in refusing security or putting the matter right, a second decree might be issued by a magistrate with *imperium*, giving the actual right of *possessio*[10]. This appears to have conferred actual praetorian ownership, excluding the old owner and ripening to civil ownership by *usucapio*[11], but there were provisions protecting the rights of third parties[12].

CCXLVI. *STIPULATIONES PRAETORIAE*[13]. These were verbal contracts, not voluntary, but forced on a party to a dispute by the praetor, and giving an ordinary action if the promise was not kept. Refusal to make the promise was dealt with differently in different cases; we have already seen the use of these stipulations in procedure and how refusal was dealt with[14]. Apart from procedure the principal cases appear to be the following.

Damni infecti. As we have seen refusal led to *missio in possessionem*. It was in the discretion of the magistrate whether the promise should be by promise or by surety[15].

1 C. 6. 43. 3. **2** *Ante*, § CCXIII. **3** G. 4. 31. **4** 39. 2. 4. 5. **5** G. 4. 31. **6** 39. 2. 4. 1. **7** See 39. 2. 4. 4. **8** 39. 2. 4. 3. **9** 39. 2. 4. 2. **10** 39. 2. 4. 4. **11** 39. 2. 5. pr.; h. t. 12. No doubt even the second decree will be nullified if the person liable falls into line before the *usucapio* is complete. **12** 39. 2. 5; h. t. 10 sq. The security was against damage within a certain time and was renewable, h. t. 13. 15–15. 1. The interdict mentioned in 43. 4. 4. pr. is presumably available only after the second decree. Arg. 39. 2. 4. 2. **13** Lenel, *E.P.* 493. We are told that praetorian stipulations are "*ad instar actionis*" (16. 2. 10. 3; 44. 7. 37). The point seems to be that a man is entitled to these in certain circumstances, under the Edict, just as he may be entitled to an action, that their content is determined by the Edict (or the praetor, 46. 5. 1. 10; h. t. 9), so that he is, if the circumstances entitling him arise, in much the same position as if he had applied for an action, the compulsory *stipulatio* providing in fact the *intentio* for his action. As to the distinction between *stip. praetoria, iudicialis, communis, ante*, § CLIII. See, for another classification of them, 46. 5. 1. **14** *Ante*, §§ CCXVI, CCXL. Such are *iudicatum solvi, pro pr. litis et v., de rato*, etc. **15** 39. 2.13. 1; h. t. 30, etc. In general, if on his own land, promise suffices, if *in alieno, satisdatio* needed, h. t. 51. 2, etc. An interpolated text makes the promise binding on alienees of the property, 39. 2. 24. 1 a.

Operis novi nuntiatio. If work was being done or about to be done to land, of a nature to injure a neighbour's land, *e.g.* by causing a great flow of water[1] or a nuisance of smoke[2], or to interfere with his rights, *e.g.* light[3], the neighbour after notice given on the spot might bring the owner before the praetor[4]. If a *prima facie* case was shewn the praetor would order a *promissio* not to do the act, the words being so framed that there was no liability if in fact the work was lawful[5]. If the promise was refused there was an interdict[6] or in some cases an *actio in factum*[7]. The promise was normally by surety[8].

Collatio bonorum vel dotis. This has already been considered[9]. The promise was with surety[10]. If it was refused the remedy was refusal of *bonorum possessio* or of further proceedings under it[11].

Under the *l. Falcidia*[12]. If there was a possibility that the legacy would have to be cut down, a promise with surety, to refund proportionately, if necessary, could be exacted. If it was refused the action on the legacy was denied. Similar rules were in practice applied to *fideicommissa*[13].

Eviction of the *hereditas*. The praetor, if he thought fit, *causa cognita*, would require a promise, with surety[14], to restore a legacy if this occurred[15]. Refusal involved denial of action on the legacy[16], and if it was inadvertently paid, without security, there was *condictio* to have the security given[17].

Usufruct and similar rights[18]: the person entitled must give security for proper use, and for restoration on expiry of the right. The rules were similar to those in the last case[19].

Legatee against universal successor. We have seen that security could be required, with surety[20]. Refusal involved *missio in possessionem.*

Rem salvam pupillo fore. This and the means of enforcement have been considered[21].

Satisdatio secundum mancipium, a problematical case[22].

1 As to the old *actio aquae pluviae arcendae*, where the work is already done, *ante*, § CLXXXVII. See also for other remedies where the work has been done, 39. 1. 1. 2 Arg. 8. 5. 8. 6. 3 39. 1. 5. 9. Not positive servitudes, h. t. 14. 4 39. 1. 1; h. t. 5. 2. 5 Lenel, *E.P.* 524. 6 39. 1. 20. pr. 7 39. 1. 20. 1. 8 39. 1. 8. 2, 3. The machinery is uncertain, the compilers having altered the texts. The *nuntiatus* could apply for remission of the notice (D. 43. 25). This seems normally to have been a *remissio* except so far as the *nuntians* had a right of prohibition (39. 1. 1. pr. or on giving security—here the *remissio* was complete, 43. 24. 7. 2), but the subsequent procedure is much disputed. See for principal views and a hypothesis, Martin, *Études Girard*, 1. 123 sqq. 9 *Ante*, § CXIII. 10 37. 6. 1. 9. 11 37. 6. 2. 8; h. t. 3. 12 *Ante*, § CXIX. 13 35. 3. 1. pr.; h. t. 3. 1; h. t. 6. 14 35. 3. 4. pr. 15 *Ib.*; h. t. 8. 16 Arg. 35. 2. 53. 17 35. 3. 3. 10. 18 *Ante*, § XCV. 19 *Ante*, § XCV. See 7. 9. 7. 20 *Ante*, § CCXLV. 21 *Ante*, § LV. 22 See Lenel, *E.P.* 521.

CCXLVII. Interdicts[1]. These were in many respects the most important of the specially praetorian remedies. The Interdict was an order of the magistrate[2] issued on application and giving rise to further proceedings if it was disregarded. In early times it may have been enforced by the magistrate's authority, but, as we know it, it was the initial step in an ordinary piece of litigation, with special formalities. It was in form praetorian and was, in most cases, set forth in the Edict. But the right which it protected was not necessarily praetorian. There were many rules of the civil law for breach of which no action was given, but the enforcement of them was left to the *imperium* of the magistrate. This was the function of most of the interdicts which related to public interests, *e.g.* those for the protection of public ways and places[3]. But many private rights were similarly protected. The XII Tables contained a clause entitling a man to enter his neighbour's land to gather fruits which had fallen over the boundary. This was enforced by the interdict *de glande legenda*[4], and there were others of the same type[5]. How the order was at first enforced is unknown, but it is probable that from very early times it was, as in later law, by *sponsiones*. These and, no doubt, many other interdicts, existed before the praetor began to issue general edicts. This is a fact which must be borne in mind, since it helps to explain one at least of the peculiarities of the interdict.

From the account in Gaius it is natural to assume that the interdict was a provisional remedy, *i.e.* that it and its dependent procedure did not finally settle the question at issue but merely determined which of two parties was to be plaintiff and which defendant in some litigation of the ordinary kind in contemplation. This no doubt is not far from the truth in the case of possessory and quasi-possessory interdicts, and, in relation to two of these, *uti possidetis* and *utrubi*[6], it is evidently their purpose as they are known to us in the classical law. But it is not true of many other interdicts, of *de glande legenda*, or of the mass of interdicts which have nothing to do with possession. This has been well illustrated by a contrast[7]. If a man was in actual enjoyment of a way over land and was interfered with by the owner, *X*, he could get the interdict *de itinere*, forbidding the interference and practically compelling *X*, if he wished to stop the enjoyment, to bring his *actio negatoria*[8], in which the question whether there really was a right of way would be finally settled[9]. Nothing could be more provisional than the operation of this

1 Ubbelohde, *Die Interdicte.* 2 On the questions of its basis in *imperium* or *iurisdictio* and of the capacity of municipal magistrates, see Ubbelohde, *op. cit.* 1. 6 sqq. 3 D. 43. 7–14. 4 43. 28; Girard, *Textes*, 17. 5 *E.g.*, *de mortuo inferendo*, Lenel, *E.P.* 441; *si arbor...impendebit*, *ib.* 467, etc. 6 *Post*, § ccxlix. 7 Accarias, *Précis*, 2. 1217. 8 *Ante*, § ccxxviii. 9 43. 19. 1.

interdict. If however a man was in enjoyment of a right of way and wished to repair the path, but was prevented from so doing, he could get an interdict forbidding the interference, but, to succeed under it, he must prove that he had a legal right to repair the way[1]. There was nothing provisional about this. The ordinary possessory interdicts being fully described by Gaius are better known to us than any others, and, as they were in effect provisional, it is easy to fall into the mistake of supposing that the provisional character is due to something inherent in interdicts. In fact it has nothing to do with their character; the provisional character is in the right of possession. So soon as the praetor had resolved that a peaceable *de facto* enjoyment should not be interfered with except by legal process, he had created provisional rights, and the protection would have had the same apparently provisional character whether it had been by interdict, as it was in classical law, or by possessory action, without previous issue of an interdict, as it was in the time of Justinian.

CCXLVIII. Interdicts were very numerous. Of many we know the form, at least approximately[2]. Of others we know only that they existed, and no doubt there were many more of which we know nothing. Interdicts were classed in many ways of which the most clear and exhaustive is into Exhibitory, Restitutory and Prohibitory[3].

Exhibitory interdicts. They were orders to produce a person or thing the subject of dispute. They ended with the word "*exhibeas.*" The few known interdicts of this type were mostly concerned with rights over persons. Thus the interdict "*quem liberum,*" for the case in which a freeman was alleged to be wrongfully detained, ran: "*quem liberum dolo malo retines exhibeas*[4]." Of the same type were those for the production of children or freedmen alleged to be wrongly detained[5], and, though this was later than the Edict of Julian, one for the case of a wife[6]. In the case of wife and children the production would be followed if necessary by another interdict of the prohibitory type, *de liberis ducendis, de uxore ducenda*[7], the case not being one for ordinary actions. For property the interdict was usually not needed as the *actio ad exhibendum*[8] sufficed, but there was at least one interdict for production of property, *i.e.* that *de tabulis exhibendis* for the case of a will alleged to be wrongly suppressed[9]. There would be difficulty in the *actio ad exhibendum*, since till

1 43. 19. 3. 11. For other interdicts involving proof of proprietary right, Ubbelohde, *op. cit.* 1. 170. He holds that about half the known interdicts are definitive—among them many relating to private land. But in many of the cases the evidence is insufficient. 2 See especially Lenel, *E.P.* 430 sqq., where the known interdicts are collected. 3 G. 4. 140–142; Inst. 4. 15. 1. See, generally, on classifications of interdicts, Berger, *Z.S.S.* 36. 176 sqq. 4 43. 29. 1. pr. 5 43. 30. 1. pr.; G. 4. 162; Inst. 4. 15. 1. 6 43. 30. 2. 7 43. 30. 2; h. t. 3. pr. 8 *Ante*, § CLXXXVII. 9 43. 5. 1. pr.

the contents of the will were known it was impossible to say who had a right to it. Thus, if it was the will of a living man, the interdict did not apply, but the *actio ad exhibendum* did, because he was the owner[1].

Restitutory interdicts. These interdicts, which were numerous, were essentially orders to restore or undo something which had been done contrary to law, ending with the word "*restituas*[2]." Many of them dealt with public rights such as those ordering an end to be put to interferences with *solum publicum*, *sacrum*, *sanctum*, public ways, rivers, etc., *e.g.*, "*quod in flumine publico ripave eius immissum habeas si ob id aliter aqua fluit quam priore aestate fluxit, restituas*[3]." Others dealt with private rights, *e.g.* the interdict *de precario* for restoration of what was given *in precario*[4], the *interdictum fraudatorium* to set aside transactions in fraud of creditors[5], the interdict *quod vi aut clam*, which ran: "*quod vi aut clam factum est, qua de re agitur, id, si non plus quam annus est cum experiendi potestas est, restituas*[6]," and others with which we shall have to deal in connexion with possessory interdicts, *e.g.*, *quam hereditatem* and its congeners[7], *quod legatorum*[8], *quorum bonorum*[9] and *unde vi*[10].

Prohibitory interdicts. This was the most numerous class. These interdicts forbade some act and usually ended with "*veto*" or "*vim fieri veto*," where they were prohibitions of interference with some act of enjoyment, but some of them, *e.g.* that forbidding interference with public rivers, had, according to Lenel, a different form. This interdict he states as: "*ne quid in flumine publico ripave eius facias, neve quid in flumine publico neve in ripa eius immittas quo statio iterve navigio deterior sit fiat*[11]." Many prohibitory interdicts dealt with interference with enjoyment of public ways and rivers and the like, such as that last mentioned, the group of prohibitory interdicts dealing with *loca publica*, *sacra*, *sancta*, etc.[12] (which ran parallel with those ordering restitution in case of past interference and with others forbidding interference with persons repairing them[13]) and others[14]. Some dealt with similar inter-

1 43. 5. 1. 10. **2** Ubbelohde, *op. cit.* 1. 195 sqq. **3** 43. 12. 1. 19. These are *interdicta popularia*. As to the measure of damages in these cases, Ubbelohde, *op. cit.* 1. 47 sqq. **4** 43. 26. 2. pr.; *ante*, § CLXXXI. **5** 42. 8. 10. pr.; *ante*, § CCIII. **6** 43. 24. See Lenel, *E.P.* 464. This remedy is available where anyone has done an act, secretly or by force (and both these words are construed very freely, *e.g.* a word of protest makes the act "*vi*," 43. 24. 1. 5 sqq.), by which harm is caused to the soil, or to buildings or the like, permanently part of it. It is indifferent where the act was done, though most of the texts deal with acts done on the injured land. It is indifferent that the act itself was lawful: the conditions in which it was done make it a wrong. The interdict is *annua*. As in the other cases in this group Justinian's treatment of the texts makes the matter somewhat obscure (D. 43. 24). **7** *Post*, p. 729. **8** *Ante*, § CXXXVII. **9** *Ante*, § CXXXVII. **10** 43. 16. 1. pr. **11** 43. 13. 1. pr.; Lenel, *E.P.* 444. **12** 43. 6 sqq. **13** 43. 11. **14** *de via publica*, 43. 10; *de cloacis*, 43. 23.

ferences with private ways and the like[1], of which that *de itinere* may be taken as an example: "*quo itinere quo de agitur, hoc anno nec vi nec clam nec precario ab illo usus es quominus ita utaris vim fieri veto*[2]." Others enforced ancient rules affecting relations of adjoining owners[3]. Others ordered the handing over of a child (later a wife) unjustly detained[4]. Others dealt with rights of burial[5], others were part of the procedure under *operis novi nuntiatio*[6]. One dealt with interference with removal, by a tenant, of a slave not subject to a lien for rent[7], and there were in addition the numerous interdicts we shall have to consider in dealing with possessory interdicts. According to Gaius these prohibitory interdicts were called Interdicts, in a narrow sense, the other groups being also called *Decreta*[8].

Before passing to other classifications it should be noted that the peremptory form of interdicts masks two characteristics, which will be considered more in detail in connexion with the procedure under them. The interdict stated precisely the circumstances in which the duty arose, so that it was a merely conditional order, as can be seen by examining those set out above. Further, the peremptory form does not really indicate any direct coercive process of the praetor. The subsequent proceedings, in case of dispute, were, after certain preliminaries, merely ordinary actions resulting in a *condemnatio* or *absolutio* with the usual characteristics.

CCXLIX. Interdicts are also classified as Non Possessory and Possessory. The latter were by far the most important in the private law, but the different types of non possessory interdicts already mentioned need a few remarks. Some were for the protection of private rights, not dependent on possession, of which class *de glande legenda* is an example. Others were so far private that they dealt with the prevention of the enjoyment by a particular person of a public right. Such was the interdict: "*ut via publica ire agere liceat*[9]." Others were simply for the protection of public rights, *e.g.* that for preventing interference with, or damage to, a public way. Of this interdict we are expressly told that it aimed at *utilitas publica* and that it was *popularе*, *i.e.* could be brought by anyone[10]. It must be remembered that the mode of enforcement here was the same as in private interdicts.

1 *De fonte*, 43. 22; *de fonte reficiendo*, 43. 22. 1. 10; *de itinere privato*, 43. 19; *de itinere privato reficiendo*, 43. 19. 3. 11; *de aqua*, 43. 20; *de rivis*, 43. 21, etc. 2 43. 19. 1. pr. 3 *de glande legenda*, above, 43. 28, and *de arboribus caedendis*, for interference with one who cuts away trees overhanging his land, 43. 27. Both these enforce rules in the XII Tables. 4 *De liberis ducendis, de uxore ducenda*, 43. 30. 2. pr.; h. t. 3. 5 *De mortuo inferendo, de sepulchro aedificando*, 43. 1. 2. 1. 6 *Ante*, § CCXLVI. 7 *De migrando*, 43. 32. 8 G. 4. 140; Inst. 4. 15. 1. 9 43. 1. 2. 1. 10 43. 8. 2. 2; h. t. 2. 34.

Possessory interdicts were either Single or Double[1], the nature of which distinction will appear in the discussion of the procedure. They were subdivided into three groups, *adipiscendae, retinendae* and *recuperandae possessionis causa*[2] (with a group, mixed, or double, in another sense in that they might be either *adipiscendae* or *recuperandae possessionis causa*)[3]. They are the appropriate remedy for the provisional right of *possessio* already considered[4]. Besides the true possessory interdicts there were others in modified form for the analogous protection necessary for the so-called quasi-possessory rights[5] arising in connexion with *res incorporales*, usufruct and the like.

(i) *Adipiscendae possessionis causa.* These, as their name shews, were the machinery by which possession was obtained by one entitled to it who had not yet had possession. The most important of these was the interdict *quorum bonorum* for the enforcement of *bonorum possessio*[6]. Closely connected with it was the interdict *quod legatorum*, by which the *bonorum possessor* gained possession from one who held the property against his will on the pretext, true or not, of being a legatee under the will[7]. Others were:

Interdictum sectorium, the means by which the buyer of the estate of a debtor to the *fiscus*, usually in cases of forfeiture, could gain possession of what was in the hands of third persons[8].

Interdictum Salvianum, to enforce the landlord's hypothec for rent[9].

Interdictum possessorium. One of the remedies of the *bonorum emptor* in *bonorum venditio.* Little is known of it. The name is not official[10].

Interdictum fraudatorium. One of the means of setting aside acts in fraud of creditors[11]. There is no real authority for the name, and the compilers of the Digest have so confused the different remedies that little can be said of its rules[12].

(ii) *Retinendae possessionis causa*[13]. These were so called as having the function of securing a possessor, whose title was disputed, in his actual holding, though in their working, as will shortly be seen, they

1 G. 4. 156, 160; Inst. 4. 15. 7. 2 G. 4. 143; Inst. 4. 15. 2. 3 43. 1. 2. 3 in f.; Vat. Fr. 92; *post*, p. 729. 4 *Ante*, § LXXII. 5 *E.g.* 43. 17. 4; 43. 18. As to the terminology, *ante*, § LXXII. 6 43. 2. 1; *ante*, § CXXXVII. According to Lenel, it ran (*E.P.* 456): "*Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides, possidereve si nihil usucaptum esset quodque ille male fecisti uti desineres possidere, id illi restituas.*" 7 43. 3. 1. 2; Vat. Fr. 90. Some texts give this interdict to the *heres* as such (C. 8. 3. 1; D. 35. 2. 1. 11; h. t. 26. pr.; 46. 3. 40). This was formerly accepted as classical law and this view has recently been revived by Lotmar, *Z.S.S.* 31. 129. But it is generally held that the texts are interpolated. A legislative change about 200 A.D. is possible, on which view C. 8. 3. 1 would be genuine. See Lenel, *E.P.* 437; *Mél. Girard*, 2. 63; Perrot, *Ét. Girard*, 1. 171. 8 G. 4. 146. 9 *Ante*, § CLXVI. 10 G. 4. 145. 11 *Ante*, § CCIII. 12 See Lenel, *E.P.* 475. It is held by many writers that, notwithstanding G. 4. 144 sqq., these interdicts are not properly called possessory. 13 G. 4. 148; Inst. 4. 15. 4.

might operate quite differently. There were two principal forms with variants. They were the two double interdicts, *uti possidetis* and *utrubi*[1], the use of which, as we know them, was to determine which of two parties was to have possession, and the resulting advantageous position of defendant, in an impending real action, the burden of proof being of course on the plaintiff.

Uti possidetis. This was used in the case of land. In classical law it ran somewhat as follows: "*uti nunc eas aedes quibus de agitur nec vi nec clam nec precario alter ab altero possidetis quominus ita possideatis vim fieri veto*[2]." Thus the possession was by these terms adjudged to the actual possessor unless he had obtained it *vi clam* or *precario* from the other, in which case it was given to that other. In that case it did not, strictly, retain possession; no doubt the words producing that effect were not part of the primitive structure of the interdict.

Utrubi. This was the interdict for moveables: "*utrubi hic homo quo de agitur maiore parte huiusce anni nec vi nec clam nec precario ab altero fuit, quominus is eum ducat vim fieri veto*[3]." Here the possession was adjudged to that party who had held it longer than the other in the past year, a difference of considerable importance[4]. The differences were gone under Justinian when both interdicts, or rather the possessory actions which had taken their place, were governed by the same rule, that of *uti possidetis*[5].

Besides these, there were accessory forms, such as *uti possidetis utile*, for usufruct[6] and no doubt *usus*, and the interdict *de superficiebus* modelled on *uti possidetis* for the case of *superficies*[7].

(iii) *Recuperandae possessionis causa*[8]. These, as their name shews, were for the purpose of recovering a possession of which one had been deprived.

De vi cottidiana[9]. Anyone who had been turned out of possession, by force of an ordinary character (*non armata*) had this interdict to recover possession. It ran: "*unde in hoc anno tu illum vi deiecisti aut familia tua deiecit cum ille possideret quod nec vi nec clam nec precario a te possideret eo illum quaeque ille tunc ibi habuit restituas*[10]." This is very like *uti possidetis*, and would often be alternative to it. It was confined to the case of dispossession from land by real force[11], and was brought

1 *Ib.*; D. 43. 17; 43. 31. As to the use of *uti possidetis* in later law against a mere trespasser who raises no counter-claim of right (43. 17. 3. 2–4), see Girard, *Manuel*, 285 and reff. 2 43. 17. 1. pr.; G. 4. 160; Lenel, *E.P.* 453; Festus, s.v. *possessio*. 3 G. 4. 160; D. 43. 31. 1. pr. 4 G. 4. 151, 152. It is important notably in connexion with the operation of the *l. Cincia* on *donatio*. *Ante*, §XCI. As to *accessio possessionum*, G. 4. 151. 5 Inst. 4. 15. 4. 6 43. 17. 4; Vat. Fr. 90. 7 43. 18. 1. pr. 8 G. 4. 154; Inst. 4. 15. 6. 9 43. 16. 1. 10 Lenel, *E.P.* 449. 11 43. 16. 1. 3. Under Justinian even a *naturalis possessor* has it, 43. 16. 1. 9, 10. But this probably means one not *in via usucapiendi*.

by the person so dispossessed, as a single interdict, against the dispossessor, a state of facts which would give *uti possidetis* too. It had the advantage that it covered not only the land but also "*quaeque ibi habuit*[1]," and, according to one view, the disadvantage that it created on recovery a new possession[2], while, it is said, that recovered by *uti possidetis* was regarded as the old possession[3]. And the limitation, "*hoc anno*," does not appear in *uti possidetis*.

De vi armata. This ran: "*unde tu illum vi hominibus coactis armatisve deiecisti aut familia tua deiecit, eo illum quaeque tunc ibi habuit restituas*[4]." There was no limitation to the year, though Justinian may have introduced it[5]. The fact that the ejected person himself held *vi clam aut precario* from the ejector was no defence. In later law this clause disappeared altogether and the two interdicts were one, the interdict *unde vi*[6]. It is supposed that the interdicts *de vi* were older than *uti possidetis*, which would account for the overlapping[7].

De precario. This was the interdict by which an owner recovered from one to whom he had made a grant *in precario*[8]. It ran: "*Quod precario ab illo habes aut dolo malo fecisti ut desineres habere, qua de re agitur, id illi restituas*[9]."

Interdicta mixta. The name is not authoritative: they are called *duplicia*[10]. They might have the effect of giving possession to one who had not possession before or of restoring possession to one who had had it before, so that they were either *recuperandae* or *adipiscendae p. c.* according to circumstances. They were *quem fundum, quam hereditatem, quem usumfructum*, and perhaps *quam servitutem*[11]. Their use was this. In a real action the person who received interim possession must give security[12]. If he failed to do so this interdict issued, under which he would have to give it to the other if he in turn offered security. Lenel reconstructs it[13], hypothetically, as: "*quem fundum ille a te vindicare vult quem possides dolove malo fecisti quominus possideres si rem nolis defendere eoque nomine tibi satisdatum est aut per te stat quominus satisdetur restituas.*" The changes in the law of security in later law rendered these interdicts obsolete[14].

1 43. 16. 1. 33. 2 See 41. 3. 15. 2, as shewing the possible effect on *usucapio*. See 41. 4. 7. 4. 3 See however Appleton, *Propriété Prétorienne*, §§ 207, 208. 4 Lenel, *E.P.* 450. 5 See 43. 16. 3. 12, and Lenel, *E.P.* 451. 6 43. 16. 1. pr. Discussion as to what amounts to armed force, 43. 16. 3. 2 sqq. 7 The same may be true of an uncertainly evidenced interdict *de clandestina possessione*, Lenel, *E.P.* 453, n. 3. As to the so-called *interdictum momentariae possessionis* of later law and other late protections against violent dispossession, see Cuq, *Manuel*, 323. 8 43. 26; *ante*, § CLXXXI. 9 Lenel, *E.P.* 466. 10 43. 1. 2. 3 in f. It will be remembered that *uti possidetis* and *utrubi* are *duplicia* in a sense much more important from the point of view of procedure. 11 Ulp. Inst., Fr. 4 (Girard, *Textes*, 489); Vat. Fr. 92. 12 *Ante*, § CCXL. 13 Lenel, *E.P.* 458. 14 *Ante*, § CCXL.

There were other interdicts to which the same name might be given. Thus the interdict "*ne vis fiat ei qui in possessionem missus est*" lay whether the holder refused to let possession be taken or ejected the *missus*[1], so that it was both *adipiscendae* and *recuperandae possessionis causa*[2].

CCL. The procedure under interdicts was somewhat complicated. The distinctions just stated do not for the most part greatly affect it, but we must bear in mind that between single and double interdicts, which is fundamental in the matter, and that between prohibitory and others which also has a certain bearing.

The procedure under single interdicts was simpler than that under double interdicts and will be first dealt with. Confining ourselves for the present to prohibitory interdicts we may take the case that *A* alleged that he had been in enjoyment of a certain right and that *B* had interfered with it. *A* would apply for an interdict and one would be issued to him, without discussion, in a form prohibiting any interference, but always containing limiting words to shew that the prohibition had no application unless the *de facto* enjoyment was of the kind the praetor meant to protect. Thus in the interdict *de itinere privato*, for example, the form was: "I forbid force to be done by which *A* is prevented from enjoying that right of way which he has been enjoying in the present year, his enjoyment not having been obtained from *B* by force or secretly or by permission[3]." Here it must be noted that the mention of a year had nothing to do with prescription. The question was not whether he had acquired the right by lapse of time, but whether there had in fact been a peaceable enjoyment, so recent, and so full, as to raise a presumption of rightfulness such that the praetor thought it ought not to be interfered with except by legal process.

If, now, *A* was not interfered with there would be no further process. But if his right was really disputed, if *B* really intended to deny the

1 43. 4. 1. 3. As to these cases, see *ante*, § CXLV. For other interdicts of a "mixed" type, see Ubbelohde, *op. cit.* 1. 183 sqq. 2 Ulpian in the Digest gives other classifications of interdicts. Some refer to the past, *e.g.* restitutory, others to the present, *e.g.*, *uti possidetis*, 43. 1. 1. 2. Some he says are *annalia*, some *perpetua*, h. l. 4. Thus while most interdicts are *perpetua*, *unde vi* and others, having a penal character, are *annua*, *e.g.* 43. 4. 1. 8; 43. 16. 1. pr. Paul (43. 1. 2) tells us that some are *divini iuris*, *e.g.*, *ne quid in loco sacro fiat*, others *hominum causa*. Of the latter some are *publicae utilitatis*, others *privatae*. Of those of private utility, some are *iuris sui tuendi causa*, *e.g.*, *de liberis exhibendis*, some *officii causa*, *e.g.*, *de libero homine exhibendo*, others *rei familiaris causa*. Of these some raise the actual question of right, *e.g.*, *de itinere reficiendo*. Others deal only with possession. He also tells us that some are noxal, and instances *unde vi* and *quod vi aut clam*, h. t. 5 (see Buckland, *Slavery*, 128). Ulpian also tells us that interdicts are *in rem scripta* but essentially *in personam* (h. t. 1. 3). The latter fact is obvious: the statement that they are *in rem scripta* seems to mean only that as standing forms in the Edict they cannot specify the person against whom they may be issued. 3 43. 19. 1. pr.

right of way, and also thought that *A*'s enjoyment had not been such as satisfied all the requirements of the interdict, he would proceed to use some force in order to raise the question. The point was that if *B* merely acquiesced in the interdict, the result would be that he would not be able to put a stop to *A*'s enjoyment except by bringing his *actio negatoria*, in which he would have the burden of proof[1]. If, however, *B* used force and *A* proceeded under the interdict, and could not prove that he had been enjoying in the past year, to the necessary extent[2], or *B* proved that it was *vi clam aut precario* from him, *B* would win in the interdict and could now disregard *A* altogether, obstructing his way, and leaving him either to abandon it or to bring an *actio confessoria*[3], in which he must prove that he had a legal right to the servitude. If *A* proved the enjoyment and *B* failed to prove one of the defects, *A* would win in the interdict, and *B* must abandon his objections or bring his *actio negatoria*.

The force used by *B* would be merely formal, but enough to raise the issue, as it amounted to disregard of the interdict. The parties went before the praetor and the question was raised: had *B* disobeyed the interdict? The point, which would be tried by a *iudex*, was raised in a noteworthy way, similar to that in real actions *per sponsionem*. *A* asked *B*: "Do you promise to pay me 10 if you have disobeyed the interdict[4]?" *B* answered: "I promise," and asked by way of *restipulatio*, "Do you promise me 10 if I have not disobeyed the interdict?" and *A* promised. The two stipulations were practically a bet. Each then proceeded to sue for the amount, *i.e.* two *formulae* for *condictio certae pecuniae* were issued, one to *A*, one to *B*. Here three points must be noted:

(i) *B* had certainly disregarded the interdict; it does not follow that he had disobeyed it. If *A*'s enjoyment was not such as to satisfy all the requirements of the interdict, *B*'s acts were not a contravention of its terms, and *B* would win. He would be absolved in the *condictio* which was issued against him, while *A* would be condemned in the corresponding *condictio* brought by *B* against him.

(ii) *Exceptiones*[5]. The restrictive words in the interdicts themselves are in some texts called *exceptiones*[6], but apart from these it was possible for the praetor to vary the words by introducing or omitting particular points to meet the equity of a particular case[7], and this may also be regarded as, in effect, inserting *exceptiones*. But as in any other actions,

1 But, as to the burden of proof in this case, *ante*, § CCXXVIII. 2 43. 19. 1. 4. The Digest makes this on 30 days (43. 19. 1. 2). But this is probably due to Justinian. In classical law the *iudex* would have to be satisfied that it had been substantially enjoyed within the last year. 3 *Ante*, § CCXXVIII. 4 G. 4. 165. This would not be the exact form, which might vary, *post*, p. 734. 5 See Ubbelohde, *Die Interdicte*, 1. 457 sqq., from whom the references are taken. 6 43. 19. 1. 11; 43. 24. 15. 5. 7 43. 13. 1. 6.

there might be *exceptiones* of the ordinary type in the resulting *formulae*[1] which would of course produce the same effect as elsewhere.

(iii) The whole duty being based on the Edict there was no liability except that which it stated. Each interdict was therefore carefully drawn so as to express all the conditions on which the right which it protected was to depend[2], and the *iudex* had no need to look outside its terms to see exactly what had to be proved. Thus in, *e.g.*, *quorum bonorum*, the claimant would not indeed have to prove that he was entitled to keep the property, but, on the words of the interdict[3], he would have to shew that the goods were in the *bona* of the deceased, that he himself had a grant of *bonorum possessio*, that he was entitled to this grant at the time when he got it, *ex edicto*, and that they were now in the possession of the defendant, or would be but for his *dolus*. If he failed to prove any of these things there would be no duty "*restituere*" under the interdict[4]. Further the claimant would fail if it was shewn[5] that the defendant held them under some claim other than *pro herede* or *pro possessore*. The importance of the exact interpretation of a form of words is characteristic of the whole formulary system, and is shewn very clearly here. Interdicts were matter of careful drafting, to be reconsidered, if necessary, every year. The interdict "*unde vi*" is a good illustration of this. We have it in two forms, one from the time of Cicero, and one from Justinian, and we have traces of its form in classical law[6]. These forms differ materially.

If *A* failed in the action on the promise, the matter was at an end. If, *e.g.*, he had not been actually enjoying the servitude to the extent, or in the manner, required by the interdict, and wished to make good his claim, he must bring an *actio confessoria*. If, on the other hand, he won, a *formula* was issued for a *iudicium secutorium*[7] for abstention from interference and damages in default. Whether there were damages for the force done between the issue of the interdict and the judgment does not seem to be clear. The form of the action is not known, and it has been suggested that in cases such as that of a right of way the notion of restitution was inapplicable and that the *formula* was simply one for damages, while in those prohibitory interdicts which had to do with really possessory rights, such as those for the protection of *missi in possessionem*, it would be for restitution and only in default for damages[8]. In any case

1 39. 1. 1. 10, *pacti conventi*; 43. 30. 1. 4, *rei iudicatae*; etc. 2 Even where, as in *de glande legenda*, the right enforced was civil. 3 *Ante*, § CCXLIX. 4 43. 2. 1. pr. 5 The burden of proof of this other title is on him, Arg. 5. 3. 13. pr. 6 *Pro Tull.* 19. 44; *pro Caec.* 19. 55; G. 4. 155; Vat. Fr. 93; D. 43. 16. 1. pr. 7 G. 4. 165. The name is recorded only of the corresponding action in double interdicts, but as this has also a special name (*post*, § CCLI) it is likely that the name *secutorium* applied here as well. 8 If there was subsequent interference. As to the *arbitrium* in prohibitory interdicts generally, see Lenel, *E.P.* 435.

there were no damages for the time before the issue of the interdict, for till then there was no duty. The view that there was no *arbitrium* for restitution in cases where the interdict was concerned with interference with a right of way is connected with the opinion that there was no *arbitrium* in an ordinary *actio confessoria* in respect of them[1]. How the damages were assessed in such a case of interdict where no *restitutio* was ordered it is difficult to say[2].

If the interdict was not prohibitory, but restitutory or exhibitory, there was an alternative, somewhat simpler, process. After the formal act of disregard of the interdict, while the parties were in court, the defendant was entitled to refuse the *sponsiones* and demand an *arbiter*[3]. The effect would be that a *formula* would be issued requiring restoration or production, as the case might be, with an *arbitrium* clause and a *condemnatio* in default of restitution. The substantial issue would be the same as in the procedure *per sponsiones*, though raised in a different way. If the defendant left the court without calling for an *arbiter*, then and there, the system of *sponsiones* would be applied[4]. It should be observed that the use of the *arbitrium* form did not make much difference in the law as we know it. It merely avoided the loss over the *sponsiones*[5], for it is clear that even in cases tried by *sponsiones* an *arbitrium* clause would be inserted if the facts admitted of it[6]. Exactly why the alternative method was applied only in restitutory and exhibitory interdicts, which it may be remembered were the class also called *decreta*, is not clear[7]. It may perhaps be allied to the fact that they prescribe a positive act, and actual performance, such as was contemplated by the *arbitrium*, was more easily enforced here[8]. There are some prohibitory interdicts to which, as we have seen, it is possible or even probable that the *arbitrium* did not apply at all, and it may well be that it had no application at all to prohibitory interdicts in the earlier days of the interdict. The reason why the defendant preferred the *arbiter* is obvious: he avoided the risk of the *sponsiones* which, we are told, were not merely *praeiudiciales* but *poenales*, actually enforced[9]. The plaintiff ran the same risk, but does not appear to have had the same privilege.

Two further observations must be made on single interdicts.

The issue to be tried in the *iudicium secutorium* was really decided in

1 See Lenel, *E.P.* 188. 2 It does not seem that *iuramentum in litem* was admissible in such a case. 3 G. 4. 162 sqq. 4 G. 4. 164. 5 But in early times the *sponsio* and the action on it may have been the last step, and the amount of the *sponsio* the real damages. In historical times the amount was probably small. 6 G. 4. 165. 7 G. 4. 140. Gaius simply speaks of the *arbitraria formula* as a "*modestior via*," G. 4. 163. 8 In the ordinary possessory cases, where after issue of a prohibitory interdict there was an ouster, the *arbitrium* would obviously be applicable. 9 G. 4. 162, 168.

the litigation on the *sponsiones*, and the issue in each of the actions was the same. It is therefore very probable that all these *formulae* were ssued together.

It has been assumed in the foregoing account that the *sponsio* was on the general question: has the interdict been disobeyed? But as the interdict failed if any one of its conditions was not satisfied, the task of the *iudex* might possibly be considerably lighter. If, as would probably be often the case, only one of the points was really in dispute, the *sponsio* might be made to turn only on that point. Thus supposing the only doubt was whether the enjoyment had been by consent, the *sponsio* might be "Do you promise me 10 if I consented to your using the right of way?" Any other of the requirements might be embodied in the same way[1].

CCLI. The procedure in the double interdicts was more complex. There were essentially but two[2], *uti possidetis* and *utrubi*, with corresponding derivative forms for usufruct and *usus*, *superficies*[3], and, in later law, *emphyteusis*[4]. These interdicts were of a very special character. As we know them in classical law, their only purpose was to confirm one of two intending litigants in possession of the disputed property, so as to make him defendant in the impending real action, the burden of proof being therefore on the other, the plaintiff. The interdict was in terms addressed to both and directed whichever of them did not satisfy the conditions on which it protected actual enjoyment not to interfere with the other[5]. Thus there were practically two interdicts in one form of words. Hence the name of double interdicts and many complications in the procedure. The conditions on which *uti possidetis* was effective were not quite the same as those for *utrubi*, as we have seen[6], but as there was no resulting difference in procedure it will suffice to deal with the former. Essentially it was an order to the following purpose: "I forbid force to be done by either of you whereby one of you is prevented from enjoying the land as he now does, not *clam, vi aut precario* from the other."

If the parties meant really to dispute the matter they proceeded to use force against each other, a purely formal force (*vis ex conventu*[7]), but

1 In Cicero, *pro Caec.* 16. 45, the *sponsio* is on the question whether *vis* has been done "*contra edictum*," but these words bring in the whole interdict. 2 The "duplex" character attributed to *de aqua* (43. 20. 1. 26), where two persons both claim the right of use, and equally possible in many other cases, probably means no more than that each will have an interdict. 3 43. 17. 4; 43. 18. 1. pr. 4 2. 8. 15. 1. 5 See the form, *ante*, § CCXLIX. 6 *Ib.* 7 This expression is found in Cicero (*pro Caec.* 8. 22) but it does not seem to be technical, and indeed it is by no means clear that as used by him it refers to this interdict. See Roby, *R.P.L.* 2. 514 sqq.; Ubbelohde, *Interdicte*, 1, 214 sqq.

enough to constitute disregard of the interdict. They then made *sponsiones*[1] as in the other case, with the important difference that, in this case, as either might have disobeyed the interdict there would be two bets involving four *stipulationes* and four *condictiones certae pecuniae*[2]. At this point another, rather accidental, complication steps in. The whole interdictal procedure would determine who was to be plaintiff, and who defendant, in a forthcoming real action. This was obviously an important issue. But the question arose, who was to keep the actual possession during the trial of the interdict, a process which might take some time, since the facts necessary to its decision might not be easily got at. That was not a very important matter, since no question of procedural importance was prejudiced by it. It was simply dealt with. The opponents X and Y bid against each other for it. If X bid most it was given to him, and he then promised that if judgment in the interdict should eventually go for Y, he would give Y the amount of his bid. Hence a fifth *condictio certae pecuniae*[3]. Sometimes the stipulation was omitted and when the possession was handed over to the highest bidder a *formula* for a *iudicium fructuarium* was given to the other, apparently for the amount of the value of the interim possession, *i.e.* the loss to him from not having had the interim possession, whatever that might amount to, in the event of his winning in the interdict. Apparently the lowest bidder might choose. If he chose the *iudicium fructuarium* the amount of the actual bid would perhaps cease to be of importance[4]. Some such alternative arrangement was convenient and even necessary in the case which might present itself, in which the interim possession was of uncertain value to one of the parties. He need not bid at all but would still retain the chance of recovering whatever the value of it might turn out to have been[5].

In addition to all these *formulae* there would be the *iudicium secutorium*, called in this case *iudicium Cascellianum*[6], for the definitive transfer of the possession to the non-possessor if he should win in the interdict[7]. It is to be noted that in this action he would recover not only the possession but also the interim fruits, so that, as Gaius tells us,

1 G. 4. 166. 2 *Ib.* 3 G. 4. 166 sq. 4 G. 4. 169. The exact content of this action is not clear: it is at least consistent with the language of Gaius that, here too, what was recovered was the amount of the bet: "*de fructus licitatione agere.*" For various views Ubbelohde, *Interdicte*, 2. 164 sqq. The text is imperfect and the word "*similiter*," which is crucial, uncertain. 5 We are not told what happened if neither bid: presumably the thing remained with the holder and the *iudicium fructuarium* would lie, under which security had to be given, G. 4. 169. This also was called *iudicium secutorium*, G. 4. 169. 6 G. 4. 166; G. 4. 169. Cascellius was a magistrate of the age of Cicero, Roby, *Introd. to Digest*, CXXI. 7 It is of course issued to the litigant who has not interim possession: if the other wins in the *sponsio*, this *formula* is not wanted.

the money recovered under the *iudicium fructuarium* or the *condictio fructuaria* was in effect a penalty[1].

Thus to each party were given two *condictiones certae pecuniae*, and to the party who did not get interim possession, either a *condictio fructuaria* or a *iudicium fructuarium*, at his choice, and a final *iudicium secutorium* (*Cascellianum*). In this case, as in single interdicts, the trial of one of the *condictiones certae pecuniae* would determine all the questions material to the decision of all the actions, though certain questions of value, perhaps in the *iudicium fructuarium*, and certainly in the *iudicium Cascellianum*, would still remain open. All these *formulae* appear to have been issued together.

Here, too, disregard was not necessarily disobedience. Both parties disregarded the interdict, but it is clear that only one can have disobeyed it. Since one of the parties must have been in possession, for otherwise the proceedings would be absurd, it seems as if one must have disobeyed it, but the matter is not without difficulty. On the words of the interdict as recorded, it might seem on certain facts that neither had disobeyed. If, for instance, *X* held the property *precario* from *Y*, the latter could not disobey, for the *possessio* by *X* was not within the terms of the interdict. On the other hand it is possible to contend that *X* cannot have disobeyed it, for *Y* was not possessing at all. The matter is controverted, but it seems that in this case *X* had disobeyed the interdict. As against *X*, *Y* was still regarded as in possession[2].

The *sponsiones* were penal, *i.e.* they were actually enforced and their amount was not set off against the damages. Here arises the question: what determined the amount of the *sponsiones*? Could a plaintiff, sure of his case, fix them as high as he liked? The answer seems to be that the Edict contained a clause, only imperfectly known, which limited the *sponsiones* to an amount having some relation to the value of the right concerned, but exactly how we do not know[3].

These double interdicts were prohibitory, and it follows that the alternative method of *formula arbitraria*, without *sponsiones*, was not available. It is clear, however, that they were in their nature extremely well suited for an *arbitrium*, and that, as a matter of fact, the *formula* of the *iudicium Cascellianum* did contain such a clause[4]. This case therefore brings into strong relief the problem of the reason for the refusal of the *formula arbitraria* without *sponsiones* in prohibitory interdicts.

In the procedure of ordinary actions there was machinery by means

1 G. 4. 167. 2 *E.g.* 41. 2. 17. pr.; 43. 17. 3. pr. This text adds that if two possess *in solidum*, but one holds *clam vi aut precario* from a third party, neither can win in the interdict against the other: both possess validly. Machelard, *Interdits*, 192 sqq.; Ubbelohde, *Besitzinterdicte*, 425. 3 Lenel, *E.P.* 454. 4 G. 4. 166 in f.

of judgment in default, *actio in factum*, *missio in possessionem*, and the like[1], to deal with the case of a defendant who disobeyed the *in ius vocatio*, or who refused to take the various steps involved in the defence of an action. As to what took the place of this in interdictal procedure our information, owing to the defective state of the manuscript of Gaius, practically our sole authority, is unfortunately incomplete. In double interdicts, he tells us[2], when a person against whom an interdict had been obtained refused to make the necessary *sponsiones*, or to take any of the other necessary procedural steps, there were *interdicta secundaria* by which he could be compelled to do so. We do not know whether they applied also to single interdicts, nor do we know how they worked. Apparently, in the last resort, there must have been some direct intervention of the praetor, perhaps *missio in possessionem* on the analogy of *stipulationes praetoriae*[3].

CCLII. We have seen that the issue of the interdict was followed, after other steps, by the issue of *formulae* in which the question was whether the duty declared in the interdict had been broken. The question arises, why, in view of this, the issue of the interdict was retained at all. Instead of saying, *e.g.* "I order you to remove the obstruction which you have put in the way which *A* was peaceably enjoying," the order to be followed, when issued, in a particular case, by steps leading up to a *formula* of which the gist was: "If it appears that *B* has obstructed a way of which *A* was in peaceable enjoyment, condemn him to pay or put it right," it seems that the Edict might have said simply, "If anyone obstructs a way of which another is in peaceable enjoyment, I will give a *iudicium*," the nature of the necessary enjoyment being specified as it was in the interdict. By apt words the same issue might be raised in a more direct and simple way without any departure from the provisional character of the proceeding. Why then was the issue of the interdict retained?

The answer seems to be historical. Interdicts existed before the standing Edict did, before the praetor had begun to exercise the power of directly creating actions, and they afforded an indirect means of doing so. The interdict was an order binding by virtue of the *imperium*[4]. Before the Edict existed the interdict could not exist as a standing order: it had to be issued expressly in each case. After it had come to be set out in the perpetual Edict this ceased to be necessary; its pre-

1 *Ante*, § CCXVI. 2 G. 4. 170. 3 See however Ubbelohde, *Interdicte*, 1. 295 sqq., who thinks they operated like ordinary interdicts. Saleilles (*Controversia possessionis*, §§ 64–66) thinks that the usual procedure was not to carry out the formalities under *uti possidetis*, but to utilise the *interdicta secundaria*. In fact however we have little information. 4 G. 4. 139.

servation was a piece of conservatism. It is probable that many of the known interdicts, or the germs of them, were incorporated as existing things into the Edict, and though there were interdicts plainly later than the origin of the Edict[1], no doubt many, it is not surprising that the existing method was followed. Once embodied in the Edict as an integral part of it, and of the formulary system, their endurance was guaranteed so long as the formulary system lasted. With its disappearance they too were superseded. This does not mean that the rights they had protected were henceforth unprotected. They were still protected, but, instead of applying for an interdict, the aggrieved person brought an action[2], in which the issue raised was the same as that in the *formula* issued in earlier days after the disregard of the interdict. This is well exemplified in the case of *unde vi*. In the old system the interdict was issued in the form "*unde tu illum vi deiecisti* (etc.)...*vim fieri veto.*" In the Digest the rule was similar except that the rule was put in general impersonal form, and for the last three words were substituted the words "*iudicium dabo*[3]." The same development took place in all interdicts (though the words of the old interdictal form were still used in some cases in the Digest[4]), and in relation to possessory interdicts, much the most important in private law, a system of possessory actions was developed, in which the issue was the same as in the old interdict, but the order itself was no longer issued[5].

We have seen that interdicts were not essentially provisional; possessory interdicts may be so described, but that is only because the right they protected was itself provisional: if it were not it would not be possession, but ownership. The true owner must always be able to recover his goods from one who has no title but possession. Many considerations justify, and have produced in various legal systems, protection to a mere possessor; we need not here consider which of these were the cause of the Roman rules[6]. But there is one point which has led to controversy and may be mentioned. In the long run the mere possessor would have to give up the property to the owner. The *bonorum possesso sine re* might recover the thing from the *heres* by the interdict *quorum bonorum*, but he must ultimately give it up, if he was sued by *hereditatis petitio*. A bare possessor might win against the owner in *uti possidetis*, but the owner could regain his property by a *vindicatio*. Why was he driven to this lengthy process? Why might not his ownership be pleaded in reply to, *e.g.*, *uti possidetis*[7]? An *exceptio iusti dominii* would have

1 See, *e.g.*, 43. 18. 2 See the rubric of D. 43. 1. 3 Cicero, *pro Tull.* 19. 44; D. 43. 16. 1. pr. 4 *E.g.* D. 43. 2; 43. 6, etc. 5 *E.g.* 43. 16. 6 See *ante*, § LXXII. 7 This is distinct from the question why possession was protected at all. It is maintained by Ubbelohde, *Besitzinterdicte*, 20. 97, 104, 430, etc. that *unde vi* (*cottidiana*)

served the purpose, and under such a plea he would have had to prove his title just as he would in *vindicatio*. The explanation is in all probability to be found in a well-known characteristic of Roman procedure: *possessio* and *dominium* are distinct things[1], and the Romans did not like joining distinct issues in one *formula*. It was this for instance which made them so reluctant to admit set off, *compensatio*, in *stricta iudicia*, and led them in classical times to drive the parties to *mutuae petitiones* even where the claims arose out of the same matter[2].

and *uti possidetis* were not available against an ousting *dominus*: *i.e.* that however the owner took it from the other he was not considered to have taken it *clam, vi aut precario*.

1 41. 2. 12. 1: "*nihil commune habet proprietas cum possessione.*" 2 17. 1. 38. pr. See however *ante*, § CCXXXIV.

INDEX

(Figures in black type are principal references)

Abdicatio filii, 133; *tutoris*, 150
Absence, *restitutio in integrum*, 715
Absolutio, 607, 623, 633, **635**, 638, 653
Acceptilatio, 55, 235, 253, 255, 257, 440, 450, 452, 456, 523, 562, **567** sq.
Accepti relatio, 567
Accessio, 196, **210** sqq., 216, 217, 253; compensation, 211; to buildings, 213; *possessionum*, 240, 242, 250 sq.
Accrual, in *Bonorum Possessio*, 384; in legacy, 334 sq.; in usufruct, 270, 348
Acquisition, of *dominium*, 188, 206 sqq.; of fruits by non-owner, 222 sqq.; of *patria potestas*, 105 sqq.; of *possessio*, 201 sqq.; of servitudes, 264 sqq.; of usufruct, 271 sq.; through *extranei*, 228, **277**, 278; through *filiifamilias*, 104, 202, **279**, **529**; through slaves, 202, **278**, 529; to *hereditas*, 306
Actio, 599 sqq.; and *obligatio*, 187, 600
Actio, ad exemplum institoriae, 516; *ad exhibendum*, 211, 214, 461, **543**, 577, 724; *aquae pluviae arcendae*, 544; *ad supplendam legitimam*, 326; *auctoritatis*, 231, 236, 240, **486** sqq., 608, 683; *Calvisiana*, 89, **592**, 655; *certae pecuniae creditae*, 456, 457, 460, 462, **613**, 731, 735 sq.; *civilis incerti, in factum*, see *Actio praescriptis verbis*; *commodati*, 467 sq.; *communi dividundo*, 252, 275, 452, 507, 509, 534, **535** sq.; *confessoria*, 193, 259, 268, 345, 544, **669** sq., 731 sqq.; *de aestimato*, 519; *de eo quod certo loco*, 635, 655, 695; *de in rem verso*, see *Actio de peculio*; *de modo agri*, 488; *de moribus*, 109, 705; *de pauperie*, 208, 598, 686; *de peculio et in rem verso*, 66, 87, 183, 375, 397, 449, 454, 462, 507, **529**, 532, 693, 699; *de pecunia constituta*, 526; *depensi*, 442, 567, 609, 616, 705; *depositi*, 465, 473; *de rationibus distrahendis*, 164; *de tigno iniuncto*, 213, 216; *doli*, 312, 405, 413, 442, 519, 555, **589** sqq.; *ex empto*, 480 sqq., 564; *exercitoria*, 424, 507, **532**, 543; *ex stipulatu*, 110, 430, 433, **672**; *ex testamento*, **345**, 453, 675, 684; *ex vendito*, 481 sqq.; *Fabiana*, 89, **592**, 655; *familiae erciscundae*, 252, 294, **315**, 333, 349, 535; *fiduciae*, **429**, 471 sqq., 542; *finium regundorum*, 252, **540**; *funeraria*, 515, **540**; *furti*, 212, 213, 215, 216, 219, 223, 465, 469, 543, **576**, 671, 683; *hypothecaria*, 345, **473** sqq., 525, 543; *iniuriarum*, 134, 313, **585**, 684, 686; *institoria*, 424, 507, 516, **531**; *iudicati*, 156, 530, 609, **637**, 666, 699, 703, 705 sq.; *iurisiurandi*, 526; *legis Aquiliae*, 107, 304, **581**; *mandati*, 512 sqq.; *metus*, 545, **588**, 670, 687; *negotiorum gestorum*, 170, 211, 215, 216, **533**, 540; *negatoria*, **669** sq., 723, 731; *oneris aversi*, 503; *operarum*, 671; *Pauliana*, 591 sq., 655; *pigneraticia*, 473; *praescriptis verbis*, 241, 492, **519** sqq., 523, 644; *prohibitoria*, 670; *pro socio*, 507, **509**, 536; *protutelae*, 166, 540; *Publiciana*, 11, 55, **192** sqq., 225, 231, 244, 246, 250, 475, 647, 670, 678; *quanto minoris*, **488** sqq., 564; *quasi-Serviana*, see *Actio hypothecaria*; *receptitia*, 527; *quod iussu*, 449, **531**, 543; *redhibitoria*, **488** sqq., 493, 529, 683; *rei uxoriae*, **109** sq., 672, 685, 688, 700; *rerum amotarum*, **109**, 574, **578**; *restitutoria*, 444; *sepulchri violati*, 684, 688; *Serviana*, of *bonorum emptor*, 401; *Serviana*, of landlord, **472**, 671, 672, 680; *servi corrupti*, 63, 590 sq.; *subsidiaria*, 165; *tutelae*, 164 sqq.; *tributoria*, 157, **530**
Action at law, course of, 602
Actiones, adiectitiae qualitatis, 686 sq.; *ad poenam, ad rem, persequendam*, 526, 581, **684**; *arbitrariae*, 634, 636, **654** sqq., 664; *civiles*, 678 sqq.; *directae*, 686 sq.; *contrariae*, 165, 466, 470, 473, **686**; *ex bono et aequo*, 648, 654, **680**, 695; *fictitiae*, 10, 98, 183, 191 sq., 194, 388 sq., 401, 551, 620, 670, **677** sqq.; *honorariae*, 678 sqq.; *in duplum contra infitiantem*, 581, 584, 617, **687**; *in factum*, 211, 464, **679** sqq.; *in personam*, 602, 605, **668** sqq.; *in personam in rem scriptae*, 670; *in rem*, 602, 605, **668** sqq., see *Vindicatio*; *in simplum, duplum*, etc., 686; *interrogatoriae*, 627, 661; *mixtae*, 684 sqq.; *noxales*, 183, 543, **594** sqq.; *perpetuae*, 251, 683 sq.; *per sponsionem*, 613, **622**, 623; *populares*, 590, 619, **688**, 700; *praeiudiciales*, 446, 602, 636, 645, **646**, 654, 664; *privatae*, 688; *quibus in solidum, non semper in solidum persequimur*, 687 sq.; *rescissoriae*, 715; *temporales*, 683 sq., 694; transmissible or not, 685; *utiles*, 127, 142, 157, 212, 584, **680** sq.
Actionis editio, impetratio, postulatio, 626, 660
Active correality, 450
Actor, municipii, 423; *universitatis*, 704
Actus, 240
Actus legitimus, 190, 231, 235
Addictio, 88, 206, **615**, 638; *bonorum libertatis causa*, **85** sq., 399; *in diem*, 494
Ademptio, of legacy, 342; of liberty, 75

Adipiscendae possessionis causa, see *Interdicta possessoria*
Aditio hereditatis, 164, 168, 174, 297, 299, 305, **309** sqq., 341, 380, 386, 391, 395; by tutor, 156
Adjective Law, 601
Adiudicatio, 197, **252**, 261, 278, 509, 536, 540, 648, 654, **657**, 671, 682
Adiutor tutoris, 174
Administratio, by curator, 173; by tutor, 155 sq., 163, 171; of *peculium*, **66**, 564, 570
Adoptio, 105, **121** sqq., 236, 320, 363, 428; of slaves, 128; *plena*, *minus plena*, 123; *restitutio*, 713
Adpromissio, **441** sqq., 517
Adrogatio, 90, **124** sqq., 131, 137, 154, 282, 302, 321, 323, 396 sqq., 531, 718; of *impubes*, 126, 372; of *libertus*, 91, 125, 128; restitution, 126, 713, 716
Adscriptitii, **91** sq., 495
Adsertio libertatis, 74, 700
Adsessores iudicis, 630, 635
Adsignatio liberti, 375, 398
Adstipulatio, 141, **440** sq., 449, 512, 515, 557, 580, 685
Aediles, edicts of, 5, 9, 11, 45, 64, 434, **598**, **678**
Aequitas, 55, 220
Aerarium, 176 sq., 316
Aes equestre, *hordearium*, *militare*, 619
Aes et libra, 236, see *Mancipatio*; release by, 567
Aestimatum, 519, 521
Affectio, *maritalis*, 113; *societatis*, 504
Affinitas, 116
Agency in contract, 516, 529 sqq.
Ager, *limitatus*, 212; *stipendiarius*, 191; *tributarius*, ib.; *vectigalis*, 275
Agnatic *tutela*, 146, 148, 167
Agnation, **105**, 139, 371
Agnatus proximus, 364 sq.
Albi corruptio, 688
Album iudicum, 88, 603, **631**, 664
Alienatio, by non-owner, 276 sqq.; of dotal land, 108; *mutandi iudicii causa*, 715
Alieni iuris, 102
Alimenta, 658; legacy of, 356, 523
Alluvio, 186, **212**, 268
Alternative obligation, 409, **482**, **561** sqq., 595; *stipulatio*, 432
Altius tollendi ius, 262, 264
Ambiguity in contract, 411
Amissio bonorum, 509
Anatocismus, 461
Animus, *domini*, 199 sqq.; *donandi*, 570; *novandi*, 565; *possidendi*, 199 sqq., 306; *revertendi*, 207
Anniculi probatio, **96**, **320**, 363 sq., 368
Annus utilis, *restitutio*, 712 sqq.
Anstalt, 177
Antestatus, 236
Antichresis, 473
Appeal, 665
Appendix, 43
Appointment of *tutores*, **144** sqq., **167**, 284
Aquaeductus, 240, 262, **263**, 266
Aquaehaustus, 265, 267
Aquae pluviae arcendae, 715
Aquilian stipulation, 568
Arbiter, 528, 603, 610, 631, 643
Arbitraria formula in interdicts, 733
Arbitria, 678, see *Actiones arbitrariae*
Arbitrium, *iudicis*, 595, **654** sqq., 732 sqq.; *litis aestimandae*, **607**, 612, 616, 625, 629, 635
Argentarii, 527; *compensatio*, 696, 698; *socii*, 510
Arra, 479, 493; *sponsalicia*, 112
Assignment of *obligatio*, 518, 550
Atrox iniuria, 587
Auctor, 486, 608
Auctoritas patrum, 3, 4, 13
Auctoritas tutoris, 59, 144, 152 sqq., **158** sqq., 162, 168, 173, 244 sqq., 435, 442, 682; *infantis*, 202 sq.; *mulieris*, 225
Auctoritas (*usucapio*), 242
Augustus, 6 sqq., 23 sq., 77
Austin, John, 59, 182
Authenticum, 48

Barter, 520
Basilica, 48
Beneficium, *abstinendi*, 362; *cedendarum actionum*, 445, 453; *competentiae*, 142, 417, 448, 509, 560, 650, 652, 657, 664, **687**; *deliberandi*, 304; *divisionis*, 166, **446** sq., 453, 527, 649; *excussionis* (*ordinis*), 447 sq., 527; *inventarii*, 313, 362
Bilateral obligations, 408, 431
Bona, *adventitia*, 123, 141, 271, **279** sq., 304, 372 sqq., 396; *invecta et illata*, 472, 478; *vacantia*, 249, 717
Bonae fidei iudicia, see *Iudicia bonae fidei*
Bona fide possessor, **192** sqq., 206, **537**, 540; in *damnum*, 583; in *furtum*, 575; in *iniuria*, 587; *ius retentionis*, 407; noxal liability, 597; of a *hereditas*, 315; right to fruits, 222, 225 sqq.
Bona fides, 199, 215 sqq.; in *praescriptio*, 251; in servitudes, 266 sq.; in *usucapio*, 243 sqq., 247; in usufruct, 271
Bona fide serviens, 244
Bonitary owner, 78, **192** sqq., 195, 231, 242, 244
Bonorum, *addictio libertatis causa*, 85 sq., 399; *cessio*, see *Cessio bonorum*; *collatio*, 321 sqq.; *distractio*, 640, 667
Bonorum Possessio, 10, 140, 284 sq., 288, 290, 298, 373, 375, **378** sqq., 401, 725, 727, 732, 738; acquisition by *tutor*, 156; *cum re*, *sine re*, 284, 376 sqq., 383 sqq., **391** sqq.; *decretalis*, *edictalis*, 378, **395** sq., 719; *ex edicto*, **384** sqq., 390, 394
Bonorum possessio, *ab intestato*, 366 sqq., 380 sqq.; *contra tabulas*, 293, 301, **321** sq., 338, 366, **379** sq., 388, 391 sq.; demand, **384** sqq., 391, 395; *secundum tabulas*, **284**, 308, 330, 370, **380**, 385, 392; *unde cognati*, **367**, 381, 382, 391, 393; *unde*

decem personae, 373 sq., **381** sq., 393 sq.; *unde cognati manumissoris*, 381 sq.; *unde familia patroni*, 381; *unde legitimi*, 367, **379** sqq., 386 sq., 391, 393; *unde liberi*, **366** sq., 374, **379** sqq., 386 sq., 391, 393, 394; *unde patronus patrona*, 382; *unde vir et uxor*, 382 sq., 391, 393; *uti ex legibus*, 376, **382**, 391, 393
Bonorum, sectio, 206, 400; *separatio*, **314**, 346, 420
Bonorum venditio (*emptio*), 303, **400** sqq., 509, 511, 603, **638** sqq., 666, 679, 687, 697
Breviarium Alaricianum, 32, 36, 39

Caduca, 253, **316**, 362
Caesares, 51
Calendar, publication, 621
Calumnia, 356, **628**, 636 sq., 661
Capacity, to contract, 416 sqq.; to convey property, 232, 234, 239, **276** sq.; to take under a will, **289** sqq., 337, 350; to make a will, 287 sqq.; to witness a will, 292
Capite poenas dare, 615
Capitis deminutio, 63, 90, 105 sq., **136** sqq., 146, 160 sq., 274, 321, 329, 357 sq., 381, 396, 401, 416, 437, 441, 455, 549, 571, 577, 581; as discharge, 557; in civil bondage, 138; in usufruct, 271 sq.; of *socius*, 509
Captivus, **67** sqq., 113, 288, 436, 715
Caput, 136
Carbonianum edictum, 320, 719
Castrense peculium, and *quasi*, **279**, 288, 416
Casus, 296 sq., 418, 469, **484**, 567, 588
Caupones, see *Nautae, caupones, stabularii*
Causa, in contract, 425 sq.; in *exceptio rei iudicatae*, 691; in *sacramentum*, 425, 606; *liberalis*, **74**, 659, 692; *manumissionis*, 80; *possessionis*, 199 sq.; *rei*, 464, 469, 522; see *Iusta causa*
Causae cognitio, 195, 417, 462
Causal *nexus* in *damnum*, 582
Cautio, 432, 458, see *Satisdatio* and Security; *de rato*, 705; *iudicio sisti*, 705; *Muciana*, **76**, **296** sq., **336** sq.
Censor, 103
Census, 70, 73, 125
Centumviri, 315, 318, 324, **610**, 622, 624, 631
Centuriae, 3
Certa, concepta, verba, 623, 625
Certainty, of *merces*, 496; of *price*, 483
Cessio, actionum, 347, **445**, 451, 476, **518**, **550**, 689, 693; *bonorum*, 402, 640, 667, 687, 717
Cessio in iure, 127, 188, 190, 192, 228, **233** sq., 261, 278, 472; by tutor, 156; of *hereditas*, 234, 398 sq.; of servitude, 264, 266; of *tutela*, 150; of usufruct, 269
Cessio legis, 423 sq., 550 sq.
Charities, 179 sqq., 185
Child of *ancilla*, not an accessory, 63; when free, 69
Children, sale of, 71, 85
Chirographa, 458
Christianity, and *leges caducariae*, **317**, 335; effect on law, 33
Church, as *heres*, 289; personality, 179
Civil bondage, 103 sq., **134** sqq., 137 sq., 364, 397, 435, 440, 529, 531, 549
Civil bondsman, alienation of, 135; possession by, 204
Civis libertus, 88, 95
Civitas, **87** sqq., 94, 99 sq., 136, 377, 647
Classes in *Comitia centuriata*, 3
Classici, 289; *testes*, 238
Classification, of actions, 668 sqq.; of contracts, 430 sq.; of *heredes*, 302; of obligations, 406 sqq.; of *tutelae*, 144
Clausula, arbitraria, 544, **654** sqq., 678; *codicillaris*, 350, 357
Codex accepti et depensi, 457
Codex, Gregorianus, 36, 38; *Hermogenianus*, 36, 38; *Iustinianus*, 40, 41, 47; *repetitae praelectionis*, 47; *Theodosianus*, 36 sqq., 48
Codicilli, 144, 350, **356** sq.
Coelibes, 291, 300
Coemptio, **119** sqq., 236, 239; *fiduciae causa*, **119** sqq., 168, 428
Coercitio, 352
Cognatio, 106, **367**, 371; effect of *capitis deminutio*, 140; *servilis*, 65, **371**, 376
Cognitio extraordinaria, 512, 603, **657** sqq., 682; *compensatio* in, 699
Cognitor, 93, 157, 608, **701** sqq.; *in rem suam*, 703
Coheredes, 297, 299
Collatio, bonorum, **321** sqq., 362, 366, 392, 722; *donationis*, 362; *dotis*, 322, 362, 722
Collatio legum Romanarum et mosaicarum, 36
Collegia, 178, 291
Collusive sale, 483
Colonary Latins, 93, 96
Colonatus, 91 sqq.
Coloni, 204, 495, 499, 583
Coloni adscriptitii, **91** sqq., 499
Colonia Latina, 140
Comitia, Calata, **125**, 128, 282; *Centuriata*, 1 sqq., 8; *Curiata*, 2, 125; *Tributa*, 3 sqq.
Comitia in the Empire, 2 sqq., 7 sq.
Comitial Will, 282
Commercium, 55, **94**, 98, 197, 239, 288 sq.
Commixtio, 210
Commodatarius, custodia, 555; theft by, 573; theft from, 575
Commodatum, 459, 465, **467** sqq., 473, 495, 522; *ius retentionis*, 408; possession, 198
Common owners, **535** sq., 552; of slave, manumission, 82
Communi dividundo, see *Actio*
Compensatio (set off), 548 sq., 558, 560, 651, 673 sq., **696** sqq., 739
Compensation in *accessio*, 211, 214, 215; in *specificatio*, 218
Compromissum, 528
Concepta, certa, verba, 623, 625
Concilium plebis, 4

Concubinatus, 128 sqq., 371
Concurrence of actions, 579, 590, 591, **709** sqq.
Condemnatio, 489, 607, 612, 613, 623, 633 sqq., **653** sqq., 664; *minus petitio* in, 696; *plus petitio* in, 695
Condicio, see Conditions
Condictio, legis actio, 612 sqq., 624
Condictio, 157, 253 sqq., 257, 433, 522, 534, **675** sqq.; *causa data causa non secuta*, 521, **541**, 676; *certae pecuniae*, see *Actio certae pecuniae creditae*; *certi*, 456, 676 sq.; *ex lege*, 464, 542, **676**; *ex poenitentia*, 86, 241, 430, 515, 542, **676**; *fructuaria*, 735; *furtiva*, 216 sqq., 223, 449, 530, 538, 542, 555, **577**, 579, 676, 694; *generalis*, 543, 677; *incerti*, 434, 676 sq.; *indebiti*, 229, 351 sq., 354, 390, 416, 420, 446, **537** sqq., 548, 559, 676; *ob rem* (*causam*) *dati*, 430, 485, 519, 521, **541**, 676; *ob turpem* (*iniustam*) *causam*, 541; *sine causa*, 418, 422, 439, 460 sq., **541** sq., 555, 676; *triticaria*, 460, 537 sq., 653, **676**
Conditions, 257, 261, 340, 491 sqq.; in *acceptilatio*, 568; in *tutela*, 149; in *cessio in iure*, 235; in contract, 419 sqq.; in *institutio heredis*, **295** sqq., 299, 302; in legacy, 210, 335; in *locatio conductio*, 500; in *mancipatio*, 238, 240, 427; in manumission, 75, 84; in mandate, 512; in *novatio*, 565; in sale, 491 sqq.; in *societas*, 505; in *stipulatio*, 438 sqq.; in *traditio*, 231; *iurisiurandi*, 76, 337; *perplexae*, 297
Conditional ademption of legacy, 342
Conditional debts, **420** sq., 639, 695
Conductor, 222, **495** sqq., 501, 556, 575
Confarreatio, 119
Confessio, 608, 616, **629** sqq., 640 sq., 661; in *actio legis Aquiliae*, 581
Conflicts of schools, 27 sqq., 114, 132, 208, 216, 234, 240, 261, 263, 269, 294, 319, 332 sq., 336, 338, 349, 398, 436, 456, 482, 560, 596, 634
Confusio, in *accessio*, 210; in *obligatio*, 451 sq., **559** sq., 562; in servitudes, 266
Coniunctim, 334 sq.
Consanguinea, 365, 371
Consensual contracts, 422, **478** sq.
Consensus curatoris, 173
Consent, in *adoptio*, 124; in *adrogatio*, 127 sq.; in contract, 410; in *emancipatio*, 132 sq.; in marriage, 114
Consilium, iudicis, 630, 635; in manumission, 80; *principis*, 15, 17, 30, 32; *senatus*, 15
Consistorium, 17
Consolidatio, 271
Consortium, 315, 511
Constitutio, 18; *Rutiliana*, 245, 249
Constitutum, debiti, 157, 423, 451, **526** sqq.; *possessorium*, **204**, 207, **229**, 511
Consultatio principis, 665 sq.
Consultatio veteris iurisconsulti, 36
Contra tabulas, see *Bonorum possessio*
Contract, 404, 406, **409** sqq.; by one *alieni iuris*, 135; by *servus hereditarius*, 306; by *tutor*, 156; *causa*, 425 sq.; choice of action, 710; *condicio*, 419 sqq.; *consensu*, 422, 478 sqq.; *dies*, 419; effect *in rem*, 184; for *heres*, 423; for third party, 423; *literis*, 236, **456** sqq., 563; of *adrogatus*, 397; *re*, 409, **459** sqq., 519; *verbis*, 406, 431 sqq.
Contraria iudicia, 636, 664, **686**
Contrarius consensus, 568
Contrectatio, 572
Contribution in *societas*, 505
Contributory negligence, 582
Contumacia, 683, 693
Contutores, 159, **162** sqq., 166, 450, 452
Conubium, 94, 97, 98, 105, **114** sqq.
Conventio, 425
Conventus, 80
Convicium, 585
Corporations, **175**, 290, 511
Corpore, corpori, in *damnum*, 583 sq.
Corpus, in *possessio*, 180, 201, 203
Correality, **448** sqq., 510, 560, 569 sq., 692, 699
Counterclaim, see *Compensatio*
Cretio, 309 sqq., 364
Crimen, expilatae hereditatis, 304, 572; *suspecti tutoris*, **161**, 658, 700
Culpa, 465, 484 sq., 490, 497, 501, 506, 547, **551** sqq., 573; in *aestimatum*, 521; in *damnum*, 581 sq.; in exchange, 520; in mandate, 514; in *stricti iuris* contracts, 555; of *tutor*, 158
Cum re, sine re, see *Bonorum Possessio*
Cumulative *intercessio*, 444
Cumulation of actions, see Concurrence
Curatio, 143 sqq., 153, **169** sqq., 535; *administratio*, 173; *bonorum*, 174, 591, **639** sq., 667, **717** sq.; *furiosi*, 169, 396; *minoris*, 171 sq.; *prodigi*, 170; *pupilli*, 173 sq.; representation by, in litigation, 703 sqq.; *ventris*, 174
Curiae, 2
Custodia, 46, 469, 473, 484, 498, **555** sqq., 575
Customary Law, 52

Damage, by wild animals, 208, 598; to free man, 584
Damages, see Measure of damages
Damnas esto, 332, 427
Damnatio, in legacy, 332, 334
Damnatus, iudicatus, 616, 717
Damnosa hereditas, 306
Damnum emergens, 583, 588
Damnum infectum, 197, 244, 545, 619, 656, **721**
Damnum iniuria datum, 580 sqq., 709 sqq.
Dasumius, will of, 359
Datio in solutum, 482, 526, 538, **560**
Datio ob rem, see *Condictio ob rem dati*
Deaf mutes, wills, 287
Death, as discharge of *obligatio*, 557; of legatee, 343; of party to mandate, 515; of *socius*, 508, 510

Debitum and *Obligatio*, **403**, 421, 537
Debt, effect of *capitis deminutio*, 141; effect of *cessio in iure hereditatis*, 398; imputation of, 560 sq.; legacy of, 345, 347; quasi usufruct in, 270
Decemviri, of XII Tables, 1; *stlitibus iudicandis*, 610, 631
Decoctor, 705
Decretalis Bonorum Possessio, 395 sqq., 719
Decretum, interdict, 726, 733; *principis*, 18 sqq.
Decuriae iudicum, 631
Dediticii, 81, 83, 97, **99** sq., 289, 377 sq.
Deductio in domum, 112
Deductio in transfer of property, 231 sq., 235, 238, 265
Deductio of *bonorum emptor*, 401, 559, **697**
Default in litigation, 608, 633, 660
Defensor civitatis, 663
Defensores, 702, 704
Delatio hereditatis, 301 sqq.
Delegatio, 253, 255 sqq., **566**
Delict, 407, 409, **571** sqq.; by *adrogatus*, 397; by slave, 65, see *Actiones noxales*; choice of remedies, 710 sq.; discharge by death, 313; discharge by pact, 524; effect of *capitis deminutio*, 141 sq., 571; in contract, 597
Deminutio capitis, see *Capitis deminutio*
Demonstratio, **643** sq., 648, 656; *plus* (*minus*) *petitio* in, 695 sq.
Denegatio actionis, 462, 625, 628, 641, 644 sq., 715
De plano, 396
Deportatio, **98** sqq., 105, 136, 142, 509
Depositum, 198, 459, **464** sqq., 470, 473, 552, 554; *irregulare*, 466, 503; *ius retentionis*, 408; *miserabile*, 466
Derelictio, 73, 84, 208
Detention, 199, 258, 496
Detestatio sacrorum, 125, 282
Dicta et promissa, 489
Dictio dotis, 44, 431, **454** sq.
Dies, 261, 546; *cedit, venit*, 332, **339** sqq., 343, 346; *fastus, nefastus*, 611, 619; in appointment of *tutores*, 149; *incertus, certus*, 75, 295, **337**; in contract, 419; in *institutio*, 295; *perendinus*, **607**, 609, 612, 632; *repetita*, **544**, 707 sqq.; *utilis*, 383, 558
Diffarreatio, 121
Digesta, of classical jurists, 28, 30, 40; of Justinian, 40 sqq., 47
Diligentia, 551, 553 sqq.
Discharge of *obligatio*, 557 sqq.
Disiunctim, 334 sq.
Dispensing power, 13
Disputatio fori, 52, 55
Dissimulatio in *iniuria*, 586
Distractio bonorum, 640, 667
Divisible obligations, 561
Division of the Empire, 17, 51
Divisory actions, 657
Divorce, 117 sq., 121
Do, dico, addico, 383
Dolus, 158, 161 sq., 412, 418, 453 sq., 509, 551, 553, **589** sq.; *restitutio*, 714 sqq.
Domicile, 250
Dominium, 187 sqq., 739; acquisition of, 206 sqq.; and servitude, 258
Donandi animus, 215, 570
Donatio, 158, 207, 232, 241, **253** sqq., 326, 429, 483, 505, 529, 564, see Gifts; *ante* (*propter*) *nuptias*, **111**, 255, 368; between husband and wife, **111**, 218; *collatio*, 302; *inter vivos*, 253 sqq., 351; *mortis causa*, 72, 190, **256** sqq., 339, 429, 592; *sub modo*, 253
Dos, **107** sqq., 117 sq., 129, 141, 168 sq., 190, 207, 247, 250, 261, 279, 368, 411, **444**, 529, 552, 554, 557, 658, 692, 718; *alienatio*, 276; *collatio*, 322, 362; *ius retentionis*, 109, 408; legacy of, 347, 351
Dotis dictio, 44, 431, **454** sqq.
Duae lucrativae causae, 343, 559 sq.
Ductio, iussu praetoris, 197, **595**, **638**
Duplicatio, 651
Dupli stipulatio, 487
Dupondius, 49, 298
Dyarchy, 50

Eadem res, persona, in *exceptio rei iudicatae*, 691 sqq.
Ecclesiastical corporations, 179 sqq.
Edicta magistratuum, 9 sqq., 24; of aediles, 9, 11, 45; of emperors, 18; of Justinian, 18, 21; of provincial governors, 5
Edictal Mass, 43
Edictum, Carbonianum, 320, 719; *generale* in *iniuria*, 585; of aediles on *venaliciarii*, 510; of praetor on *contutores*, 163; on debts of *adrogatus*, 397; on warranties in sale, 364, 488 sqq., 505; *successorium*, 379
Edictum, praetoris, 9 sqq.; *novum, praelatum, tralatitium*, 6, 9; relation to *ius gentium*, 55; revision by Julian, 10, 30
Edictum Theodorici, 37
Editio actionis, 626, 708
Effects, of *adoptio*, 122 sq.; of *adrogatio*, 125; of *capitis deminutio*, 139; of *emancipatio*, 133; of enslavement, 72
Egestas, 509
Ekloge, 48
Emancipatio, 121, 123, 127, **132** sqq., 236, 320, 361, 370, 416, 428 sq., 441, 571
Emancipatus, succession of, 321 sq.; succession to, 373
Emblemata Triboniani, 44 sqq.
Emperor, control of legislation, 8; enactments of, 16, 24; property of, 177; succession, 51
Emphyteusis, 222, 225, **274** sq., 475, 495, 734
Emptio venditio, see Sale
Enslavement, 67 sqq.; *restitutio*, 713
Entry on *hereditas*, see *Aditio*
Epistolae, 19
Epistola traditionis, 232, 241
Ereptio legati, 343

Error, as to identity of parties or subject, 415; in *cessio in iure*, 235; in contract, 414 sqq.; of *status*, 87, 97; in procedure, 693; in *traditio*, 230, 231; *restitutio in integrum*, 715
Erroris causae probatio, **97** sq., 320, 363 sq., 368
Exceptio, 11, 443, 462, 643, 645, **648** sqq., 662 sq., 673; effect of, 648, 698; in interdicts, 731
Exceptio, annalis Italici contractus, 650; *bonorum possessionis non datae*, 389, 394; *cognitoria, procuratoria*, 651, 701; *doli*, 211, 214, 261, 388, 390, 392, 394, 412, 413, 438, 446, 468, 470, 590, **650** sqq., **697** sqq.; *iurisiurandi*, 526, 651; *iusti dominii*, **195** sq., 652, 738; *legis Cinciae*, **254 sq.**, 313, 673; *legis Plaetoriae*, 171; *litis dividuae*, 649, 696; *metus*, 588 sq., 652; *non adimpleti contractus*, 491; *non numeratae pecuniae*, **438** sq., 457 sq., 467, 650 sq.; *pacti*, 261, 266, **569**; *praeiudicii*, 662, 693 sq.; *rei iudicatae, in iudicium deductae*, **447**, 559, 635, 650, 673 sq., 682, **689** sqq., 694 sq., 698 sq.; *rei litigiosae*, 649; *rei residuae*, 649; *rei venditae* (*donatae*) *et traditae*, **193** sq., 230, 255, 670; *restitutae hereditatis*, 352; *senatusconsulti, legis*, **444**, 649; *ususfructus*, 255, 652, 670
Exceptiones in edictum propositae, 651; *perpetuae* (*peremptoriae*), *dilatoriae* (*temporales*), 537, **651**, 715; *rei, personae, cohaerentes*, 652
Exchange, 520
Ex edicto, see *Bonorum Possessio*
Exercitores, joint, 450
Exheredatio, 296, 302, 310 sq., **318** sqq., 322, 325, 328, 357
Exhibitory interdicts, 724, 733
Ex operis, ex re, acquisition, 278 sq.
Expensilatio, 456 sqq.
Expromissio, 566
Extinction, of *obligatio*, 557 sqq.; of servitudes, 266 sqq.; of usufruct, 271 sq.
Extinctive *praescriptio*, 249
Extranei heredes, 304 sqq.
Extraneus manumissor, **147**, 381, 393
Extraordinaria iudicia, 657 sqq.
Eviction, in sale, 486 sqq.; of *hereditas*, 722
Evidence, 632, 662

Facultas solvendi, 561, 563, 636, 655
Failure, of condition, 421; of legacy, 341 sqq.; of will, 329
Falsa causa, 336; *demonstratio*, ib., 347
Familia, 102 sqq., 136
Familiae, emptio, 236 sq., **283**, 293 sq., 329; *erciscundae*, 452; *mutatio*, 138 sq.
Family trusts, 358 sqq.
Favor libertatis, 76 sq., 336
Female agnates in succession, 365, 371
Fenus, 460 sq.; *nauticum*, 463 sq.
Festuca, in *cessio in iure*, 233
Fictio legis Corneliae, 68
Fideicommissa, **16**, 19, 45, 132, 266, 272, 342, **349** sqq., 356, 358 sqq., 362, 455, 535, 658; *hereditatis*, 239, 344, **349** sqq.; *libertatis*, **75** sqq., 85, 90, 303, 353 sq., 399; *missio in possessionem*, 720; *rerum singularum*, 353
Fideicommissary substitutions, 360
Fideiussio, **441** sqq., 517 sq., 699; *alterna* (*mutua*), 451; *indemnitatis*, 447, 682
Fidepromissio, 313, 405, **441** sqq., 557
Fiducia, 44, 86, 120, 189, 231, 235, 238, 241, 277, 405 sq., **427** sqq., 464, 466, 471 sqq., 484, 522, 552, 554, 597; *cum amico*, 428, 543; *cum creditore*, 429
Filiifamilias, 102 sqq.; acquisition through, 202, **279** sq., 529; alienation by, 276; contract by, 529, 549; noxal surrender, 597; proprietary rights, 104, 279 sq.; *restitutio in integrum*, 714; wills, 288
Fiscus, **176** sq., 190, 220 sqq., 251, **372**, 400
Flamines, **119**, 121, 131, 139, 321
Floating charge, 475
Foreclosure in pledge, 474
Formal transactions, 233; contracts, 409, 441, 459
Form, of *institutio*, 294; of *mancipatio*, 236 sq.; of *stipulatio*, 431 sq.
Forms, of *condemnatio*, 653; of *intentio*, **647**, 671; of legacy, 331 sqq.; of surety, **448**; of will, 282 sqq.
Formula, 603, 614, 627, **642** sqq.; *arbitraria*, 654, 733; *in ius, in factum*, 465; *per sponsionem*, 668, 704; *petitoria*, 655, 668, 704; *Publiciana*, 195; *Rutiliana*, **401**, 671, 679
Formulary system, 5, **623** sqq., 659
Foundations, 179 sqq.
Fragmenta Vaticana, 36, 41
Fragmentum Dositheum, 36
Fraternitas, 504 sqq., 536
Fraud, on creditors, **80**, 84, **591** sq.; on patron, 592
Fraudulent adstipulator, 440
Freedman, see *Libertus*
Free persons, acquisition through, 202; sale of, **72**, 135, **481**; theft of, 574
Fructus, 214, 222 sqq., 272 sq., 485, 491; *civiles*, 223 sq., **226**, 268; *duplio*, 669; *licitatio*, 735
Fructuum, perceptio, 222 sqq., 498; *separatio*, 222, 225 sqq.
Fugitivus, possession, 200
Fundus dotalis, see *Dos*
Furiosus, 112 sq., 152 sq., **169**, 200 sqq., 205, 229, 288, 310, 416, 570, 703, 719
Furtum, 409, 414, 440, **572** sqq.; by owner, 573; *conceptum*, 578; *lance licioque conceptum*, 576, 578; *manifestum, nec manifestum*, 576, 618; *non exhibitum*, 578; *oblatum*, ib.; *prohibitum*, 578; *rei hereditariae*, 304, 375, **572**
Fusion of *fideicommissum* and legacy, **354**, 357

Gaius, 29, 34 sq.

Gens, 2; succession, 365, 383
Genus, sale of, 482
Gifts, see *Donatio*; *in causa caduci*, **316**; *post mortem, pridie mortis*, 76, 83
Gods, as *heredes*, 289
Greek law, infiltration, 37
Group personality, 175
Guardianship, see *Tutela, Curatio*

Habere frui possidere, 191 sq.
Habere licere, stipulatio, 487
Habitatio, 274; pledge of, 475
Hereditas, 10, 183, 188, **281** sqq.; acquisition to, 306; and reversion, 375, 378 sq.; *cessio* of, 234; *iacens*, 175 sq., **304** sqq., 362; lapsed shares, 315; *mancipatio* of, 239, 283; passing to Fisc, 307, 342; personality of, 305; possession by, 203; sale of, 480
Hereditatis petitio, 227, **315**, 324, 349, 375, 387, 388, 391, 395, 669, 673 sq., 738; *missio in possessionem*, 720; *possessoria*, 387 sqq., 395; *utilis*, 352
Heredes, as witnesses to will, 292; classification of, 302 sq.; contract for, 423; charge of debts, 314; *coacti*, 352; *fiduciarii*, 351 sqq.; *furiosi*, 719; *incerti*, 720; liabilities of, 312 sqq., 405, 552, 554; *missio in possessionem*, 719 sq.; *necessarii*, 81, 83, **302** sqq., 308, 362; *suspecti*, 720
Heredium, 303
Hire, see *Locatio conductio*
Holograph Will, 286 sq.
Honoraria, 512, 658
Honorarii Tutores, 163
Horror of intestacy, 361
Husband and wife, succession, 368
Hypothec, 111, 250, 355, **471** sq., **477** sq., 498

Illegal conditions in wills, 296; in contracts, 422
Impensae in *accessio*, 215; in *dos*, 109 sq., 700; in *locatio*, 497; in *negotiorum gestio*, 535; in *redhibitio*, 490
Imperial legislation, 38
Imperial provinces, 9, 50
Imperitia, 501 sq.
Imperium, 148, 712, 721, 723, 737
Impetratio actionis, 660, 626; *dominii*, 474
Implied, ademption of legacy, 342; gift of liberty, 75, 83
Impossibility as a discharge, 557
Impossible conditions, 76; in contracts, 422; in wills, 295, 336
Impubes, 114, 126, **143** sqq.; as *tutor*, 152 sq.; unauthorised transactions, 160
In bonis habere, 192 sqq.
Incapaces in contract, 416 sqq.
Incertae personae, 179, 208, **289**, 319, 350, 358 sqq.; *traditio* to, 231
Incerti de statu suo, 287
Indefensi, **629** sqq., 640, 717
In diem addictio, 494
Indignitas, **317**, 327, 343
Indirect representation, 533
Indivisible obligations, 408, 434, 561
Infamia, 92 sq., 118, 161 sq., 465 sqq., 509, 536, 554, 577, 640, 654, 684, 689, 701; of women, 93
Infans, **159**, 174, 202; *aditio*, 310
Infantiae proximus, 159
Infitians, 617, see *Actio in duplum*
Informal, manumission, 78; wills by parents, 286
Ingenuus, 84, **91**, 135, 363
Inheritance of *status*, 200
Initium possessionis, 243 sqq.
Iniuria, 407, 447, **584** sqq.; noxal actions, 594, 596; to slaves, 587
Iniusta causa, see *Condictio*
Iniustum sacramentum, 607
In ius vocatio, 89, **605**, 608, 613, 617, 626, 660, 686, 737
In libertate morari, 79, 80
Innominate contracts, 44, 496, **518** sqq.
Inquilinus, 92, 495
Insinuatio donationis, 255
Institor, 306, 449, 452 sq., **531**
Institutes, of Gaius, 29, 46; of Justinian, 23, 46
Institutio heredis, 281, 285, 289 sqq., **293** sqq.; *ad certam rem*, 294, 330; of *collegia*, 178; of *municipia*, 178
Insula, 497; *nata*, 186, 212, 213, 268
Intellectus, 158; *possidentis*, 200
Intentio, 456, 460, 462, **645** sqq., 671
Intercessio, 444; of magistrate, 641, 715
Interdicta, 11, 270, 543, 602, 622, 642, 658, 661, **723** sqq.; classifications, 724 sqq., 730; *duplicia*, 729; *exhibitoria, restitutoria, prohibitoria*, 724 sq.; *mixta*, ib.; *popularia*, 726; *possessoria*, 193, 198, 200, **726** sqq.; *secundaria*, 737
Interdictal procedure, 730 sqq.
Interdictio prodigi, 170
Interdictum, de aqua, 726, 734; *de glande legenda*, 723, 726; *de clandestina possessione*, 522, 729; *de liberis ducendis, exhibendis*, 724, 726, 730; *de itinere*, 723, **726**, 730; *de itinere reficiendo*, 724, **726**, 730; *de precario*, 522, 729; *de superficiebus*, 275, 728; *de tabulis exhibendis*, 724; *de uxore ducenda*, 724, 726; *de vi armata, cottidiana*, 728 sq., see *Interdictum unde vi*; *fraudatorium*, 592, 727; *momentariae possessionis*, 729; *possessorium*, 727; *quam hereditatem, quem fundum*, 630, 725, 729; *quod legatorum*, **387**, 389, 725, 727; *quod vi aut clam*, 304, **545**, 715, 725, 730; *quorum bonorum*, **385** sqq., 392, 394 sq., 725, 727, 732, 738; *Salvianum*, 472, 727; *sectorium*, 727; *unde vi*, 9, 472, 588, 725, **729**, 730, 732, 738; *uti possidetis*, 472, **723**, 728, **734** sqq.; *utrubi*, 255, 472, **723**, 728, **734** sqq.
Interesse, in *actio ad exhibendum*, 544; in contract, 424, 436; in *damnum*, 583; in *furtum*, 574; in *iniuria*, 586; in mandate,

512 sq.; in *rapina*, 579; in sale, 479, 490; for *restitutio in integrum*, 713
Interest, **545** sqq., 558, 674; after *mora*, 547
Interpolations, 44 sqq.
Interpretatio, of pontiffs, 2; of *prudentes*, 22, 52
Interpretation of contract, 411 sq.
Interrogationes in litigation, 312, **627** sq., 661
Intestabiles, **93**, 287, 291 sq.
Intestacy, 361 sqq., 380 sqq.
Inventory, by *heres*, 313; by *tutor*, 154
Italic land, 188
Iter, actus, via, 240, 263
Iteratio, 95, 146

Joint, delict by slaves, 596; *commodatum*, 470; liability for debts, 313; legacy, 334 sqq., 346; liability for penalty, 449, 453; stipulation, 449
Iudex, 11, 195, 603, 607, 610, 627, **631**, 681; *pedaneus*, 659, 663; *qui litem suam facit*, **593**, 633, 636, 641
Judgment, effect, 70, 607, **636** sq., 664; in default, 608 sq., **633**, 660
Iudicatus, 616, 717
Iudicatum facere, 615
Iudicatum solvi, see *Satisdatio* and Security
Iudicia, bonae fidei, 55, 408, 410 sqq., 612, 646, **672** sqq., 694, 697 sqq.; *contraria*, 636, 664, **686**; *extraordinaria*, 657 sqq., see *Cognitio*; *imperio continentia*, 168, **197**, 637, **681** sqq., 689 sqq.; *legitima*, 153, 252, 447, 637, **681** sqq., 689 sqq.; *publica rei privatae*, 171; *stricta*, 408, 410 sqq., 646, 651, **672** sqq., 694, 697 sq., 739
Judicial stipulations, 434
Iudicis postulatio, 612, 616
Iudicium, 604; *Cascellianum*, 735 sq.; *fructuarium*, ib.; *secutorium*, 732 sqq.
Julian, 30; revision of the Edict, 10
Junian Latins, see *Latini*
Iura, in bonis liberti, see Succession to freedmen; *incorporalia*, 187; *in re aliena*, 197, 258 sqq.; *praediorum, rusticorum et urbanorum*, see Servitudes
Iuramentum in litem (*iusiurandum*), 633, **655**, 675, 733
Iurata promissio liberti, 431
Iurgium, 604
Iurisdictio, 148, 603
Jurisdiction, limits, 641 sqq., 663
Jurists, 21 sqq., 33; in imperial *consilium*, 26; cited in Digest, 27, 41
Juristic persons, 174 sqq.
Juristic writings, 28 sqq., 34 sq.
Ius, 258, 537, 604; *actionum*, 29, 183, **599** sqq.; as *ius in rem*, 187; *civile*, 52 sqq.; *gentium*, **52** sqq., 98, 100, 228, 231; *honorarium*, 9 sqq.; *naturale*, 52 sqq.; *personarum*, 29, **56** sqq., 60; *Quiritium*, 189, 192; *rerum*, 29, **182** sqq.
Ius abstinendi, 134, 303; *accrescendi*, **252**, 270, **316** sq., 319, **335**, 343, 362, 384; *antiquum in caducis*, 292, **316**, 343; *anuli aurei*, 91; *capiendi*, 291 sq.; *edicendi*, 5, 9; *faciendi*, 259; *honorum*, 94, 98; *in personam*, 403 sqq.; *in rem*, 182 sqq.; *iura condere*, 26; *liberorum*, 105, 129, **169**, 368 sq., 371; *offerendae pecuniae*, 477; *prohibendi*, 259; *respondendi*, 22 sqq.; *retentionis*, **214** sqq., 407 sq., 465, 468, 470, 488, 498, 537, 575, 669; *suffragii*, 98; *tollendi*, 214 sq., 497
Iusiurandum, calumniae, 356, 628 sq.; *delatio* of, 197, 614, **628**, 661 sq.; *in litem*, see *Iuramentum*; *liberti*, 396, **455** sq., 567; *necessarium*, 614, **628**, 661 sq.; *relatio* of, see *Relatio iurisiurandi*; *voluntarium*, 525, 662
Iussum, in acquisition by slave, 279
Iusta causa, in servitudes, 266; in *traditio*, **229**, 425, 494; in *usucapio*, 199, **246**, 425; in usufruct, 271
Iustae nuptiae, 105 sqq.
Justinian, as legislator, 40 sq.
Iustitium, 611
Iustus contradictor, 692

Laesio enormis, **483**, 521, 563
Land, see *Damnum, Furtum, Res soli, Solum, Possessio, Usucapio*
Lapsed shares in *hereditas*, 300, 315; legacies, 334 sqq.
Latini, 87, **93** sqq., 99, 101, 114, 160, **647**; acquisition of *civitas*, 95 sq.; *capitis deminutio*, 139; wills of, 288
Latini, colonarii, 93, 96; *veteres*, 93
Latini Iuniani, 79, 80, 83, 87, **94** sq., 145, 291, 350, 377
Latitatio, 626, 630, 640, 717
Latium, maius, minus, 94
Law, of Persons, 29, 56 sqq.; of things, 29, 56, 182 sqq.; of actions, 29, 56, 599 sqq.
Law of Citations, 29 sqq., **39**, 41
Law Schools, 39, 49, see *Scholae*
Legacy, 45, 219, 322, **331** sqq., 535, 720, 722; *per damnationem*, **332**, 334, 539, 581, 616, 618; *per praeceptionem*, 333 sq.; *per vindicationem*, **331** sq., 334, 339, 354; *sinendi modo*, 333 sq.
Legacy, *alimentorum*, 356, 523; *debiti*, 347; *dotis*, 347, 351; *generis*, 346; *in annos singulos*, 438; *liberationis*, 345, 347; *nominis*, ib.; of annuity, 347; of materials of house, 341; *optionis*, 346, 543; *partitionis*, 349, 351; *peculii*, 347; *rei alienae*, 345 sq.; *rei obligatae*, 347; *sub condicione*, see Conditions; *sub modo*, 337, 340; to son or slave of *heres*, 337 sq., 341; *ususfructus*, 272, 348
Legal education, 49
Legal impossibility, see Impossible, Impossibility
Legati Caesaris, 9, 50
Legis Actio, 5, 74, 124, 178, 233 sq., 429, 440, 447, 603, **605** sqq., 619 sqq., 634, 657, 689, 700 sqq., 721
Legislation in Republic, 1; in divided Empire, 17, 51; of Justinian, 40

Legitimation, 128 sqq.
Legitimi, heredes, 367; *tutores*, 163 sqq.
Lex, as discharge, 559; as *modus adquirendi*, 253
Lex coloniae Genetivae, 610, 614, 615; *metalli Vipacensis*, 16, 619; *Rhodia de jactu*, 503; *Romana Burgundionum*, 37; *Romana Wisigothorum*, 32, 36, 39; *Rubria*, 609, 629 sq., 638, 642, 653, 656, 680; *Salpensana*, 139, 143, 160
Lex commissoria, 474, 479, 493; *contractus*, 420; *mancipii*, 238
Lex, curiata de imperio, 7, 8; *data*, 7, 16; *dicta*, 7, 16; *edictalis*, 21; *generalis*, 52; *lata*, **2** sq., **7**, 16, 24; *perfecta, imperfecta, minus quam perfecta*, **7**, 443; *publica*, 283; *regia*, 1, 6, 17, 20; *tributa*, 4, 8
Lex (*leges*), *Aebutia*, 5, 444, 614, 618, **624**, 625, 648, 681, 689; *Aelia Sentia*, 10, **79** sqq., 83, 90, 94, 96, 99, 101, 135, 303, 358; *Appuleia*, 443, 445; *Aquilia*, 408, 440, 539, **580** sqq., 591, 594, 597, 616, 646, 675 sqq., 686 sq., 710; *Atilia*, 148; *Atinia*, 248; *caducariae*, 129, 258, 291, 298, 300, **316**, 332, **334** sq., 341, 343, 347, 348, 350, 357, 362, 384; see *L. Papia Poppaea, Iulia de maritandis ordinibus*; *Calpurnia*, 431, **612**, **614**, 678; *Canuleia*, 4, 7, **115**; *Cicereia*, **443**, 518, 527, 683; *Cincia*, 7, 89, **254** sq., 257, 313, 367, 648 sq., 673, 728; *Claudia*, 167; *Corneliae*, 68, 110, 288, 444, 518, 527, 585; *Crepereia*, 622; *duodecim tabularum*, see Twelve Tables; *Falcidia*, 256, 258, 294, 313 sq., 326, **338** sq., 343, 347, 352 sqq., 542, 722; *Fufia Caninia*, 14, 75, **79**, 83, 135, 358; *Furia de sponsu*, **443**, 446, 617, 683; *Furia testamentaria*, 7, **338**, 367, 618, 648; *Hortensia*, 4 sq., 7, 14; *Hostilia*, 68, **700**; *Icilia* 4; *Iulia, de adulteriis*, **108** sq., 249, 261, *de cessione*, 640, *de collegiis*, 178, *de maritandis ordinibus*, 8, 107, 109, 113, 115, **291**, **316**, *de vi*, 580, *municipalis*, 620, 639, **682**; *Iulia et Plautia*, 248; *Iulia et Titia*, 149; *Iuliae iudiciariae*, 624, **681** sq., 690; *Iunia* (*Norbana*), 10, **79** sqq., 94, 96, 145, 152, 291, 341, 357, 377; *Iunia Velleia*, 320; *Liciniae*, 5, 612; *Marcia*, 7, 618; *Minicia*, 101; *Papia Poppaea*, 8, 10, 115, 253, **291**, **316**, 341, 376, 382, 393 sq.; *Papiria*, 611; *Petronia*, 64, 636; *Pinaria*, 606, 612, 632; *Plaetoria*, **171**, 648, 678, 714; *Poetelia*, **426** sq., 616, 618; *Publilia*, 442, 617; *Publilia Philonis*, 4; *Scribonia*, 258, 264; *Sempronia*, 483; *Silia*, **612** sq., 676, 678; *Valeria Horatia*, 4; *Vallia*, 617 sq.; *Visellia*, 95; *Voconia*, **289**, 337 sq., 349 sq., 365, 376
Libellus conventionis, contradictionis, 660 sq.
Libera persona, acquisition through, 202, 277
Liberi, 106, **366**, 368; *patroni, tutela*, 147; *patroni*, succession, 375, 399
Libertus, libertinus, 84, **88**, 89, 375, 545; *adrogatio* of, 91, 125 sq.; as *tutor*, 150 sqq.; *ingratus*, 71; *orcinus*, 78, 354; see Succession to freedmen
Liberty, definition, 62; *restitutio*, 713
Liberum matrimonium, 106 sq., 117
Libripens, 236, 283
Lis, 604, 606
Litis contestatio, 243, 250 sq., 258, 396, 446 sq., 450 sqq., 465, 518, 544 sq., 549, 558, 566, 571, 586, 588, 590, 592, 595 sq., 607, 627, 634 sq., 643 sq., 646, 653, 660 sqq., 669, 675, 682, 689 sqq., 700 sq., 706 sqq., 717
Litis denuntiatio, 660
Loan, for consumption, 458 sqq.; for use, 467 sqq.; *per aes et libram*, 426 sq.
Locatio conductio, 465, 468, 478 sq., **494** sqq.; *irregularis*, 503; *operarum*, 500 sqq.; *operis*, 500 sqq., 512; *partiaria*, 496; *rei*, 495 sqq., 500
Longi temporis praescriptio, 197, 243, **249** sqq., 644; in servitudes, 266
Longissimi temporis praescriptio, 251
Loss of *testamenti factio*, 307
Lucrifaciendi animus, 572
Lucrum cessans, 583
Luere debere, 620
Luminibus officiendi ius, 264

Magister Bonorum, 401, 603
Mala fide possessor, 575; *hereditatis*, 315
Mancipatio, 119 sq., 124, 156, 188, 190, 192, 209, 228, 231 sq., **236** sqq., 261, 293, 329, 472, 494, 513; *cum fiducia*, 263, 429; *familiae*, **283**, 285, 307, see Mancipatory will; in *donatio*, 241, 256; *metus*, 413; of servitudes, 264; to or by *filius* or slave, 239
Mancipatory will, 237, **282** sqq., 288, 329 sq.
Mancipii causa, see Civil bondage
Mancipium, 62, 133
Mandata principis, 18, 21
Mandatum, 202, 424, 441 sq., 470, 478, 501, 507, **512** sqq., 534, 553 sq., 557; as agency, 516; as assignment of contract, 518; as surety (*m. qualificatum*), 448, 517; *post mortem*, 515
Manumission, 63, **73** sqq., 156, 331, 455; by will, 74 sqq., 79, 284; *Censu*, 73; *inter amicos*, 78, 83; *in ecclesiis*, 82, 83; *per epistolam*, 78, 83; *sacrorum causa*, 79; *vindicta*, 73, **74**, 235
Manumission, age of parties, 80; by peregrine, 81; in fraud of creditors, 80, 84; in fraud of patron, 80 sq.; *metus*, 413; of common slave, 82; of pledged slave, 82; of *servus fructuarius*, ib.; of *servus populi*, ib.; of *servus universitatis*, ib.; of unborn person, 77, 83
Manus, 103 sqq., **118** sqq., 131, 169, 397, 531; *missio in possessionem*, 718; possession by one in, 204
Manus consertio, 606, 607
Manus iniectio, 442 sq., 455, 606, 608, **614** sqq., 637 sq.

Marriage, **105** sqq.; of *concubina*, 130; *restitutio*, 713; see *Nuptiae, Conubium*
Materna bona, 280 sq.
Matrimonium iuris gentium, 105 sqq.
Measure of damages, in *actio ad exhibendum*, 544; in *commodatum*, 469; in *communi dividundo*, 536; in *condictio furtiva*, 578; in *damnum*, 580 sq.; in deposit, 464 sq.; in *furtum*, 577; in *hereditatis petitio*, 315; in *iniuria*, 586 sq.; in *locatio*, 497 sq.; in mandate, 514; in *metus*, 588; in *negotiorum gestio*, 534 sq.; in *pignus*, 473; in *rapina*, 579; in *vindicatio*, 258; in sale, 480 sq., 485 sq., 489 sq.; in *servi corruptio*, 591; in *societas*, 506
Mensor, 501
Merces, 496, 502 sq.
Metus, 413, 453 sq., **588** sqq., 673, 714, 716 sq.
Milites, 153, 157; wills, 357 sq.
Militia, 326
Minors, 171 sqq., 549; *restitutio*, 714, 717
Minus petitio, 644 sqq.
Misrepresentation in contract, 416
Missio in possessionem, 197, 242, 244, 314, 320, 344, 352 sq., 359, 477, 540, 626, 630, 638 sq., 642, 654, 658, 664, 667, 712, **717** sqq., 732, 737; *rei servandae causa*, 717
Mistake, see Error
Modalities in contract, 419 sqq.
Modes of acquisition of *dominium*, 206
Modus, 253, 337; *lege agendi*, 605
Money paid by mistake, see *Condictio indebiti*
Monilia, 219
Mora, 405, 418, 421, 450, 503, 506, 538, **546** sqq., 561, 563, 566; *creditoris*, 547
Morbus, in sale, 488 sqq.; *sonticus*, 605, 608
Mortgage by *fiducia*, 471 sq.
Mortis causa capio, 328
Mother, succession of, 368 sq.; to, 370
Multa in *damnum*, 580
Municipia, personality, 177; *heredes*, 290
Mutatio iudicis, 708
Mutuae petitiones, 696, 739
Mutuum, 168, 410, 420, 430, 439, **459** sqq., 467, 525, 537, 545

Natural children as *heredes*, 289, see Legitimation
Naturalis ratio, 53
Nautae, caupones, stabularii, 555 sq., 593
Nauticum fenus, 460, **463** sq., 545
Necessarius heres, 299, 302 sqq.
Negative, conditions, 76, 296, 336; *interesse* in theft, 574 sq.; prescription, 249; servitudes, 259, 263
Neglegentia, 552, 553, 556, see *Culpa*
Negotiorum gestio, 166, 211, 215, 390, 453, 513, **533**, 552, 561
Nemo pro parte testatus, 281, 327, 357
Nexi liberatio, 426
Nexum, 404, 409 sq., **426**, 460, 567, 616 sq.
Nomen Latinum, 93, 94
Nomina arcaria, 456; *transcriptitia*, see Contract *literis*
Nominatio, in acquisition by slave, 279; *iudicis*, 643
Non bis in idem, 454, **689**, 702
Non-possessory interdicts, see Interdicts
Nonuse of servitudes, 267; of usufruct, 271
Nota censoria, 117
Nova clausula Iuliani, 11, 366
Nova species, 216 sq.
Novatio, 444, 450, 452, 509, 514, 548 sq., **563** sqq.; *necessaria*, 450, 566, 689; of or by conditional obligation, 420
Novellae constitutiones, 40, 47
Noxa caput sequitur, 87, **595**, 597
Noxal, actions, see *Actiones noxales*; liability, 134, 183, 397, 404 sqq., **594** sqq., 654; surrender of children, 104, 114
Nuda voluntas, aditio by, 310
Nude pacts, 524 sq.
Nulli res sua servit, 259 sq.
Nuncupatio in Mancipatory Will, 283 sqq.
Nuptiae, 107, 112; effect of *capitis deminutio*, 140
Nuptiae iustae, 105 sqq.; determination, 117, see Divorce; requirements, 112 sqq.
Nuptiae non iustae, 105 sq.

Oath, see *Iuramentum* and *Iusiurandum*
Oblatio curiae, 130
Obligatio, 183, **403** sqq., 537; alternative, 561; and *actio*, affinity, 600; as *res incorporalis*, 187, 403; assignment, 518, 550; beginning in *heres*, 423, 515; *civilis honoraria*, 406, 408; divisible, 561; *ex contractu*, 409 sqq.; *ex delicto*, 571 sqq.; extinction, 557 sqq.; *faciendi, dandi*, 405; *naturalis*, 54, 66, 87, 141, 159, 408, 435, 442, 444, 461, 463, 491, 498, 545, **548** sqq., 558, 564, 682, 699; *quasi ex contractu*, 533 sqq.; *quasi ex delicto*, 593 sq.; *re*, 459, 572
Obsequium, 89, 91, 94, 96, 150
Occidere, 581 sq.
Occupatio, **206** sqq., 217 sqq., 223
Offer, death of party, 410
Officium iudicis, 634 sqq., 673
Omission in *damnum*, 581 sq.
Omission in will, of ascendants, 325; of brothers and sisters, ib.; of *postumi*, 319; of *sui heredes*, ib.
Omnia iudicia absolutoria, **634**, 673 sq., 693 sq.
Oneris ferendi ius, 259
Ope consilio, 573, 591
Opening of Will, 293
Operae, servorum vel animalium, 274; *liberti*, 89, 90, 96, 455
Operis novi nuntiatio, 545, 715, **722**, 726
Oportere, see *Intentio*
Optio tutoris, 167 sq.
Oral Will, 286
Oratio principis, 15, 21
Orbi, 291, 300
Ordo Equester, 88, 91; *Senatorius*, ib.

Ordo iudiciorum, 657, 663
Ownership, inferior modes, 191 sq.
Owner, treasure, 220; theft by, see *Furtum*

Pact and stipulation, 265, 277
Pacta, 55, 465, 469, **524** sqq., 549; *adiecta*, 190, 500, **524**, 674; *continua*, 525; *dotalia*, 108; *ex intervallo*, 525; *legitima*, 409, 528 sqq.; *praetoria*, 409, **525** sqq., 680
Pactum, de non petendo, 421, 423, 448, 451 sq., 565, **568** sqq.; *de retroemendo, retrovendendo*, 492; *displicentiae*, 492; *donationis*, 256, 529; *dotis*, 529; *fiduciae*, 189, see *Fiducia*; *protimeseos*, 492
Papinian, 31
Papyri, as sources, 37
Pardon of *servus poenae*, 70, 85
Parens manumissor, 132, 369, **373** sq., 380; *tutela*, 147
Parricidium, 103
Pars, dominii, 269; *legitima*, 325 sq., 344
Partial ademption of legacy, 342
Partial failure of will, in *querela*, 328
Particeps, 510
Partis evictio, 487 sq.
Partus ancillae, 63, 224, 247 sq., 268
Passive correality, 450
Paterfamilias, 102; contract with *filius*, 548, see *Patria potestas*
Pater solitarius, 291
Patria potestas, 97, 99, **103** sqq., 113; determination, 131 sqq.; over issue of one *in mancipio*, 134; *revocatio* to, 131
Patrimonium, 184 sq.
Patron's rights, 88 sqq.; effect of *capitis deminutio*, 141; succession, 89, 91, 96, **375**; *tutela*, 146
Paul, 31
Pauperies, 598
Payment, in *mancipatio*, 237, 240; in *traditio*, 231; of debt to pupil, 160; see *Solutio*
Peculium, 66, 78, 87, 94, 133, 202, 306 sq., 399, **529**; *castrense*, 140, 142, **279** sq., 288, 372 sqq., 396, 416, 463; *profectitium*, **279**; *quasi-castrense*, 140, 142, **280**, 288, 372 sqq., 396, 416, 463; reversion of, 372 sqq., 378
Pecunia, 283; *traiectitia*, see *Nauticum fenus*
Penal actions, see *Actiones ad poenam persequendam*
Penal slavery, 142
Penal stipulation, 424
Perambulatio, 232
Peregrini, 87, **97** sqq., 102, 114, 240, 289, 350; in *damnum*, 584; *institutio* or legacy, 341; ownership by, 192, 197
Perendinatio diei, **607**, 609, 612, 632
Permutatio, 468, 486, **520**
Perpetuities, 358 sqq.
Persona, 174 sq.; *ficta*, 175, 305; *singularis*, 176
Personality, 174 sqq.
Personal nature of *obligatio*, 404
Personal servitudes, 260, 267 sqq.
Persons, law of, 56 sqq.
Piae causae, 179 sqq., 256
Pignoris capio, 618 sqq.
Pignus, see Pledge; and *fiducia*, 428; *ex causa iudicati*, 666; *praetorium*, 477
Plebiscita, 4, 24
Pledge, 44, 183, 205, 222, 459, **470** sqq., 474 sq., 563, 692; conditions, 420; indivisibility, 252; *ius retentionis*, 408; manumission of slave, 82; *novatio*, 566; priorities, 476 sq.; right of sale, 474; subject of, 263, 475
Pledgee, alienation by, 276; *interesse* in *furtum*, 575
Plurality of principals, 448 sqq.
Plus minusve secuere, 615
Plus petitio, 444, 635, 645, **694** sqq., 706, 715
Pollicitatio, 455
Pontifices, 2, 606, **609**, 621
Populus Romanus, as person, 176
Positive *interesse* in theft, 574
Positive servitudes, 259, 263
Possessio, **198** sqq., 222 sq., 464, 466, 472, 496, 522, 671, 739; acquisition, 201 sqq., 232; by *hereditas*, 306; *civilis, naturalis*, 199, 200; feigned in Publician, 196; for *captivi*, 68; *iuris*, 260, 386 sq.; loss of, 204 sq.,; not a *res*, 187, 205; *pro herede, pro possessore*, **315**, 386, 389 sq.; theories of, 199 sq.
Possessory, actions, 738; interdicts, see *Interdicta*
Possibility, in contract, 417 sq.; in conditions, see Conditions
Postliminium, **67** sqq., 73, 85, 288, 356
Postpapinianian Mass, 43
Postulatio, 92; *actionis*, 626, 660; *suspecti tutoris*, 161
Postumi, 138, 144, 290, 296, 303, 319 sq., 363 sq.; *Aquiliani*, 320; *extranei*, 308, 337; *institutio* of, 308; *Iuliani*, 320; *legitimi*, 319; omission of, 319, 393; *sui*, 308; *Velleiani*, 320
Potestas and *tutela*, 143
Potestas, see *Patria Potestas*; in noxal actions, 595, 627
Potioris nominatio, 150
Praeceptio, see Legacy
Praeda, 209
Praedial Servitudes, see Servitudes
Praefecturae, 51
Praefectus, annonae, 663; *iuri dicundo*, 642; *praetorio*, 17, 50, 51; *urbi*, 50, 53, 663; *vigilum*, 663
Praeiudicium, see *Actio praeiudicialis*
Praeiudicium (as defence), **644**, 709, 711
Praelegatum, 333, 339, **349**
Praemia patrum, 105, 123, 129, 291, 300, **316** sq., 335
Praepostere conceptum, 337, 437
Praes, 448, **606** sq., 616, 704
Praescripta verba, see *Actio praescriptis verbis*
Praescriptio, in *formula*, 643 sq.; *longi temporis*, **249** sqq., 277, 644, 694; *longissimi temporis*, 251; *praeiudicii*, 644; *pro*

actore, pro reo, 643, 653; in usufruct, 271
Praestationes, in divisory actions, 648, 654
Praetor, de liberalibus causis, 10; *peregrinus*, 9, 12, 50, 625; *fideicommissarius*, 10, 349 sqq.; *tutelaris*, 10, 149; *urbanus*, 9, 12, 50, see *Edictum praetoris*
Praetorian, law of *exheredatio*, 321 sqq.; scheme of succession, 366 sqq.; will, 284 sq.
Pragmatic sanction, 21
Precarium, 467, 471, 477, **521** sq., 553, 729
Prescription of actions, 558
Presence, in *auctoritatis interpositio*, 158; in *stipulatio*, 433
Prevention of satisfaction of *condicio*, 297, 421
Price in sale, 482 sqq.
"*Pridie quam moriar*," 437, 446
Princeps, legibus solutus, 16; *senatus*, 14; succession, 51
Principum placita, 16 sqq., 24
Priority, in *bonorum possessio*, see *Bonorum possessio*; in pledge, 476 sqq.
Privative *intercessio*, 444
Privileged debts, 540, 639; hypothec, 477
Privilegium, 290 sq., 312
Procedure, 599 sqq.; in interdicts, 730 sqq.
Proculian School, 27 sqq.
Procurator, 168, 244, 512, 513, 518; *acceptilatio* by, 568; acquisition by, 202, 277; *ad litem*, 701 sqq.; alienation by, 277; *in rem suam*, 157, 315, 445, 518, 550; *novatio* by, 564; purchase by, 405; *voluntarius* (*defensor*), 702, 704
Prodigus interdictus, **170**, 292, 549, 570, 703; will of, 288
Profectitium peculium, see *Peculium*
Pro herede gestio, **310**, 312, 364
Prohibition to alienate, effect *in rem*, 190, 359
Prohibitory interdicts, see *Interdicta*
Pro noxae deditione, 597
Pronuntiatio, 636, 647, 664, 690
Proscriptio bonorum, 639
Pro tribunali, 396
Provincia, 659; change in meaning, 51
Provincial Edict, 12; land, see *Solum*
Provisional interdicts, 723, 738
Pubertati proximi, 159
Puberty, 161
Publicani, 619 sq.; liability for *familia*, 596; *societas*, 504, 510
Pulsare, verberare, vi domum introire, 585
Pupillary substitution, 104, **300** sqq., 322, 357
Pupillus, alienation by, 276; *commodatum* by or to, 470; contract by, 436, 442, 549; deposit by, 464; *missio in possessionem*, 718; tacit hypothec, 478
Purging of *mora*, 547
Putative *causa*, 425, see *Iusta causa*

Quaestor sacri palatii, 17
Quarta, Antonina, 127, 323; *Falcidia*, 326, 354 sqq.; *Pegasiana*, 353 sq., 357
Quasi, castrense peculium, 280, 288; contract, 406, 533 sqq.; delict, 407, 409, **593** sq.; possession, see *Possessio iuris*; *postumi*, 320; pupillary substitution, 302; *traditio*, 265, 277; usufruct, 270
Quem liberum, see *Interdictum*
Querela inofficiosi donationis, dotis, 329
Querela inofficiosi testamenti, 254, 256, 289, 296, 301, 318, **324** sqq., 357, 683, 685; under Novels, 328
Quinquaginta decisiones, 46
"*Quoad vivam*," 438
Quod legatorum, see *Interdictum*
Quorum Bonorum, see *Interdictum*

Rapina, 409, **579** sqq., 675
Ratification, by *pater*, of marriage, 114; in litigation, see *Satisdatio*; of acquisition by *procurator*, 202, 277; of slave's contract, 531; of *intercessio* by woman, 445; of loan to *filiusfamilias*, 463; of *negotiorum gestio*, 534
Real contracts, 459, see Contracts *re*
Receptum, arbitri, 528; *argentarii*, 527; *nautae cauponis stabularii*, 528
Recuperandae possessionis causa interdicta, see *Interdicta*
Recuperatores, 610, 623, 631 sq., **635**
Recuperatoria Iudicia, 98, 623
Re, coniuncti, disiuncti, re et verbis coniuncti, 334 sqq.
Redemption, of child, 71, 73; of captive, 69
Redemptor, 502
Redhibitio rei venditae, see Sale
Regula Catoniana, 258, **337** sq., 341 sq., 346, 354
Regulae of Ulpian, 26, 33
Rei vindicatio, see *Vindicatio*
Relatio iurisiurandi, 526, **628**, 661, 663
Relatio, to *princeps*, 665 sq.
Relationship of slaves, see *Cognatio servilis*
Release of debt, 567 sqq.; *per aes et libram*, 567
Relegatio, 509
Remancipatio filii, 120
Rem non liquere, 635
Remotio tutoris, 162
Rem ratam habiturum dominum, see *Cautio de rato*
Renunciation, of servitude, 266; of tenancy, 499, see *Societas, Mandatum*
Repetitio diei, 544, **707** sqq.
Replicatio, 447, 651
Representation, in litigation, 440, **700** sqq., 707; in contract, 516, 529 sqq.; in manumission, 74, 84; in transfer of property, 276 sqq.
Repudiation, of *bonorum possessio*, 384; of *hereditas*, 312; of legacy, 344
Repudium (divorce), 117
Res, 182 sqq., 404; *alienae, fideicommissum* of, 353, sale of, 488; *communes*, 173 sqq.; *corporales*, 187; *deiectae vel effusae*, 453,

593, 688; *derelictae*, 208; *divini iuris*, 184 sqq., 210; *dotales*, see *Dos*; *extra commercium*, 201; *extra patrimonium*, 184 sq.; *furtivae*, sale, 481, *usucapio*, 194, 248; *hereditariae*, theft, 572; *humani iuris*, 184 sqq.; *hostis*, 209 sqq.; *incorporales*, 187 sq., 260, 265, 403, 522, *cessio* of, 235, *commodatum* of, 468, possession, 198, sale of, 481; *in patrimonio universitatis*, 184; *litigiosae*, 276, 481, 529, 532, 694, 705, **715**; *mancipi, nec mancipi*, 168, 188, 225, 228, 231, 234, **239**, 241, 250, 263, 276, 486; *nullius*, **184** sqq., **209** sqq., 212, 217 sq., 332; *publicae*, **184**, 186, 213, 221, 725; *religiosae*, **184** sq., 221, 481; *sacrae*, **184** sq., 221, 418, 481; *soli*, 188, 572, see *Solum*; *sanctae*, 184 sq.; *suspensae*, 593, 688; *universitatis*, 184; *vitiosae*, 248, 488

Res inter alios acta, 691 sq., 716

Res iudicata, 233, 398, see *Exceptio rei iudicatae*

Res perit domino, 484

"*Res salvas fore*," 528

Rescission of *usucapio*, 249

Rescript procedure, 19 sq., 665 sq.

Rescripta principis, 18 sqq.

Resolutive conditions, 257; in wills, 296; in contract, 422; in sale, 491 sqq., effect *in rem*, ib.

Responsa prudentum, 22 sqq., 30

Restitutio in integrum, 72, 144, 160, 166, 171 sq., 249, 254, 266, 276, 312, 314, 317, 368, 413, 448, 549, 588, 589, 592, 636, 641 sq., 658, 682, 693, 695, 697, 706, 707, **712** sqq.; effect *in rem*, 716

Restitutio natalium, 91

Restitution of *servus poenae*, 71

Restitutory interdicts, see *Interdicta*

Retention, right of, see *Ius retentionis*

Retinendae possessionis causa interdicta, see *Interdicta*

Revocatio in duplum, 638

Revocatio in patriam potestatem, 131

Revocation, of gifts, 190, **253** sq., 257, 430; of mandate, 516; of will, 329 sq., 344

Rhodian Sea Law, 503

Risk, after *mora*, 547; in *aestimatum*, 521; in *condictio furtiva*, 542; in *condictio indebiti*, 539; in *condictio ob rem dati*, 541; in *condictio sine causa*, 542; in *locatio*, 498, 503; in *negotiorum gestio*, 534; in sale, 484 sqq., 491 sq.; in *societas*, 505

Rivers, in what sense public, 186

Rumpere in *damnum*, see *Damnum*

Rustic servitudes, see Servitudes

Rutilian *formula*, 401, 679

Sabinian, doctrine, dominance of, 30; Mass, 43; School, 27 sqq.

Sacra, 125, 127, 133, 361, 364

Sacramentum, **605** sqq., 613, 616, 618, 620 sqq., 634, see *Legis actio*

Sacrilege, 185

Salaria, 512

Sale, 411, **478** sqq.; *ad gustum*, 492; by tutor, 155; *custodia*, 555; defect of title, **44**, 485 sqq.; duties of parties, 484 sqq.; of child by *paterfamilias*, 103; of freeman, 72, 417, 481; of *hereditas*, 480; of *res locata*, 499; of *res emptoris*, 479 sqq.; of *res religiosa*, 417; of *spes*, of *res sperata*, 470, 488; of usufruct, 269; of young children, 71, 85; *perfecta*, 484 sqq.; special conditions, 491 sqq.; *uti optimus maximusque*, 486

Saltus aestivi, hiberni, 204 sq.

Satisdatio, 344, 434; *de rato*, 705; *iudicatum solvi*, 641, **704**, 706; *pro praede litis et vindiciarum*, 622, 641, **704**, see also *Cautio*, Security

Satisfaction of *condicio*, 297, 336, 421

Scholae prudentum, 27 sqq.; conflicts, see Conflicts of schools

Scholia Sinaitica, 36

Scientia, 202, 278, 310, 383, 529 sqq., 594

Seashore, as *res*, 184, 186

Sectae prudentum, 27 sq.

Secundaria interdicta, see *Interdicta*

Secundum tabulas, see *Bonorum possessio*

Security, by *adrogator impuberis*, 126 sq.; by *tutor*, **154**, 163, 446; by usufructuary, 269; in *actio iudicati*, 637; in litigation, 44, 444, **704** sqq.

Self-mancipation, 135, 426 sq.

Semel heres semper heres, 281, 295, 355, 398

Senate, 3 sqq., 50

Senatorian, order, 88; province, 9, 50

Senatusconsulta, 12, 13 sqq.

Senatusconsultum, Afinianum, 323; *Claudianum*, **69**, **71**, 83, 400; *Dasumianum*, 85; *Iuncianum*, 85; *Iuventianum*, 227, **315**, 674; *Largianum*, 377; *Macedonianum*, 10, 14, **462** sqq., 467, 549, 626, 648, 652; *Neronianum*, 333; *Orphitianum*, 79, **369** sq., 380; *Pegasianum*, 317, 350, **352** sqq., 357, 362; *Pusio-Pegasianum*, 96; *Rubrianum*, 85; *Silanianum*, 14, 82, 309, 317; *Tertullianum*, 14, **368** sqq., 380; *Trebellianum*, 10, **351** sqq., 648; *Velleianum*, 10, 14, 152, **444** sq., 549, 648 sq., 652

Sententia, in *sacramentum*, 607

Sententiae of Paul, 26, 31, 36

Sequestratio, 466

Servian Classes, 3, 238

Servilis cognatio, 65, 371, 376

Servitudes, 188, 207, 240, 250, **258** sqq.; equivocal forms, 273; *mancipatio* of, 239; on *res sua*, 273; on a servitude, 260, 273; *personarum*, 267 sqq.; *praediorum*, **258** sqq., 486, 536, 669

Servitus poenae, 142

Servius Tullius, 3, 88

Servus, acquisition through, 62, 202, 227, **278**, **529**; alienation by, 276; *alienus, institutio*, 302, 309; *alienus*, liberty to, 353 sq.; as criminal, 543; as person, 175; as *res*, 63 sqq.; as witness, 67, 292, 306, 543, 632; children of, 101; *communis*, 203, 252, 309; *corruptio*, 590 sq.;

cruelty to, 65; differences in position, 67; *dolus* of, 470; *fructuarius*, 62; manumission of, 73 sqq., 82; possession by, 203; *fructus*, 63; *fugitivus*, noxal liability, 594; *hereditarius*, 62, 203, 305 sqq., 358, 436; in commerce, 65 sqq.; *iniuria* to, 63; *institutio* of, 308; *pactum de non petendo*, 570; *naturalis obligatio* of, 548; *peculium*, 66, see *Actio de peculio*; pillaging *hereditas*, 304; *poenae*, 62, 70 sqq.; *publici*, 66, 67, 82, 154; relationship, 65, 371, 376; sale of, 64; *sine domino*, 63, 67, 308; stipulation by, 435; *suis nummis emptus*, etc., 86, 91; *universitatis*, 82; wills of, 288
Set off, see *Compensatio*
Settlements, 358 sqq.
Shares, in *hereditas*, 298; in *societas*, 505; in *usus*, 272
Simplaria venditio, 490
Sine re, cum re, see *Bonorum Possessio*
Singular succession, 331
Slavery, 54, 62 sqq., see also Enslavement, *Servus*
Societas, 451, 478, 496, **504** sqq., 516, 552 sqq., 557; conditions, 419, 505; *leonina*, 505; *omnium bonorum*, 207, 504, 510 sqq.; *quoad usum, sortem*, 505; special types, 510 sqq.
Socii, pactum de non petendo, 569
Sodalicia, 178
Soldier's will, 357 sqq.
Solidarity, 448 sqq.
Solidi capacitas, 292, 316
Solum provinciale, italicum, 188, 191, 197, 249 sq.
Solutio, 408, 560 sqq., see Payment
Solutionis causa adiectus, **436**, 460, 538, 561, **563**
Son, condition on *institutio* of, 296
Sortitio Iudicis, 632
Spatium deliberandi, 299, **312**, 362, 393, 395
Specificatio, 211, 216 sqq.
Specific performance, 656
Sponsalia, 112
Sponsio (surety), 313, 405, **441**, 456, 557; formal *stipulatio*, 434
Sponsiones, 388, 723; and *restipulationes*, 613; in interdicts, 731, 733 sq., 736; *poenales*, 526 sq., 731, 733, 736; *praeiudiciales*, 622; *tertiae partis*, 676
Sponsores, 440 sqq., 616 sq.
Spurii, 105
Stabularii, see *Nautae*
Statuliber, 76, 78, 81
Status, 59; at birth, 69; of children, 100; of one *in mancipio*, 134; *mutatio*, 136, 137; *restitutio in integrum*, 413, 713
Status dies cum hoste, 605
Stellionatus, 476
Stiftung, 176, 177, 180
Stillicidii non recipiendi ius, 264
Stipulatio, 55, 98, 236 sq., 409 sqq., 414, **431** sqq., 564 sqq.; *ad diem*, 437; *amplius non peti*, 705; and *mutuum*, 460, 462; *Aquiliana*, 523, 568; by slave, 435; *culpa*, 555; *condicio*, 438; "*cum moriar*," 437; *dupli*, 487; *emptae et venditae hereditatis*, 351; for third party, 436; *habere licere*, 487; "*in annos singulos*," 438; pacts, 525; "*quoad vivam*," 438; *partis et pro parte*, 349 sqq.; *poenae*, 424; *post mortem*, 437, 440, 442, 515, 564; *praepostere concepta*, 437; *praetoriae, iudiciales*, etc., 11, 434, 634, 712, 721, 737; "*pridie quam moriar*," 437, 440
Stricti iuris, bonae fidei, 408, 410 sqq., see *Iudicia, stricta, bonae fidei*
Sublocatio, 497
Subpartnership, 507
Subpledge, 475
Subscriptio principis, 19 sq
Substantia, error in, 415 sqq.
Substantive law, 601
Substitutio, 298 sqq.; and *institutio*, relation, 299; of *coheredes*, 300
Subvades, 609
Successio graduum, ordinum, 366 sqq., 371, 382
Successio in locum, 477
Successio in *querela*, 325
Successio miserabilis, 400
Succession of Jurists, 27 sq.
Succession on death, by will, 281 sqq.; in female line, 370 sq.; of father, 372 sqq.; on intestacy, 48, 361 sqq.; *per capita, per stirpes*, 372; to freedmen, 89, 91, 96, **375** sqq.; under Novels, 371 sqq.; under Twelve Tables, 363
Successive, hypothecs, 476 sqq.; *substitutiones*, 298 sq.
Sui et necessarii heredes, **303** sq., 363 sq., 375
Sui iuris, alieni iuris, 102, 173
Summissio, 224
Superficies, 213, **274** sq., 475, 728, 734
Supervening impossibility, 296 sq., 336
Supplicatio, 19, 666
Surety, 435, **441** sqq., 449, 451, 517, 526 sq.; *novatio*, 565; *pactum de non petendo*, 569; *restitutio*, 717, see *Adpromissio, Constitutum, Fideiussio, Fidepromissio, Vas, Praes, Mandatum, Sponsio*
Suspending power, 13
Syndicus, 704
Syngraphae, 458
Syro-Roman Lawbook, 48

Tabularius, 127, 154
Tacit hypothec, 478
Taxatio, 636, 646, 650, **656** sq., 664, 688
Testamentary tutors, see *Tutela*
Testamenti factio, 145, **287** sqq., 307, 309, 351, 357
Testamentum, 281 sqq.; *in comitiis calatis*, 282; *in procinctu*, ib.; *per aes et libram*, 237, 282 sqq.; special forms, 286; under *ius tripertitum*, 286; under praetorian law, 284
Testamentum, desertum, destitutum, 329; effect of *capitis deminutio*, 140, of en-

slavement, 72; *imperfectum*, 287; *iniustum*, 293; *inofficiosum*, 324; *irritum*, 285, 329; *non iure factum*, 293, 344; *nullius momenti*, 318; of *libertus*, 375; of woman, 285, 287; *ruptum*, 285, 328 sq., see Will
Textura, 210
Theft, see *Furtum*
Thesauri inventio, 206, 219 sqq.
Threefold, arrangements in law, 138; division of the law, 29, **56** sqq., 182, 403, 600; scheme of *capitis deminutio*, 136
Tigni immittendi ius, 265, 267
Tignum iniunctum, 213, 216, see *Actio de tigno iuncto*
Title in interdicts, 738
Titulus in *usucapio*, see *Iusta causa*
Traditio, 55, 112, 190, 192, 196 sq., 206 sq., 224, **228** sqq., 494, 511; *brevi manu*, 222, 223, 229, 460; by agent, 230, 232; by delivery of means of control, 229, 232; *cartae*, 256; *clavium*, 232; *ficta*, 232; *fiducia*, 428, 471; *incertae personae*, 208, 209, 247; in *mancipatio*, 237; *longa manu*, 228; of *res mancipi*, 209, 242; payment of price, 231; symbolic, 229
Transactio, 155, 451 sq., 514, **523**, 539; in *querela*, 327
Transfer *ut manumittatur*, 86, 91, 112
Transfuga, 69
Translatio iudicii, 596, 627, 635, 702, **706** sq., 716; *legati*, 342
Transmissio hereditatis, 317 sq.
Transscriptio, see Contract *literis*
Tresviri capitales, 611
Tribonian, 17, 40, 47, 48
Tribuni plebis, 4, 8
Tribunicia potestas, 6, 8
Trinoctium abesse, 121
Tripartite will, 285 sq.
Triple sale, in *adoptio*, 122, 128; in *emancipatio*, 132
Triplicatio, 651
Turpis, causa, 541; *persona*, in *querela*, 325, 327
Tutela, 59, **143** sqq., 322, 417, 481, 535; age as qualification, 152; *agnatorum*, 146; *a magistratu dativa*, **148** sq., 153, 161, 162, 165, 167; *cessicia*, 141, **168**, 234; close of, 160; distribution of administration, 163; *excusationes*, 150 sqq.; *extranei manumissoris*, 147; *fiduciaria*, **147** sq., 151, 153, 167, 428; incapacities, 152 sq.; *legitima*, 89 sqq., 141, **145** sqq., 151 sqq., 163, 167 sqq., 285, 373; liabilities, 164, 453, 552, 554; *liberorum parentis manumissoris*, 148; *liberorum patroni*, 147, 154; of Latins, 160; of *liberta*, as *res*, 182; of women, 143 sq., **166** sqq., 287; *optiva*, 167 sq.; *parentis manumissoris*, 147; *patroni*, 133, 146, 154; remedies, 164; *testamentaria*, 104, **144** sqq., 152, 167
Tutor, actio iudicati, 156; *adrogatio* by, 127; *administratio*, 155 sqq ; *ad certam rem*, 153, 168, **174**; appointment of slave, 145; as representative in litigation, 703; *auctoritas*, 152 sqq., **157** sqq., 162, 166; *cessans, gerens*, 164, 166; change of, 120 sq., 168; contract by, 156; *contutores*, see this word; *culpa* and *dolus*, 158, 552 sqq.; *donatio* by, 158; duty to obtain, 302; *honorarius*, 163; insanity, 152; inventory, 154; litigation for *pupillus*, 156; maintenance of child, 155; marriage of ward, 115; *negotia* between him and ward, 159; *pactum de non petendo*, 570; *praetorius*, 152, 153, 159, 168, 682; sale by, 155; security, **154**, 163, 722; *suspectus*, 161; temporary, 153; *traditio* by, 230; transfer of actions, 157
Tutoris, accusatio, 161 sq.; *optio*, 167 sq.; *remotio*, 162
Twelve Tables, 1 sq., 7, 52, 74, 89, 118, 121 sq., 132 sq., 143, 145 sq., 148, 161, 164, 169 sq., 183, 189, 206, 213 sq., 231, 233 sqq., 238, 242, 245, 248, 253, 262, 282, 303, 313, 363 sqq., 374 sqq., 393, 399, 404, 407, 431, 465, 486, 524, 571, 576 sqq., 585, 593 sq., 598, 605, 612 sqq., 616, 628, 637, 678, 683, 703, 710, 712, 723, 726

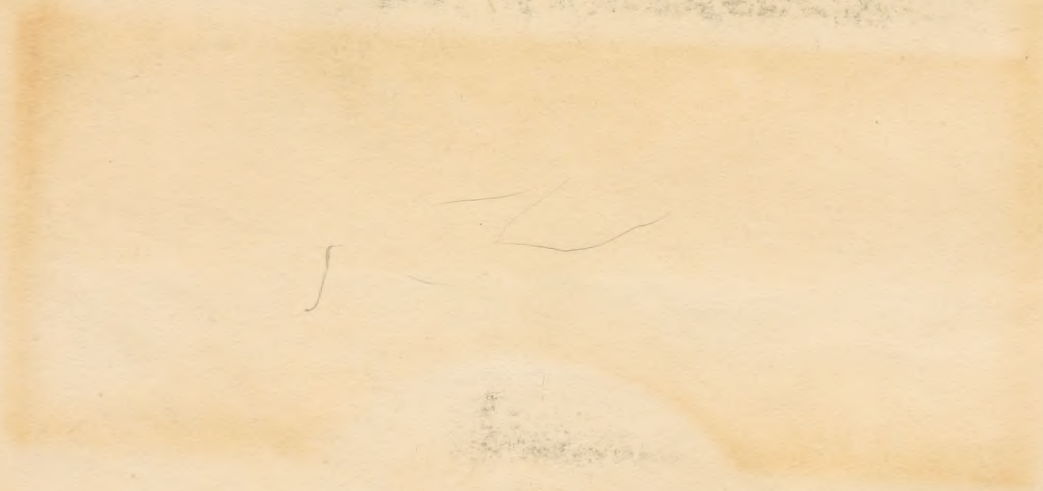
Ulpian, 32 sq.; *Regulae*, 33, 61
Unde cognati, liberi, etc., see *Bonorum possessio*
Unde vi, see *Interdictum*
Unilateral *obligatio*, 404
Universal succession, 281 sqq.
Universitas iuris, 183, 281 sqq., 396 sqq.
Universitas rerum, see *Universitas iuris*; of physical things, 608, 700
Urban servitudes, see Servitudes
Usage as law, 52
Usucapio, 55, 194 sqq., 206 sq., 213, 226 sq., 240, **242** sqq., 252, 274, 389 sq., 401, 466, 474, 486, 560, 694, 721; by *hereditas*, 307; *ex Rutiliana constitutione*, 245, 249; *libertatis* (of land), 267, 271; *lucrativa*, 244 sq., 315; of servitudes, 258, 264; *pro emptore*, 491; *pro herede*, 386, 388; various *causae*, 247
Usufruct, 191, **268** sqq., 360, 396, 502, 728, 734; *capitis deminutio*, 140; *custodia*, 555; expiration, 224; *fructus*, 222 sqq.; *in singulos annos*, 272; legacy of, 348; of *grex*, 224; *pars dominii*, 269; pledge, 475; *possessio*, 198; risks, 224; security, 722; through son or slave, 272
Usureceptio, 245, 429
Usurpatio, 243
Usus, 272, 274; *aquae*, 273; *manus*, 121; pledge, 475
Uti ex legibus, see *Bonorum possessio*
Uti possidetis, see *Interdictum*
Utrubi, see *Interdictum*
Uxor, iusta, non iusta, see *Iustae nuptiae*

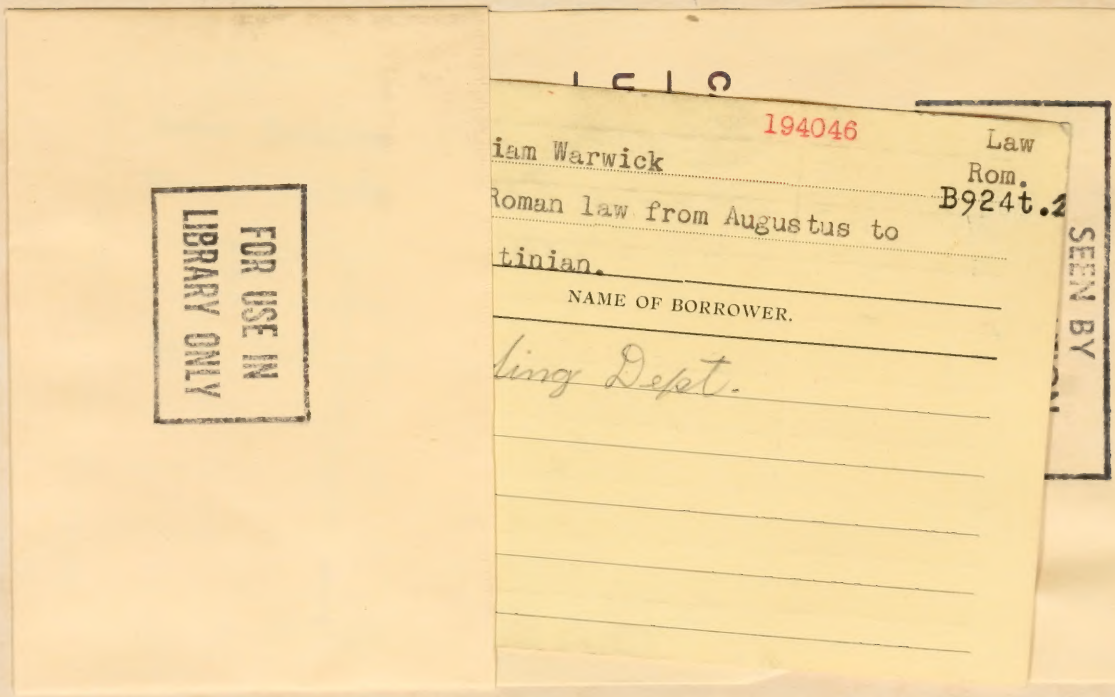
Vacua possessio, 485 sq.
Vadimonium, 609, 612, **626** sq., 642, 660, 705

Variae causarum figurae, 593
Vas, 448, 609
Vatican Fragments, 36
Vectigalis societas, 504, 510
Venditio, see *Emptio* and Sale
Venia aetatis, 172
Ventris nomine, missio in possessionem, 719
Verba certa, concepta, 623
Verbal contracts, 431 sqq.
Verberatio of slave, 587
Verbis coniuncti, 334 sq.
Vestal virgins, 131, 137, 139, 321
Via. 240
Vi bonorum raptorum, 579 sq.
Vicarius, 51, 52, 663; *servus*, 529
Vicarious responsibility, 594
Vinculum iuris, 403
Vindex, 608, **614** sqq., **626**, 718
Vindicatio, 193, 197, 198, 205, 211, 212, 214, 218, 227, 233, 235, **258**, 331, 334, 345, 468, 606, **668** sqq., 738 sqq.; *utilis*, 254, 258, see *Actio in rem*
Vindiciae, 611
Vindicias dicere, 606
Vindicta, 74, 78, 80, 83, 233
Vir et uxor, succession, 368
Vis, 413, 725 sqq.; *ex conventu*, 734; *maior*, 503, see Risk
Vitium, in *praescriptio*, 251; in sale, 488 sqq.; in *usucapio*, 248
Vocatio, in ius, see *In ius vocatio*; *in tributum*, 530
Voconiana ratio, 365
Voting power in *comitia*, 3
Votum, 454
Vulgaris substitutio, 298

Wild animals, capture, 207; edict of aediles, 208, 598
Will, see *Testamentum*; adoption by, 128; manumission by, 74 sq.; revocation, 329 sq.
Witnesses in litigation, 632 sq., 662; to codicils, 356; to wills, 283 sq., 292 sq.
Women, adoption of, 124 sqq.; as *heredes*, 289; power of testation, 120, 285, 287; *tutela* over, 166 sq.
Writings of jurists, 28 sq., 34 sqq.
Written, contract of sale, 479; *formula* in litigation, 624; *mancipatio*, 237; stipulation, 237, 432, 433, 449
Wrongful damage, 580 sqq.

CAMBRIDGE: PRINTED BY J. B. PEACE, M.A., AT THE UNIVERSITY PRESS.




194046
Law
Rom.
B924t.2
iam Warwick
Roman law from Augustus to
tinian.
NAME OF BORROWER.
ling Dept.
FOR USE IN
LIBRARY ONLY
SEEN BY